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# OFFERING BRIBES: A LEGI-PRAGMATIC PERSPECTIVE

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**Abstract**

*Offering a bribe is generally thought of as giving something of value with corrupt intent to influence an action of a civil servant in his official capacity. This act can be accomplished physically or verbally hiding behind elaborate code words built in socio-pragmatic norms specific to a given community so that they can easily mislead those outside the transaction. The present paper approaches this offence from two perspectives: legal and pragmatic. It shows how it has been perceived in criminal laws and how it is realized through socio-linguistic expressions which can potentially be understood by the interactants as signs of offering bribes. The study is guided by two research questions: Are there linguistic expressions from which the speakers of Iraqi Arabic can typically infer that the speaker is offering bribes? And what insights can the pragmatic analysis offer the judge or trier of facts in evaluating the evidence on this offence? The major argument in the present paper is that the linguistic evidence can have no less evidentiary value in detecting the corrupt intent of bribery than the circumstantial evidence.*

**Keywords:** *Bribery, Pragmatic analysis, forensic linguistics, criminal evidence, Iraqi context bribery in Iraq.*

## 1. Introduction

In everyday interaction people use verbal and nonverbal means of communication to convey the message to their interlocutors. Offer, agreement, disagreement, warning, accepting, refusing, requesting etc., can be performed by nonlinguistic means using gestures, body movements, hands or signs. Using language to request something or someone to do something, offering something to someone or agreeing to do something to someone are all actions that can also be performed through language. Such verbal actions are not suspected or incriminated. They are commonly used in normal communication. They are suspected and indicted only when they contain illegal elements. That is when what is being offered, requested or accepted is illegal or illegitimate. Technically speaking, when what is exchanged is illegal *quid pro quo*.

To most people bribery is no more than offering someone some money for doing something which he should not do and the other party, usually a public official, agrees to do it. It is the practice of enticing someone to do something he is otherwise unwilling or reluctant or legally forbidden to do, with money or gift. But bribery is much more complicated than this. It is applicable only when the transaction is forbidden by law either explicitly or implicitly and requires one party to break a law, or neglect his duties and typically involves a public official who agrees to do this illegal action. Bribes can hide behind terms ranging from direct to indirect using various strategies of indirectness and elaborate code words built in socio-pragmatic norms that are specific to a given community group and can easily mislead those outside the transaction.

The present paper attempts to consider offering bribes from two perspectives: legal and pragmatic focusing on the pragmatic aspect. This is because the pragmatic manifestation has not been given its due interest in the literature on bribery despite the fact that the words that accompany the acts of offering, requesting, and accepting can change these physical acts into punishable crimes. This paper provides a data-based evidence on offering bribes with all its verbal manifestations in the Iraqi context in all its phases and from which interactants can easily infer the intended meaning which the speaker wants to convey. The major argument in the present study is that the linguistic evidence can have no less evidentiary value in detecting the corrupt intent of bribery than the circumstantial evidence. It is guided by two research questions: Are there linguistic expressions from which the speakers of Iraqi Arabic can typically infer that the speaker is offering bribes? And what insights can the pragmatic analysis offer the judge or trier of facts in evaluating the evidence on this offence?

## Bribery: Legally Considered

Bribery is commonly thought of as a corrupt behaviour or a misconduct of a public official accused of betraying the public trust by requesting or accepting money, an article of value, or a benefit in return for his official responsibility. Collin (2000:36) defines it loosely as "the crime of giving someone a bribe-money offered corruptly to someone to get him to do something". Oran and Tosti (2000:61) view it as the offering, giving, receiving or soliciting of anything of value in order to influence the actions of a public official". Martin (1997:52) stipulates that the offer, reward, or advantage be given to a servant of a public body "in relation to any matter with which that body is concerned. A more comprehensive definition of bribery is provided by West's Encyclopedia of American Law;

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where bribery is seen as "the offering, giving, receiving or soliciting of something for the purpose of influencing the action of an official in the discharge of his or her public or legal duties. A bribe may consist of money, or of personal favour or benefit, a promise to later payment or privilege, or anything else the recipient views as valuable. " (Hooper, 1968:118)

Bribery, as such, overlaps with related acts such as extortion and blackmail and grafts. For Perkins and Boyce (1982 in Garner 1999:605) the dividing line between bribery and extortion is shadowy. If one other than the officer corruptly takes the initiative and offers what he knows is not authorized fee, it is bribery; if the officer corruptly makes an unlawful demand which is made by one who does not realize it is not the fee authorized for the service rendered, it is extortion. For Martin (1997: 181) extortion is an offence committed by a public official who uses his position to take money or any other benefit that is not due to him. Lindgren (1993: 1695-1702) distinguishes between two types of extortion: extortion by threat and fear and extortion under colour of office. Coercive extortion refers to the illegal use of threat or fear to obtain property or advantages from another; extortion under colour office is the seeking of a corrupt payment by the public official because of his ability to influence official action.

By contrast, bribery seeks not only to have a preferential treatment but also to influence the official action in his or her favour. Thus, "the same envelop filled with cash can be a payment extorted under the influence of unfairly positive treatment"(Ibid:1700).

Blackmail is the act of getting money or a benefit from someone by threatening to make public information of a secret which a person does not want it to be revealed. Elliott and Quinn (2006: 219) and Martin (1997: 47) consider a person guilty of blackmail when he makes any unwarranted demand with menaces for the purpose of financial gain. Menace is the major criterion for distinguishing extortion and bribery from Blackmail.

Grafti also overlaps with bribery. It is defined as offering, or receiving money, a benefit, or an article of value as a reward for a past official decision in an attempt to receive favourable consideration in the future. . Various states in the United states declare it a crime because the public is deprived of the right to receive honest and faithful service.

Thus, blackmail and extortion are similar to bribery in that both involve receiving money or advantage as an inducement for doing or omitting to do something. They differ from bribery in that bribery is an offence of a public official while blackmail and extortion are not. Also, both blackmail and extortion have varying degrees of menace, whereas bribes are mostly given voluntarily. Graft differs from bribery in that graft, unlike bribery, does not require an intent to influence or to be influenced .

Legally, bribery comprises three distinct types of acts: bribery of public officials, bribery of elections and bribery of and by agents. The present paper is restricted to the first type of acts, namely, bribery of public officials.

In bribery of public officials two important elements must be available: a public official and a corrupt intent to influence or to be influenced in carrying out a public duty to wrongfully gain a financial or other advantage for himself or herself. And in order to find the defendant guilty of this offense most of world statutes, including Iraqi penal code No. 111 of 1969 Articles No.207-214 (amended), stipulates that the prosecutor must prove each of the following three elements beyond a responsible doubt: 1) That the accused offered, gave or promised something of value to a public official; 2) That the person(s) who solicited or received the money or article of value was at that time a public official; and 3) That the offerer and/ or the public official did so corruptly with the intention to influence an official act as a remuneration for the advantage or promise given.

The first element in bribery is that the public official must be a government officer or employee acting for or on the behalf of the government. The official act is usually understood as any decision or action which may at any time be pending or be brought before any public official, in such official capacity, or in such official's place of trust. The decisions or actions are those which are generally expected of public official.

The corrupt intent is the second important element in bribery which must be proved by the prosecutor beyond any responsible doubt. The court must contend beyond a reasonable doubt that a person who offers money or a thing of value corruptly to a public official acts knowingly and intentionally with the purpose of accomplishing an unlawful end regardless whether the act was successful or not.

Because of the importance of proving or disproving intent in bribery a detailed discussion of this concept will be made paying special attention to physical and verbal representation of the corrupt intent in bribery.

Intent is commonly viewed as a psychological phenomenon (De Jong 2011:1). It is a "mental state that a person may have regarding the doing of a future act" (Tiersma 1987:324). Black's Law Dictionary distinguishes between intent and motive. Unlike motive which is the inducement to do some act, intent is the mental resolution or determination to do it. It is the state of mind accompanying an act especially a forbidden act. (pp. 813-814). Various types of intent can be identified: intent can be general or pertaining to specific crimes; immediate relating to wrongful act or implied from speech or conduct. A person's intent cannot be easily proven by overt behaviour or witness's testimonies. The court, therefore, has to infer it from the subtotal of the circumstances including factual presumptions (Kadmi 1994 in Azuelos-Atias 2007:101).

In Bribery, the corrupt intent must be proved in the act of offering, soliciting and/ or accepting money or the items of value by the public official which will influence the discharge of his official duties in return for the payment. More specifically, "the item of value must be corruptly offered with the intent to induce that person to act in a particular way in his or her official capacity" (Solan&Tiersma 2007: 194). Likewise, the prosecution must prove beyond a reasonable doubt that the defendant, the public official acted with corrupt intent in exchange for the illegal *quid pro quo*.

It is not necessary to show that the public official to whom the bribe was offered was actually corrupted by the offer. Similarly, there is no need to show that the official accepted the bribe. Some statutes pass that regardless of who initiates the deal. Either party can be found guilty of the crime independently of the other. Saudi Arabia Anti Bribery Law in Resolution No.175 on 28-12-1412 AH provides in Article (9) that "any person offering a bribe, and which is not accepted from him shall be punished with imprisonment not exceeding (10) years or fine not exceeding one million Rials or both". Article 313 of Iraqi Penal Code No.111 of 1969 provides that "anyone who offers a bribe to a public official and is not accepted from him shall be punished with imprisonment or fine". This implies that there must be a corrupt intent in the mind of one of the parties; therefore it is personal not joint in nature. Yet, bribery is generally regarded as an offense of a public official and the offerer of the bribe is deemed an accessory whose punishment is derived from the punishment of the public official.

## Bribery: Pragmatically considered

The act of bribery is partly physical and partly linguistic. The physical act is usually expressed through offering, or promising to offer, requesting, accepting or taking money, an article of value or a benefit. Linguistically, the act of bribery is usually expressed indirectly through words but its intention can be guessed by the interactants through various types of contextual and paralinguistic cues. Pragmatics, the study of the intended meaning of the speaker, the choice he makes, the effect his use of language has on other participants in an act of communication (Leech,1983;Crystal 1991;Yule1996) is particularly relevant to the linguistic analysis of bribery.

Pragmatists postulate that on any occasion the verbal action performed by a speaker consists of three related acts: locutionary; illocutionary, and perlocutionary (Austin,1962; Searle,1979). A locutionary act is the basic act of utterance or producing meaningful linguistic expressions: An illocutionary act is the use of well-formed utterances to perform specific communicative function(s): to make a statement, an offer, a suggestion ,and the like…The perlocutionary acts refer to the effect, the speaker wants to create upon other participant(s) while producing his utterance. Pragmatics, in fact, focuses on what is not explicitly communicated and on how utterances in situational contexts are interpreted. It is concerned "not so much with the sense of what is said as with…what is communicated by the manner and style of an utterance" (Finch 2000:150). This is why the act of bribery can have pragmatic implications.

## Speech Act Theory

An essential topic that exists in almost all books on pragmatics is speech acts. Speech act theory originally initiated by J. Austin (1962) in his book "How to do things with words" and developed by the philosopher John R. Searle assumes that a significant part of our use of language is to perform certain acts, and that utterances can be regarded as events in a similar way to other actions. Austin first distinguishes between constatives and performatives. Constatives are utterances such as statements and questions where actions are being described or asked about rather than explicitly performed. Performatives on the other hand are utterances the saying of which perform the actions named by the verbs (Finch 2000: 181). In order for specific utterances to be counted as performatives, a number of conditions must be met. These conditions are called felicity conditions. Austin (1962 in levinson 1983 : 229) distinguishes three main categories of these conditions;

a) There must be a conventional procedure having a conventional effect, and the circumstances and persons must be appropriate as specified in the procedure.
b) The procedure must be executed correctly and completely, and
c) Often the person must have the requisite thoughts, feelings and intention, as specified in the procedure and if consequent conduct in specified, then the relevant parties must do.

In addition to the felicity conditions, Yule (1996: 50) points out that in everyday contexts among ordinary people there are at least six preconditions on speech act. There are the general conditions, that they understand each other and are non sensical, content conditions, that the content of the utterance must be about a future event; preparatory conditions, that each act has its own preparation; sincerity conditions, that the speaker genuinely intends to carry out the future action; and essential conditions, that the utterance changes the state of action or being and create new state or obligation. In bribery, for example, the general condition is that each party ,the offerer and the offeree are serious and want to complete the transactions. The content condition is available in that offering bribes is for doing a future act. Sincerityconditions is met since both the parties intend to perform what they commit themselves to do.

Many suggestions have been offered to classify speech acts. The most important classification is the one presented by Searle (1977 in May 1993: 131). Searle distinguishes five main types of speech acts: representative, directives, commissives, expressives

and declarative. Representative speech acts represent a state of affairs where the intention is to make the words fit the world e.g. statements. Directives aim at directing the hearer towards doing something e.g. orders. Commissives are those types of speech acts in which the speaker commits himself to doing something e.g. promise. Expressives involve expressing a certain psychological state e.g. congratulations. Declarations are speech acts that bring about something to the world e.g. marriage and divorce (Cf. Leech 1983: 205-206; Finch 2000: 182).

## Indirectness: Characteristics and Strategies

Speech acts of the kinds already mentioned can either be direct or indirect. A speech act is said to be direct when the form of the utterance coincides with what the speaker is intending to convey i.e. when the utterance directly, openly, plainly and bluntly communicates what it intends to communicate. By contrast in indirect speech acts there is a mismatch between expressed and implied meaning. In indirectness, Searle (1979: 31-32) notesthat "the speaker communicates to the hearer more than he actually says by way of relying on their mutually-shared background linguistic and non-linguistic knowledge together with the general powers of nationality and inference on the part of the hearer.

Indirect speech acts are quite common in everyday conversation. Pinker et al (2008: 833) point out that people often do not blurt out what they mean in so many words; they, instead, veil their intentions in innuendo, euphemism, or double speaker. When people speak, they often insinuate their intent indirectly rather than stating it as a bald proposition. Examples include: sexual come-ons, veiled threats, polite requests, and concealed bribes. Because of most bribery acts are done indirectly a detailed discussion of the indirect speech acts is going to be made so as to provide a linguistic background for subsequent discussion.

Indirectness is an immediate and central concern of pragmatics. Obeing (1994: 42) views it as "a communicative strategy in which the interactants abstain from directness in order to obviate crises or in order to communicate difficulty and thus make their utterances consistent with this face and politeness". Indirectness is often appealed to for a variety of reasons. Thomas (1995: 143-6) points out that indirectness is universally used for four reasons: interestingness, increasing the force of the message, competing goals and politeness, and regard of face. In other words indirect speech is used to make the message more interesting, more forceful and effective and more politely expressed , to save face, avoid embarrassment, and to achieve the sense of rapport that comes from being understood without saying what one means. Dews et al (1995 in Alkhaffaf 2005: 94) believes that indirectness provides immunity to the speaker and frees him from full responsibility of what he has meant. The speaker can easily claim that he is responsible for what he has actually said not for the indirect meaning that the listener attaches to what he has said.

A closer look at the various aspects of indirectness reveals that it has a number of characteristic features. Indirectness is said to be: a universal, intentional, non conventional, rational and risky linguistic phenomenon (Leech,1981;Levinson,1983; and Grundy,2000). It is a universal linguistic phenomenon because it is found in almost all cultures and societies although different cultures vary widely in how, when and where to use it. It is intentional in the sense that its aim is to "produce specific effect upon the hearer utilizing shared and/ or background knowledge, and interlocutor's rationality and inference" (Thomas 1995: 119). It has non-conventional forms, most of them use non conventional forms i.e. forms which are not commonly used to communicate the function intended. It is rational in that "speaker is behaving in a rational manner to avoid embarrassment or face threatening" (Dascal1993 in Ibid: 121). Finally, indirectness is costly and risky: it takes longer time for the hearer to understand what the speaker wants to convey; and the hearer may not understand the speaker's intention or he may misinterpret the intended meaning that is expressed indirectly (Ibid).

In everyday communication, the frequent use of indirectness is said to be governed by a number of variables the most important of which are: the relative power of the speaker upon the hearer, the social distance between the interactants, and the degree of imposition, rights and obligations each party enjoys (Thomas 1995: 124-9). The employee, for example tends to be more indirect when expressing his dissatisfaction about his employer. By contrast, you feel in less need to employ indirectness when you feel close to someone, or similar to his age, social class, occupation etc. You need to use indirect speech when the size of imposition is relatively great as when you ask someone to do something to you which might be greater than his ability or beyond his ability. Finally indirectness depends on whether or not the speaker has the right or obligation to affect the hearer's behaviour.

Indirectness can be expressed in various ways. In relevant literature, these are called strategies of indirectness. Research work on indirectness (Brown and Levinson 1987, Obeng 1994, and Bull 2003 in Alkhafaf 2005) identify six strategies in which indirectness find expressions: metaphors, innuendoes, euphemism, proverbs, circumlocution and evasion.

A metaphor is a twisted speech or writing used by a speaker or writer to embellish his/her utterance or writing by asserting that something is equivalent to another which in most ways different. It is sometimes appealed to save face and to give the indication that the speaker possesses good speech. Innuendo or insinuation is an indirect suggestion often with harmful connotation.

Innuendo is often resorted to when the interactants are engaged in delicate issues without being engaged in direct verbal dueling (Obeng 1994: 53). The user of the innuendo can easily claim immunity provided that it is used responsibly without mentioning the name of the person whom the innuendo is directed at.

Euphemism is usually appealed to when talking about delicate things or topics to overcome unfavourable implications or unpleasant connotation of a word or phrase by another which has less harsh and more cheerful expressions (New mark 1963in Naoum 1995: 5) as when a man saying that his wife's physical structure is changed instead of saying that his wife has become pregnant. This strategy is said to flout Gricean maxims of perspicuity in that it is less clear (Obeng 1994: 58). Yet, it can be seen as witty and eloquent and saves one's face.

The strategy of using proverbs is by far the commonest strategy in which indirectness finds expression. Obeng (Ibid: 43) notes that the impersonal nature of the proverb helps the user to claim immunity from any social or individual penalty that might otherwise has been imposed.

Circumlocution is a roundabout way of stating things. It is defined by McArthur (1981: 367) as "the use of a large number of unnecessary words to express an idea needing fewer words especially trying to avoid directly answering a difficult question". The excessive use of words may communicate to the interlocutor that the speaker does not like to answer the question directed to him or to talk about the point under question. Circumlocution again, flouts Grice's maxim of manner "be brief"; yet it is recommended to maintain face and a polite way for refusing or accepting a controversial view point.

Unlike circumlocution, evasion is derived from the verb evade "to get out of the way or escape from" (McArthur 1981: 620) It is a sort of tricky avoidance of answering delicate or embarrassing question which one has no option but to answer. It is a kind of face maintenance answer to a face threatening questions. Bull and Mayer (1988 in Al khaffaf 2005: 26) summarize the options available to the speaker to evade critical or embarrassing questions among which are: ignoring the question asked, attacking the question, apologizing, or declining to answer the question, stating that the question has already been answered or repeating the answer to a previous question. Again, evasion flouts Grice's maxim of reference 'be relevant'; yet it an indirect strategy to keep up cooperation, overcoming face threatening and saving face in a tricky manner.

Having identified the strategies that are commonly used in indirect speech act, the question to be addressed now is: how is it possible for the hearer or interactant to uncover the intended meaning of the speaker "the unsaid" from "the said", i.e. the literal meanings of the words uttered by the speaker? Put it simply, how does the ineractant get to the indirect meaning the speaker aims at?

Considerable research has been devoted to provide an answer to this question. Grice (1975: ) maintains that the interactant is able to guess the implied meaning of the speaker because competent language users are usually cooperative and observed the shared rules of conversation which are subsumed under what he called cooperative principle. This principle dictates that the speaker's contribution is suppose to be informative, truthful, relevant, brief, clear, unambiguous and orderly. Technically speaking, the speaker's conurbation should satisfy the maxims of quality, quantity, relation and manner. (Cf. Levinson 1983; Grundy 2000). Violating one or more of these maxims will lead the hearer to make what Grice calls "Conversational Implicature" . Grice's theory of implicature tries to explain a hearer gets from what is said to what is meant in occasions when the speaker conveys more than, or different from, the literal meaning of his words and expressions. To this end, Grice distinguishes, first between conventional and non-conventional or conversational implicature. Conventional implicature is evident from using specific lexical expressions and does not depend on special contexts for their interpretation. The use of 'but' and 'yet' in any sentence have the implicature of contrast; 'even' implicates 'contrary to expectation' (Yule 1996: 45). By contrast conversational implicature is context dependent. It depends for their interpretation on a wide range of contextual information including information about the participants and their relationship with each other (Finch 2000: 167).

## The Speech Act of Offering Bribes:

In everyday situations offering may be accomplished through physical and/or verbal acts (i.e. through language). Nobody is convicted for offering a service, an assistance, or money to another for humanitarian purposes. Yet an offer is indicted when the offer involves an illegal element i.e. when the offer is made in remuneration to an illegal act to be done by the offeree. Shuy (1993: 43) notes that "the difference between an offer and a bribe lies in: in *the quid pro quo* of a bribe". Before we identify the distinctive features of the speech act of offering bribes, a review of the speech act of offering, in general, is required.

Offering is commonly understood as presenting or promising to present something (money, thing, or service) to express acknowledgement, or to maintain positive social relationships leaving the offeree the choice to accept or deny the offer. Hickey (1986, cited in Al-Sha'baan 1999: 15) argues that as a speech act, offering involves a sort of commitment on the part of the speaker independent of the hearer. Following Searle's (1979) classification of speech acts, Hancher (1979: 7) views offering as a commissive – directive speech act requiring two participants to act: the offerer who looks forward towards the completion of the act by

a positive response from the offeree. Tiersma (1986: 190, 197-198) argues that the speech act of offering must adhere to two basic types of rules: those that regulate the process of offering and those that count as placing the offerer under the obligation to carry out the terms of the bargain. These must be accompanied by a particular intent.

Addaraji et al. (2012: 4) suggest that the speech act of offering be accounted for in terms of orientation: whether the offer is speaker-oriented, hearer-oriented or speaker-hearer-oriented depending on the speaker's intent to commit himself, the hearer or both. In speaker-oriented offers, the speaker commits himself to do something to the hearer who is a mere observer, e.g. *Shall I get you a chair?* In hearer-oriented offers, the speaker directs the hearer to do an act if the hearer accepts the offer, e.g. *Have a coke*! ; while in speaker-hearer-oriented offers, both the speaker and hearer commit themselves to do an act on condition that the hearer accept the offer, e.g. *Perhaps we should have other cups of tea.*

The speech act of offering is also said to be culture-bound. The ways offering is done have cultural implications and differ from culture to culture (Leech, 1983). The ways offering is made or expressed are considerably affected by the cultural value, customs and tradition and have, therefore, different implications.

In terms of politeness theory, the speech act of offering is seen as a face threatening act. Within politeness theory, 'face' is understood as every individual's feeling of self-worth or self image; This image can be damaged, maintained or enhanced through interaction with others (Thomas, 1995: 169). Brown and Levinson (1987: 13) distinguish between two types of face wants: positive and negative. Positive face is reflected in the speaker's desire to be approved of, respected and appreciated by others; whereas negative face refers to the speaker's desire to be unimpeded, or put upon and to have the freedom to do what s/he wants to do. Within this framework, offering is done baldly or directly when the offer is in the hearer's interest. By contrast, offering is made indirectly when it is in the speaker's interest, when it is highly demanding on the part of the hearer, when the speaker expects that his offer might be denied by the hearer, or when the offer damages the hearer's self-image or his reputation in the eyes of others. For these reasons, the speaker uses various strategies of indirectness to mitigate his offering.

The speech act of offering bribes share the general speech act of offering in several respects. First, it is speaker-hearer-oriented in the sense that the offerer commits himself to what he has promised to offer only when the offeree does or promises to do what is required from him by the offerer in response to the rumuniration received or promised to receive. Second, there must be an intent-the offer intends to pay or present or do something and the offeree intends to do something to the offerer. Third, it is a face-threatening act in that offering a bribe can have a bearing on both interactants and is normally refused and might lead the offerer to jail. It is, therefore, most often made indirectly to leave a chance for denial by both parties.

The speech act of offering bribes, however, has a number of features which set it a part from the general speech act of offering. To me, the characteristic features of offering bribes are the following:

First ,Applying Austin's felicity conditions to bribery, in order for the speech act of offering bribery not to misfire, the offeree must be a public official having specific power or authority, and both the parties perfectly know that what they are doing is illegal, yet they intend to accomplish the deal to the end.

Second It is a speech act of corrupt intent. The offerer promises to present money, an article of value or a service to a public official in exchange for a benefit an illegal act done by the public official for the benefit of the offerer. It is this corrupt intent which is incriminated by law.

Third, it is mostly done indirectly. The offerer rarely uses bald-on-record strategies (to use Brown and Levinson's 1987 terms) in offering. This is because it is highly face-threatening act. S/he most often use indirect strategies and conversational implicatures to communicate his corrupt intent. S/he may use double meaning expressions, jokes, overstatements, maneuvering, etc., to save his face in case that the offeree does not accept the offer and also not to harm the offeree's reputation or self-image. Indirectness is also appealed to because these strategies can help him to easily deny his corrupt intent and thereby escape from punishment.

Fourth, it may be preceded by negotiations with a third party especially when it occurs for the first time so that the offerer comes to the offeree (the public official) with full background knowledge about her/him and prior agreement about what, when, where and how it will be paid. When there is no third party, preparatory strategies such as requesting for help, explaining the problematic situations, checking the person(s) who can help doing what s/he wants and whether the person can accept a bribe to complete the corrupt transaction. Fifth, it is speaker-hearer oriented in the sense that both the offerer and the offeree benefit from the transaction when the offer is accepted by the offeree.

Sixth, it is a bilateral corrupt contract.Theofferer commits himself to pay what he promises to offer and the offeree (the public official) commits himself or promises to do what is required from him by the offerer.

Seventh, it is socially-conditioned and culturally-bound. What is sometimes regarded as a grant, a present or a gift in a given situation or context in one society might be regarded as a bribe or a grafti in another society.

Eighth, it is context-dependent. The words or expressions uttered by the offerer have context-dependent meaning which are usually more or difficult from what the words might literally say. They are, therefore, understood differently by different

participants in a given communicative event. This will help the offerer to claim that his/her words have been wrongly understood.

Ninth, the offeree must be a public official and the act to be done must be within his capacity.

From a socio-linguistic perspective, offering bribes is to be viewed as a speech event of special type. A speech event is "a piece of linguistic interaction, a communicative happening consisting of one or more utterances" (Criper and Widdowson, 1975: 185). As a speech event, offering bribes consists of a series of predictable events which seem to be recurrent in most bribery cases. They usually take four phases: stimulation, negotiation, agreement/disagreement, and extension (cf. the four phases of bribery-problem, proposal, completion and extension-suggested by Shuy, 1993: 21-24).

In Iraq, the phases of offering bribery usually take the following route: A problematic situation is stimulated by expressions of some kind uttered by a public official indicating that the application cannot be managed in a normal way, or a contravention of special type which requires paying a lot or being demanding is committed. Next, a negotiation starts either directly or indirectly through a third party as a mediator in order to overcome or help solve the problematic situation. Then, the transaction may either succeed- when both agree on the terms of the deal or fail -when one of or both the parties disagree on the terms or the transaction itself. Finally, extension can be made when the parties agree to extend the agreement to include future transactions.

## Data Collection procedure and Analysis:

### Participants:

In order to collect the data on the verbal act of offering bribes two groups of people were purposefully selected for providing the expressions and utterances that are commonly used by the interactants in the speech event of stimulating, negotiating, agreeing/disagreeing, and extending phases of offering bribes. The first group included public officials who were in direct contact with people and applicants in special institutions where offering, requesting and/or receiving bribes are quite probable. The public officials were randomly selected from those who work in the Vehicle Registration Department, police officers who work in criminal investigations, and public servants who work in immigrations and passport office especially those responsible for issuing passports, and civil servants working in property conveyance section in Real Estate Registration office – Mosul Branch, and those working as tax assessors in the General Commission of Taxation – Mosul Branch. The participants in this group were asked to write down as many occasions and cases as possible that stimulate or drive the applicants to have their things done illegally and even tend to offer bribes indirectly to have their affairs completed. They were also asked to write down expressions that are typically regarded as an indirect offering of bribes.

The second group of participants were solicitors , auctioneers, lawyers who are regularly in direct contact with the groups above and pursuants who apply for the offices mentioned above for one reason or another. The participants in this group were asked to write down the cases and circumstances that force them to follow illegal means and ways to have their applications done and their affairs completed.

## Instrument

The instrument that was found to be appropriate to collect the data was two versions of an open-ended questionnaire. The first version was presented to the first group. It reads as follows: "owing to your position in the office, being responsible for performing or supervising actions or applications directly pertinent to a large class of people and in direct contact with those who want to have their applications or business done, you come across people who persist on having their things done quickly and perfectly, legally or sometimes illegally. Would you kindly write down the cases or occasions when those people offer or promise to offer directly or indirectly money, service, article of value, benefit and the like to have things done for them; and the recurrent expressions as far as you remember from which you infer that they are indirectly offering bribes"?

The second version was presented to the second group. It reads as follows: "Due to your business as a regular pursuant or solicitor, being in direct contact with public servant especially those working in the Directorate of Traffic office, Passports Office, Real Estate registration, the General Commission of Taxation and the like, would you kindly write down the cases in which you have no way but to offer a bribe to have your application done quickly, and the expressions from which you infer that you should have to pay or promise to pay, money, an article of value or, a benefit if you want to have your business or application done quickly and smoothly.

In addition to the questionnaire, interviews with a number of public officials, solicitors, auctioneers, and lawyers were made asking them to remember as many expressions as possible from which one infers that the speaker offers a bribe of some kind to have his business or application done.

## Data analysis and discussion

The data collected were put into four categories: the expressions that indirectly stimulate the applicant to think of an illegal way to have his application or business done; the expressions commonly used in negotiation; the expressions that signal that the offer is accepted or denied; and the expressions which indicate that the transaction can be extended to other cases.

Below are the expressions that stimulate the applicants to think of illegal ways to have his business done from the points of view of the public officials in the institutions already mentioned.

| Expressions | No. | Translation |
|---|---|---|
| السيارة عليها شارة حجز. | 1. | There has been a sign of attachment on your car in the vehicles register. |
| رقم الشّاصي مختلف عما مثبّت في السجلات. | 2. | The chassis number of your car is different from the one fixed in our records. |
| لازم ترجع الى الكمارك لتدقيق رقم الشّاصي. | 3. | You have to go back to custom office to check up the chassis number again. |
| لازم ترجع على الفحص وتفحص السيارة مرة أخرى. | 4. | You have to go back to the inspection office to check up your car again. |
| أرجع إلى نفس الدائرة لختمه ثانية .الختم غير واضح. | 5. | The stamp is not clear. You have to go back to the same office to stamp it again. |
| لازم يجي المالك الشرعي شخصيّاً. | 6. | The legitimate owner must personally attend in front of me. |
| تعال بعد يومين بلكي يصلك السرة. | 7. | Come back in two days, I will put your application in the queue. |

The expressions above are quite normal in the vehicles registration office. There is nothing in them that leads or stimulates the interactant to offer bribes. What changes these expressions into stimulations that motivate some interactants to offer bribes to have their business done illegally is the communicative event or circumstance of the individual interlocutors and the background knowledge the public official has about the applicant.

To begin with, expression No. 1 above stimulates offering a bribe when the applicant perfectly knows that the car has been officially attached and wants to lift the attachment sign illegally. Expression No. 2 leads to offering bribery when the applicant knows that the number of the chassis was fake or tampered with or does not want to go to the custom office to fix it correctly. Expressions No. 3, 4 and 5 lead to think of offering a bribe when the applicant has had painful experience in the custom office and that checking up the chassis number in the custom office or in the inspection office where very long queues of cars are waiting for him require a lot of time. Here, the interactant has no way but to negotiate with the public official to solve the problem. Expression No. 6 leads to think of offering bribes when the applicant is not the legitimate owner and that the owner cannot attend personally either because he is dead or very difficult for him to attend the registration office. Expression No. 7 enhances negotiation with the public official and may sometimes offer a bribe when the applicant is from another governorate , lives in the suburbs, or his residence is far away from the custom office and cannot stay for days in a hotel waiting for his business to be done.

The frequent expressions reported by those working in direct contact with people in the passport office and found to be leading to offering bribes were the following:

| Expressions | No. | Translation |
|---|---|---|
| صعب وتجديده منتهي جوازك. | 1. | Your passport is expired and it's renewal is not easy. |
| تعمل ترجع لازم تصحيحه وصعب خطأ الجد أسم جديد من المعاملة. | 2. | Your surname is wrong and you need to check it and the whole application should be renewed. |
| العامة للمديرية أبعثها لازم ينشال وصعب منع عليك. | 3. | You are prohibited from travelling abroad and lifting the prohibition mark is not easy. |
| تدبّرلك إستمارة ولازم خلصت الإستمارات. | 4. | The application forms have finished. You have to obtain one. |
| تبدّلها لازم قديمة بالمعاملة المدنية الأحوال هوية. | 5. | The identity card is expired. You need a new one. |

The first expression may lead the applicant to offer bribes to have his passport renewed when he needs to travel abroad urgently. Utterance No. 2 stimulates offering bribes to correct the surname because the applicant perfectly knows that the legal route may take days or weeks but can be easily corrected by the public official in charge himself. The same applies to utterance No. 3 where the applicant absolutely knows that he will not be allowed to travel abroad unless he negotiates with the officer in charge to convince him to overlook the prohibition issued against him and permits him to travel. Utterance No. 4 stimulates the crooked way to get an application form only when it is limited in number but essential for the application for a passport. Utterance No. 5 has nothing on the face of it. It obliges the applicant to think of an illegal way only when he learns that changing the

identity card is a very difficult task and needs a lot of time and effort.

The cases that were reported to invite offering bribes in the taxation office mostly come under the following circumstances:

| Expressions | No. | Translation |
|---|---|---|
| لم تراجع منذ مدّة والضّريبةعليك كثيرة | 1. | You have not shown up for a long time. I'm afraid the tax is high. |
| عندك أعذار حتى نساعدك بالضّريبة. | 2. | Have you got excuses to help you?. |
| معاملتك طويلة عريضة وتحتاج وقت حتى نصفّيها روح تعال بعد أسبوع. | 3. | Your application needs a lot of time to finish. Come back next week. |
| معملك عليه ضريبة مضاعفة لأن مكائنه من منشأ أوربي. | 4. | Your factory will have a high tax because its machinery is of European origin. |
| تعال غداً حتى نطلع معاك كشف على معرضك. | 5. | Come back tomorrow. We will assess the tax on your show on the spot. |

The first utterance incites the applicant to think of a wrapped way to bribe the public official only when he knows that the tax will be high. The second utterance arouses in the applicant the tendency to offer a bribe when he understands that the excuses decrease the amount of the tax but he has no excuses and wants the public official to help him in this respect. In the third case, the utterance instigates the applicant to bribe the public official when he has no time to wait for a week or more and wants his business done quickly. The fourth utterance greatly invites the applicant to think of a twisted way to change the place of origin of his machinery or a way which may reduce the amount of tax which he is supposed to pay. The fifth utterance invokes the tendency to offer a bribe when the applicant utterly knows that on the spot inspection will make the tax assessor increase the tax considerably.

In the real estate registration office, the following cases were reported to invite the applicant to think of an illegal way to have things done for his benefit in the most appropriate way.

| Expressions | No. | Translation |
|---|---|---|
| البيت عليه شارة حجز بالسّجل. | 1. | There is a sign of attachment on your house in the registrar. |
| الحمل مال البيت ما مثبّت بالسّجل. | 2. | The buildings have not been fixed in the registrar. |
| لازم نطلع كشف حتى نقدر نقدّر الرّسوم. | 3. | We have to see your house to estimate the charge. |
| السّند قديم ولازم تطلّع سند جديد بالعقار. | 4. | The title deed is old. You need a new title deed for your house. |
| تحتاج لجلب كتاب من دائرة القاصرين .احد الورثة قاصر | 5. | One of the inheritors is a minor and you need to bring a certificate from the Minor's Affairs office. |
| لازم تروح إلى بغداد تجيب صورة قيد دارك. | 6. | You have to go to Baghdad to bring a copy of your house record. |

In the utterance No. 1, the claimant wants to lift the attachment sign at all costs because this sign prevents him from selling or buying the real estate. In the utterance No. 2, the claimant wants to fix the buildings on his land and recognizes that this needs a lot of time and effort a case which motivates him to pay something to have his buildings fixed. Utterance No. 3 invites the inquirer to convince the public official not to go on spot inspection to assess the charges especially when he perfectly knows that on the spot assessment would be much higher. Utterance No. 4 may motivate the applicant to think of convincing the public official to overlook the date especially obtaining a new copy of the title deed takes time and a lot of effort. Utterance No. 5 stimulates the inquirer to ignore this certificate when he finds it difficult or impossible for him to obtain such a certificate from the minor's' Affairs office. Finally, utterance No. 6 invokes thinking of a twisted way to persuade the public official to ignore this certificate by offering a bribe especially when obtaining such a certificate is not very much necessary or when going to Baghdad is costly and risky.

From the view points of solicitors', auctioneers', lawyers and regular pursuants who are regular customers in the offices above, some public officials in those offices are artful in creating obstacles or demanding the applicants to submit documents most of which can be overlooked leaving no choice for them but to pay or promise to pay a bribe to have his application or business done. The utterances above were mostly attached by expressions from which one may indirectly infer that the pursuant has to pay in order for his business to be completed.

A part from the minute differences in the expressions that are recurrent in each office, solicitors, auctioneers, lawyers and regular pursuants reported a number of utterances that are regularly attached to the situations already mentioned:

| Expressions | No. | Translation |
|---|---|---|
| بسيطة شوفنا ونشوفك. | 1. | Simple, scratch my back and I'll scratch yours. |
| فرّحنا نفرحك. | 2. | My happiness is your happiness. |
| فيد وأستفيد. | 3. | Mutual benefit. |
| أدهن أيدك وبسيطة. | 4. | Show me kindness. |
| حرّك أيدك حتى أتحرّك. | 5. | Move your hand to make me move. |
| شويّة حرّكني ليش واقف خامل؟ | 6. | Do something, do not just stand there. |
| معاملتك تحتاج چروخ. | 7. | Your application needs wheels. |
| مع هذا شغلتك بسيطة بس ينرادلها مصرف. | 8. | Your work is easy but it will cost. |
| لا تشيل هم بس خلّي للسيارة بانزين. | 9. | Don't worry, just put fuel in the car. |
| سهلة بس لا تنسونا. | 10. | Don't worry, but keep us in mind. |
| بسيطة بس شوّفني البطاقة الحمراء. | 11. | Consider it done. Just show me the 'red card'. |
| الشّغلة ينرادلها دفعة. | 12. | Your application needs a push. |
| أريد أكمّل معاملتك بس أخاف لا باص الدّائرة يفوتني. | 13. | I want to complete your application, but I'm afraid that I might miss my bus. |
| هذي تمشي بدفتر. | 14. | This needs (copybook)ten grand to be completed. |

The expressions above are commonly uttered by the public officials when the pursuant or applicant please them to help him giving different reasons. Unlike the expressions provided by the public officials which are constatives and stating facts and have informative functions, the expressions provided by the second group - auctioneers, solicitors, pursuants, applicants and the like, are performatives and negotiable. They are performatives in that when uttering them the speaker is not telling facts or imparting information; he is, actually, requesting, or urging his interlocutor to negotiate or bargaining with his job in exchange for a personal benefit. Still, unlike the expressions of the first group, almost all the expressions used are indirect employing a variety of linguistic strategies to convey them. Of course, these are commonly uttered when the public official feels the difficulty that would face the applicant in providing the documents he requests or the task he is required to perform to have his application request or claim carried out. Also, these expressions are most often said by the public official sarcastically with tricky laughter to save his face when his interlocutor refuses the transaction or misunderstands his intention, leaving a space to deny his intention to solicit a bribe and that his words have been wrongly interpreted.

The expressions above were reported by the auctioneers, pursuants, solicitors and those in direct contact with the public officials who are fully aware that all the words and expressions above refer to one thing, namely, a bribe paid to the public official to have him nudge the applicant's business or application under his charge.

The question now is: how is it possible for those people to make a relationship between "what is said" with "what is implicated" in different situational contexts. .The answer to this question was provided by Grice (1975) who maintains that the interactants are able to understand each other's intended meaning owing to conventions agreed upon in a given communicative event subsumed under what he called "cooperative principle" and conversational maxims. The cooperative principle suggests that one's contribution to be "such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged" (Levinson, 1983: 101). To have an effect, the utterance made by the speaker is expected to follow four maxims: of quality-be truthful and never say what you believe to be false; of quantity-make your contribution as informative as is required; of relevance-be relevant to the topic you are talking about; and of manner-be brief, orderly and avoid ambiguity (Ibid: 101-102).

Relevant to the cooperative principle is the notion of presupposition which is a proposition taken for granted by the speaker and is supposed to be known by the hearer although it is not explicitly stated (Cruse, 2006: 137). Presupposition is of two types: semantic and pragmatic. Semantic presupposition is conventionally triggered by using certain words or expressions such as iteratives, verbs that indicate a change of state, implicatives, verbs and certain grammatical constructions; whereas pragmatic presupposition is inferred from the situational context (for details, see Yule, 1996; Saeed 1997; and Grundy, 2000).

In addition to the speech act theory, these two notions are highly relevant in bribery cases. They can help in explaining how the intention of the offerer, solicitor and acceptor can be understood without being explicitly stated. Thus, the utterances reported by the auctioneers, pursuants, solicitors etc., are not uttered to impart information. They are uttered to negotiate with their interlocutors the terms of bargaining of the act to be performed with the public official for the applicant's benefit in exchange for the money, article of vale or a benefit to be given or promised to be given by the applicant.

The expressions reported by the second group where each of which can attach to any of the utterances

regularly reported by the first are obviously speech acts. These speech acts communicate one basic communicative function- that of requesting bribes. This communicative function has mainly been communicated indirectly using various strategies of indirectness. The speaker depends on the presuppositions he assumes on the part of his interlocutors and his interlocutors are mostly able to figure out the speaker's intended meaning on the basis of their background knowledge, contextual clues, in addition to the cooperative principle, and conversational maxims already mentioned. Thus, when hearing the utterances above, the rational applicant is fully aware of how to care for, , what 'hand oiling', 'hand movement', 'trucks' mean in the context under question, how the application 'costs' and what 'putting benzene in the car' suggests; what 'remembering' implies and what the 'red card' connotes, how to nudge the application, what 'missing the bus' hints, and what ''notebook/buck' refers to. Counting on the presupposition, conversational implicature and contextual cues, the speaker assumes that the listener understands his metaphors like 'oil your hand', 'put trucks', 'red card' or 'notebook'. In the Iraqi context people conventionally use the phrase 'oil/lubricate your hands' to refer to giving money, 'trucks' to 'facilitate doing something' and the "red card" to refer to the bank-note of 25 thousand Iraqi Dinars and the "book" to "bucks" i.e. 100 US dollars.

Of course, loading these expressions with double meaning to indirectly refer to money or an article of value is a maneuver to cover the malicious intent, to save face and deny any accusation of him for soliciting bribes assuming that he has never asked for money and that the words he uttered were wrongly and maliciously interpreted.

Soliciting bribes can or cannot be instigated by the public official. In fact, very few public officials working in the offices above solicit for bribes in comparison with those subjected to various cases of offering bribes without being solicited. The following expressions were reported by the public officials who completed the questionnaire and wereinterviewed in the present study and subjected to various cases of offering bribes:

| Expressions | No. | Translation |
|---|---|---|
| .ألله يخلّيك مشّيها وآني حاضر | 1. | Please, let this slide and I'll be ready for everything you want. |
| .أدفعها وأتعابك موجودة | 2. | Nudge it, and I'll make it worth your while. |
| .أشتأمر آني حاضر بس خلّصني | 3. | I am ready for everything. Just finish it please! |
| .كمّلها وما راح أقصّر ويّاك | 4. | Just finish it and I'll do what you want. |
| .هلّلا هلّلا بينا بالضّريبة وتتدلّل | 5. | Reduce the tax amount andI am ready for whatever you say. |
| .بس خلّصني من الكمرك وأشتأمر آني حاضر | 6. | Just help me with the custom duties and I am ready to do what you want. |
| .بس شيل الحجز المنع واللّي تأمر بيه تتدلّل | 7. | Just lift up the compounding prohibition and say what you want. |
| صاحب /عندي بنزينخانة /إذا تحتاج شي أنا صايغ .صاحب معرض سيّارات /مطعم | 8. | If you need anything I am a goldsmith/ I have a petrol station / a restaurant in Al-Majmu'a/car showroom/ dealer. |
| .بس سوّي البنچر والهوا موجود | 9. | Just do the puncture and the air is handy. |
| .أعجنها والخمرة موجودة | 10. | Knead it and the yeast is at your hand. |

The utterances above signal the third phrase of offering bribes. These utterances usually follow the ones uttered by the public officials indicating that negotiations can be made and a sort of compromise can be reached. In the first four utterances the applicants request the public officials to make their applications up and that they are ready to offer the interactants what they want-usually money-in exchange for what the public officials are going to do illegally or illegitimately for him. These utterances were quite normal and recurrent in almost all public offices and reported by almost all participants and interviewees in the present study. Utterances five and six were particularly used in Real Estate Registration Office and General Commission of Taxation Office because the tax and custom can be very high, a case which leaves the door open for negotiation to reduce them considerably. In utterance seven, negotiations to lifting up the attachment sign is recurrent in the Real Estate Registration Office while prohibition from traveling abroad is commonly found in Passport Office. Canceling the attachment sign or prohibition from traveling abroad is not an easy task and the applicants are sometimes ready to pay millions of Iraqi Dinars for such canceling. This is why there have always been rooms for negotiations and offering bribes.

Utterances No. 8, 9 and 10 are different from their predecessors in that they are highly indirect. They can be approached pragmatically because the speaker says something and means a completely different thing. In the utterances above, the words do not say what they mean. They are not answers to questions like what do you do for living? From the context in which they are used, the presupposition the speaker made on the part

of the listener, social background knowledge, the cooperative principle and implicature in addition to the conversational maxims already pointed out. The utterances "I am a goldsmith", "I have a petrol station" and "I have a restaurant in Al-Majmu'a" or "I have an auto show" have only one communicative function: "I am rich, I have a lot of money and I can pay what you say, just process my application within your authority". The same applies to utterance No. 9 where the speaker uses a metaphor "puncture" to refer to the application which failed to move smoothly and to "the air" to refer to the bribe (the money) which can help in making the application proceed again. The same relationship applies to the "dough" and the "ferment" which changes the dough to bread. Again, the application which needs to proceed is linked to the dough which needs to be "knead" and the "ferment" which turns the "dough" to bread is linked to the money which can be paid in exchange making up the application in an illegal way.

The communicative function of offering bribes-can be easily understood by those who were used to hear such expressions and to work on the basis of the promise given. Those who are outside such types of communicative events and transactions may not understand what these utterances exactly mean and why they have been uttered in that situation. This will give the interactants additional immunity and safety and help them escape from the accusation of offering and of soliciting bribes claiming that their utterances mean what they say and that the interpretations given to their utterances were not right.

Offering bribes can also be viewed as a commissive speech act in which one party commits himself to give or do something to the other party. In the transaction, the offerer commits himself to pay money, a service, or a benefit to the public official in exchange for processing the application legally or illegally. By contrast the public official commits himself to process the application in exchange for the money, service or benefit he got or will get from the offerer. This transaction is negotiable in the sense that one party, usually the public official, may accept or deny the terms of the deal. The following expressions were reported by the interviewees as verbal signs of agreement by either party.

| Expressions | No. | Translation |
|---|---|---|
| أعتمد. بسيطة. | 1 | I can manage it. You can count on me. |
| تتدلل. | 2. | With pleasure. |
| ما أردّك. | 3. | You can not be denied. |
| صار. | 4. | Done. |
| أتّفقنا. | 5. | It is a deal! |
| أعتبرها منتهية /خلص. | 6. | You can consider it finished. It's done. |

As for the expressions used to decline an offer, the following utterances were also reported by the same interviewees to be regularly used for declining the offer.

| Expressions | No. | Translation |
|---|---|---|
| أسف، ما أقدر. | 1. | Sorry, I can't. |
| هلا بيك بس الشغلة ما تصبر. | 2. | You are welcome, but your application cannot proceed! |
| كمل المعاملة /أشنو أنت ووين تشتغل ما يهمني. | 3. | I do not care who you are or what you do, complete your documents. |
| حالك حال الناس أنت ما أحسن منهم. | 4. | You are like all the people here. You are not better than them. |
| أنت تريد ترشيني؟ أخبّر عليك الشرطة؟ | 5. | Do you want to bribe me? I'll call the police. |
| طلبك غير قانوني وما يمشي عدنا. | 6.. | Your request is not legal and cannot proceed. |

Unlike the expressions that are commonly used in negotiating and offering bribes, the speech act of accepting or denying bribes are direct, non-negotiable, said with falling intonation and predetermined. The perlocutionary force of the utterances of accepting bribes is usually favourable, beneficial, positive and well-disposed for both parties. By contrast, the perlocutionary force of the utterances of denying the offer is usually unfavourable, non-beneficial and negative for one party-the offerer rather than the other-the public official. The tone in accepting is commonly warm, sympathetic, approving, conciliating and promising; whereas the tone in denying is usually expressionless, aggressive, reproachful and even threatening. Thus in the utterances above that show agreement, utterance No. 1 is promising and confidential; utterance No. 2 is encouraging and warm; utterance No. 3 is cordial and sincere; utterance No. 4 is determined and definite; utterance No. 5 expresses agreement and settlement; while utterance No. 6 implies complete agreement and assurance. On the other hand, in the utterances that show refusal of the offer, utterance No. 1 and 2 are discouraging; utterance No. 3 is denying and face-threatening; utterance No. 4 is assertive and offensive; utterance No. 5 is suspicious and threatening; while utterance No. 6 is destructive, unquestionable and non-reconciling.

The final phase of offering bribes is the extension phase. Here, the agreement or acceptance of the offer can be extended to include future deals and transactions. This case happens when both the parties the offerer and offeree were satisfied with the terms of the transaction and each commits to perform what will be required from him in the future. The utterances that were reported by the interviewees to be regularly said by the offerer were:

| Expressions | No. | Translation |
|---|---|---|
| راح أبعث فلان عليك هم عنده شغلة مثلها. | 1. | I will send X to you. He has the same issue. |
| عندي معاملة أخرى تسوّيها؟ | 2. | I have another application. Can you process it? |
| أجيك كل مرّة، ها؟ صرنا عرف. | 3. | We have become acquaintances. Can I come to you every now and then? |
| أمرّك إذا صارلي شغلة، زين؟ | 4. | I will come to you if I have a problem, is that ok? |

In the utterances above, the offerer wants to consolidate his relationship with the public official and would like to be sure if he can come back to him whenever he faces a problematic situation in his office. These utterances are pragmatically direct, less face-threatening, because they are in favour of the interlocutor. They all have one communicative function, namely, that of consolidating social and utilitarian relationships between the interactants paving the way to future deals and transactions.

The utterances that were reported to be recurrent in the discourse of the public officials to express consolidation for future deals were:

| Expressions | No. | Translation |
|---|---|---|
| آني الممنون. | 1. | I appreciate it. |
| تتذلّل وأهلاً وسهلاً. | 2. | Most welcome. |
| آني حاضر لأي شغلة أخرى. | 3. | I am ready for any other work or business. |
| تعالني وشتريد يصير. | 4. | Come to me and we'll do whatever you want. |

In the utterances above, the speaker-the public official-wants to ensure his interactant that he is ready for any future deal or transaction. Pragmatically, these utterances communicate the speaker's readiness and confirmation of doing similar work in the future. These expressions herald the preclosing stage in this deal which is often ended by عليكم السّلام (peace be upon you) and its response السّلام وعليكم (peace be upon you too).

## Conclusion

The present paper aimed to provide a research-based evidence on the pragmatic dimension of offering bribe viewing it as a speech act based on the speaker's presupposition on the listener's background knowledge, socio-cultural knowledge and conversational implicature making use of cooperative principle and conversational maxims. The major argument is that the verbal manifestations of offering bribes are no less essential evidence than the physical evidence in the court of law on the corrupt act of bribery

The sole physical evidence almost available in incriminating offering bribes is catching the accused *flagrant delicto* in the act of offering bribes. This material evidence is a beyond doubts evidence; yet, it is not always easy to obtain. Actually, most of offering bribes are done in safe places like restaurants, cafés, clubs, and the like. The public official rarely receives money or articles of value in his office. This is why most of the bribery cases are difficult to prove. It seems to me, therefore that viewing offering bribes as an independent offense a part from being accepted or denied can mostly be proved by analyzing the utterances made in a given speech event from a socio-pragmatic perspective. Analyzing the utterances from this perspective can substantially help in bringing to light the malicious intent, if any, and thereby aids the judge or trier of fact in his discretion of the circumstances that surround the act of offering bribes. To our mind, accounting for the expressions from which a lay person can infer the corrupt intent of the offerer and analyzing them socio-pragmatically, can greatly serve in capturing a lot of bribery cases which can otherwise flee from criminal justice.

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# THE PROCEDURE FOR THE REFERRAL OF THE CRIMINAL INVESTIGATION BODIES

**Denisa BARBU**[*]

**Abstract**

*Vintil Dongoroz mentioned in one of his books that "the referral is the dynamic act that causes the prosecution to take place." We can say that the criminal prosecution is born when the criminal prosecution bodies are informed of a crime of a criminal nature by one of the above mentioned ways of referral.*

*The common point of all means of referral is that it always takes the written form, either by direct recording of the injured party or by the oral hearing. In practice, the document of referral is the document which will always contain the registration number of the prosecutor's office and the resolutions of the hierarchical chiefs on the registration procedure and the worker to whom the work was assigned for verification and settlement.*

*The referral is the effect of a manifestation of will for the purposes of conducting criminal proceedings that may be brought by the criminal investigation body, the finding body or the injured party whose interests or rights have been violated as a result of committing an offense.*

*Any criminal offense brought before the categories of civil servants mentioned in this Chapter shall lead to their obligation to immediately notify the competent prosecution body. Also, the criminal investigation body should refrain from carrying out any criminal investigation if it clearly finds that it is not competent and the investigation is not urgent.*

**Keywords:** *jurisdiction, obligation, Criminal investigation, competence, the procedure*

## 1. Introduction Ways of Referring to Criminal Investigation Bodies

### 1.1. The Complaint

The most common way to refer criminal prosecution bodies is the complaint through which individuals can address the authorities by making them aware that they have been the victim of a crime.

Any complaint may be made in writing or by oral proceedings where the criminal investigation bodies record a report. This is done in his own name or by the trustee in a situation where a procuration is attached, by procedural substitutes or by legal representatives instead of persons without exercise capacity.

*Practical aspect:*

- On 15.05.2014, at 15.15, at the Police Headquarters of the Municipality of Târgu Mureș was presented named G.R. together with the minor G.F. who verbally reported the following: about one hour before, his child returned from school without having a Samsung mobile phone on it, and the child told him that his mobile phone would have been taken from the desk at the last hour when he had physical education.
- The police have recorded a report containing the data of the legal representative, the verbal ones, and the mention that they require identification of the perpetrators of the offense of theft. Following the notification, the criminal investigating authorities carried out criminal investigation activities which ultimately led to the identification of the authors.

The Code of Criminal Procedure states that the complaint may also be filed in electronic form, subject to the existence of an electronic signature. As regards the notion of electronic signature, it is defined in Article 4 (3) of the Law No. 455/2001 republished as data in electronic form that are attached or associated with other data also in electronic form, which will serve as an identification method. The electronic signature cannot take the form of the scanned signature.[1]

In practice, there is a situation where the author of the offense is the legal representative and an ex officio referral is recorded in this respect.

*Practical aspect:*

- On 14.02.2015, at 18.00, T.R presented herself at the headquarters of Onesti City Police, who notified the police that his son T.I. left the park to play in the nearby park and did not return. Police officers carried out specific activities to find the minor, and around 21:00 it was legitimized by a police patrol and was led to the police headquarters to record a report and hand him over to parents. Considering that the minor showed marks on the surface of the body, the police asked him about the origin of these signs, and the child reported verbally that they were made after the beatings he receives almost daily from his mother. Taking into account the visible traces of the juvenile's body and those reported by him, the police officers as observers have been notified of the offense of "ill-treatment of the minor" and the case was taken over by the criminal investigation bodies who developed specific activities, also helped by a psychologist.

With regard to the form of the complaint, the complaint must contain the name, surname of the

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[1] Legea nr.455/2001 r. Art.4, pct.3

person who is making it, accompanied by the personal numerical code, the quality and domicile of the complaint, and, in the case of legal persons, the name, headquarters, single registration or fiscal identification code and indication legal or conventional representative. After these data the complaint describes the description of the act that he wants to claim, and the author indicates if it is known and non-mandatory to indicate the means of evidence that he considers necessary to be administered in order to prove the deed. Also, the injured party is not obliged to record the legal framing of the act or if the criminal prosecution bodies do not have the obligation to fit the act exactly as indicated, but how it considers it necessary. If the complaint is missing at least one of the mandatory conditions of the form, the petitioner shall be remanded by administrative means and shall indicate the missing items, and in the case where one of the substantive or formal conditions, for example the lack of all the name of the petitioner or the description of the deed, it is classified.[2]

Due to the fact that not all persons have legal education, they are unaware of the legal framing of the act they wish to claim, nor of the competence of the criminal investigation bodies or the courts. Thus, the wrongly directed complaint is submitted by administrative means to the competent judicial body. If the criminal investigation body draws up the order to initiate the criminal proceedings in rem on the basis of the complaint, the prosecutor will send the complaint to the competent body without taking into account the form of the refusal, except in the case in which the prosecutor starts the prosecution.

*Practical aspect:*

- On 11.05.2015, at 09.00 at the Breaza City Police Headquarters, the so-called F.H. who filed a complaint in which it was recorded that on 10.05.2015, at 22.50 while listening to music in front of block No. 2, on Peace Street, together with a friend, two gendarmes presented, dressed in uniform that hit their bodies with sticks and sanctioned them for their contravention. He wanted to file a criminal complaint for the offense of hitting or other violence. Given that the Gendarmerie workers have the military status, the complaint was filed administratively with the Military Prosecutor's Office attached to the Bucharest Military Tribunal for the investigation of the offense of abusive behaviour.

### 1.2. Denunciation

Any natural or legal person, even if he is not the injured person, has the possibility to inform the criminal prosecution bodies about the existence of any offense by denunciation.

Denunciation is a voluntary referral method that can be made by a natural or legal person without any legal obligation to do so. Exceptions make certain situations where denunciation becomes mandatory if the person has become aware of the commission of any crime. In this respect, the legislator incriminated at art. 266 para. (1) Criminal Code the offense of non-forfeiture which consists in a person's act of not announcing the authorities, even though he was aware of an offense provided by the criminal law against life or that resulted in the death of a person. It is also stipulated in art. 410 par. (1) of the Criminal Code, the offense of non-infringement of national security crimes thus criminalizes the person's deed to do so in the event that he has been informed of the preparation or committing of any offense that is likely to affect national security.[3]

There are situations in which the denouncer may be the person who committed the offense and thus benefit from the removal of criminal liability as a cause of non-punishment.

*Practical aspect:*

- On 14.09.2014 R.E. turned-out at the headquarters of the General Anticorruption Directorate - Argeş County Service, and filed a complaint about the fact that an employee of RAR Pitesti requested and received the amount of 500 lei to make his technical inspection of his BMW 3 Series without passing it through all the verification means. The DGA workers received the denunciation and under the direct coordination of a prosecutor within the Prosecutor's Office attached to the Argeş Tribunal, investigated the denounced person, investigating activities that led to the identification and probation of several RAR employees receiving regular bribes for various services who were circumventing the proper performance of their duties. Since R.E. filed the denunciation before the criminal investigative bodies had been notified, he benefited from the elimination of criminal liability.

Also, self-denouncement may also have the value of a mitigating circumstance.

*Practical aspect:*

- On 20.08.2014 the workers of the Giurgiu Organized Crime Prevention Service under the coordination of a prosecutor within the DIICOT - Giurgiu Territorial Office carried out a flagrant, resulting in the fact that the DV received for resale from the named RT a number of 22 sachets containing a white powder, possibly cocaine. Being faced with clear evidence and at the request of his lawyer, the defendant R.T. filed a complaint with the criminal investigating authorities about the persons who supplied him with high-risk drugs, as well as with other individuals on the same criminal level as he. Thus, the criminal investigating bodies initiated specific activities to investigate the facts, with 12 persons being prosecuted and the denouncer benefited according to art.15 of the Law no.143/2000 on the prevention and combating of illicit drug trafficking and consumption, to halve the penalty limits prescribed by law. Concerning the so-called D.V, it is worth mentioning that the flagrant was carried out following its denunciation and thus

[2] Mihail Udroiu. Procedură penală. Partea specială 2017, Ed. Universul juridic, pag. 26.
[3] V. Rămureanu,Proceduri penale, Bucuresti, 2016, Ed. Universul Juridic, pag. 28.

benefited from the provisions of art. 14 of the Law no. 143/2000 his deed was not punished because it was brought to the attention of the authorities before the criminal prosecution had begun.

A denunciation is made only personally, and if he is a person with restricted exercise capacity through his legal representative. There is a situation where the person who has been denounced by a person is his legal representative or a person who agrees with his acts if he has limited exercise capacity. In this case, the prosecution is made ex officio.

The denunciation having a written form must fulfil the formal requirements in the sense that it contains the name, surname, personal numerical code, its quality and domicile, and for legal persons the name, the registered office, the unique registration code, the fiscal identification code, the registration number in the trade register. Once personal data have been recorded, the description of the reported criminal offense, as well as the indication of the perpetrators and evidence, if known by the denouncer, must be given. The lack of one or more of these form elements involves redressing the administrative complaint by indicating the missing elements, and in the absence of an essential condition as the author's identification data or the description of the act is incomplete or unclear, the organs of tracing criminal will dispose the classification.

*Practical aspect:*

- The workers of the Criminal Investigation Bureau of the Barlad City Police received by e-mail a denunciation from Popescu Robert stating that on 25.08.2016 he passed the Urological Department of the Emergency County Hospital at the 3rd floor where a person was screaming from pain, which is why the denouncer wishes to be held accountable the medical personnel for negligence in the service. Police officers proceeded to identify the denouncer and found that his identity could not be accurately determined, the sending address did not exist, and the databases contained a large number of people with that name. Regarding the description of the deed, the criminal investigating bodies have determined that the injured person cannot be identified because the name or even the ward in which he was present was not indicated and the concrete way of committing the negligence offense was not described in the notification. Taking into account the findings of the investigation bodies, they solved the denunciation in the form of a petition and did not find any real aspects of criminal nature, for which reason they ordered its classification.

If the denunciation is anonymous, it can not be considered as an act of indicating the criminal prosecution bodies, but the judicial bodies have the obligation to verify the veracity of the issues raised and if they find that they confirm, they will initiate the prosecution.

*Practical aspect:*

- On May 14, 2014 at the Police Headquarters of Constanţa Municipality an e-mail was received regarding a denunciation from several detainees of Poarta Albă Penitentiary. The denunciation was anonymous, no name or surname being indicated, but it was brought to the knowledge of the criminal investigation authorities that the prisoner of F.L. of Cell No. 12, Body B boasts that he cheated more elderly people by "the accident method", earning big sums of money. In his criminal activity he uses a cell phone and several phone cards illegally obtained from other detainees and is helped by his former concubine N.E. who presented at the home of injured people to take money or jewellery from them. Considering that several facts of this kind were reported in the district of Constanţa County, being left with an unknown author, the criminal investigating authorities heard of themselves and under the supervision of a prosecutor they were able to prove the criminal activity of the detainee F.L. and the so-called N.E., investigations that were uncovered by a flagrant on 18.08.2014.

As in the case of the complaint, the denunciation may also have electronic form, subject to the existence of an electronic signature, and in the oral case, the criminal investigative body will record it in a minutes and then hear it in witness quality.

### 1.3. The referrals made by leadership persons or other people

On the same level with the complaint and the denunciation as a way of indicating the criminal prosecution bodies, there is the referral made by the persons with leading positions or by other people, being regulated in art. 291 para. (1) of the New Criminal Procedure Code. They are obliged to immediately notify the criminal investigating bodies the persons who hold leading positions within the public administration authorities or other public authorities, public institutions or other legal persons of public law who, in the exercise of their duties, have learned of the existence of any offenses. It is also the duty of the persons who have control duties when, in the exercise of their duties, they have been aware of the commission of any offense. These people can be part of public institutions, but also of private entities with their own control mechanisms. Also in the provisions of Article 291 are included those persons exercising a public interest service which have been invested by the public authorities or are subject to their control or supervision and in the exercise of their official duties have been aware of the existence of any crime, bailiffs, lawyers in the performance of certain tasks, notaries public.[4]

These referrals apply only to offenses for which the criminal action is initiated ex-officio and must have the content of a denunciation. We note, therefore, that this way of referral essentially takes the form of a mandatory denunciation.

Also included in this category are the minutes drawn up by the finding bodies listed in Articles 61 and

[4] Phd Judge Voicu Puşcaşu, Phd Judge Cristinel Ghigheci, Proceduri Penale, Vol. 1, pg. 41- 42.

62 of the New Code of Criminal Procedure. They no longer resume the description and their examples, since both the theoretical and the practical part are entirely applied by the section of the finding bodies.

The public order and national security bodies shall draw up a report in the event of a finding of a criminal offense. This act has a dual function both as a means of referring the criminal prosecution body being provided in art. 288 para. (1) referring to art. 292 of the new Code of Criminal Procedure and as a means of proof provided in art. 198 par. (2) New Code of Criminal Procedure.

In this category is also included the conclusion of a hearing made by the court in the case of the offense of audience.

*Practical aspect:*

- On 9 May 2014, 10 a.m., at the Iasi Tribunal, several defendants accused of criminal grouping, trafficking and money laundering have been tried. The public hearing was attended by defendants, including D.L. what managed to bring a gun with ammunition into the courtroom. When M.S. had to speak, D.L. pulled out a gun and directed it to the witness, but the trigger was not perturbed because the hitch was not drawn and a representative of the guard intervened. In this case, the referral was constituted by the closing of the sitting, and the prosecutor present in the court took over the case by immediately ordering the continuation of the criminal prosecution and taking the measure of apprehension of the accused person that he intended to kill the witness M.S.

### 1.4. The ex officio referral

Article 292 of the New Code of Criminal Procedure stipulates the way of the ex officio notification, so the criminal investigation bodies, if they have become aware of the committing of a crime in a different way than the complaint, denunciation or notifications made by persons with leading positions are bound to record an ex officio referral.

Starting from the ex officio notification of the criminal prosecution body, either personally proceeds with the prosecution, or hand it over to the competent prosecution body by administrative means.

As we have previously stated in the case that the complaint or denunciation does not meet the substantive or lawful conditions, the criminal investigation bodies can check the issues raised and, if it finds that they may be relevant, draws up a minutes from which they refer from office. A practical example was opened at the denouncing session.

One of the usual sources of information from which the criminal prosecution authorities complain ex officio is the media.

*Practical aspect:*

- On April 22, 2014, in the local press, in Neamt County a press article entitled "Find out who poisons the water in Bicaz Dam" appeared. It was mentioned in the article that a slaughterhouse in Bicaz-Chei drove dead animal remains in the Bicaz River, which later collapsed in the Bicaz Dam and became an outbreak of infection. Taking into account the ones mentioned in the press article, the criminal prosecution bodies heard of the offense of water infestation, and in the course of the criminal investigation it was ascertained that the reported issues are true.

In a rule of law, there are also specialized bodies with the objective of maintaining national security. These structures carry out specific investigative activities and the information obtained is confidential. Criminal Investigation Bodies have access to classified information up to various levels of classification according to the specifics of work, so they can be notified of offenses, but they can not use the documents they receive because they are not intended to be advertised. In order to capitalize the information it is necessary to initiate the criminal prosecution which starts from the official act of the ex officio notification.

*Practical aspect:*

- A specialized structure on the maintenance of national security carried out the specific investigation activity towards the foreign citizen I.H. As a result of the investigations, it has been shown that he travels regularly to Turkey by airplane and has more Romanian citizens known to be part of the so-called "underworld", suspected of dealing with drug trafficking. Given that I.H. has a very high standard of living, with no visible source of revenue, and several people said they were buying high-risk drugs from Turkey that they made available to the interlopes, the structure informed D.I.I.C.O.T. prosecutors have heard of their case and initiated the prosecution.

In the case of offenses found in the flagrant, the minutes to be drawn up on this occasion constitute an act of indicating the criminal prosecution bodies, and the injured persons of the offense found may file a complaint.

If the information is accurate, no matter how they get to the criminal prosecution body, this is obliged to complain of its own motion.[5]

### 1.5. Preliminary complaint

Another way of indicating criminal prosecution bodies is the prior complaint in the form of a regular complaint, the difference being that the existence of this complaint makes the criminal action in the case of criminal offenses conditional. The existence of the prior complaint does not give rise to the obligation of the criminal prosecution bodies to order the commencement of criminal prosecution, the continuation of the criminal prosecution of the suspect or the commencement of the criminal action.

The prior complaint must meet the formal and substantive conditions, just as for a regular complaint, and in the absence of one or more of such elements, it

[5] PhD Judge Voicu Puşcaşu, PhD Judge Cristinel Ghigheci, Proceduri Penale, Vol. 1, pag. 44.

is returned administratively by indicating the shortcomings.

The preliminary complaint is made in written or oral form, in which case the criminal investigative body records a report in this respect. This can be done both personally and for another person by procuration, and the New Code of Criminal Procedure stipulates that the prior complaint may be advanced electronically, subject to the existence of an electronic signature, just as with the other means of notification.

The injured person may be deprived of his/her capacity to exercise and the prior complaint may be made by his/her legal representative, and if he/she has limited exercise capacity, he may be personally made with the consent of the persons provided by the civil law. If the perpetrator is even his/her representative, the criminal prosecution bodies may order the commencement of criminal prosecution, the continuation of criminal prosecution of the suspect and the bringing of criminal proceedings, by virtue of the fact that, exceptionally, the existence of the preliminary complaint on certain offenses. Another exception to this rule is where the author is even the representative of the legal person whose interests should be protected.[6]

If we are in the situation of the provisions of art.199 of the Penal Code on domestic violence, where the commencement of the criminal action is conditioned by the existence of the preliminary complaint and the withdrawal of the preliminary complaint takes place, the prosecutor shall decide whether or not the will of the injured person, having the possibility to continue the prosecution as it deems necessary.

*Practical aspect:*

- On May 15, 2015, R.E. has filed a preliminary complaint, for the offense of hitting or other violence, against her husband, R.L., by making available to the criminal investigation authorities and a medical certificate, certifying that after the blows received it required 11 days of medical care. Subsequently, on 18 August 2015, she appeared before the criminal prosecution authorities saying she wanted to withdraw his previous complaint. Since the evidence-based economy shows that for R.L. this is not the first offense of this kind, and two more criminal cases have been filed in the last year by withdrawing the preliminary complaint and the perpetrator is known as a very violent person, it is concluded that he presses the injured person in order to withdraw the preliminary complaint, which is why the prosecutor considered it necessary to continue prosecution with regard to the suspicion and the initiation of the criminal action as finally to forward the file to the competent court.

When referring to the existence of the prior complaint we also consider the active or passive indivisibility of criminal liability in the sense that if the preliminary complaint was formulated only by one of the injured persons although there are several persons who have been injured the author will answer the criminal as well if the prior complaint concerns only one person, the prosecution will extend to all the perpetrators of the crime regardless of whether they are authors, co-authors, instigators or accomplices.

As regards the procedural period of revocation, the New Code of Criminal Procedure establishes it at 3 months from the day when the injured party learned of the act and does not take into account whether at the time when he learned of the criminal offense he knew the author or not. If the injured party is a minor or an incapacitated person, the term of revocation shall run from the time when his legal representative has learned of the existence of the deed. It has been concluded in the case-law that in the case of an abuse of trust which is committed by the refusal to return a good, the period of decline begins to run from the moment the author has given his first refusal, a solution given by the Bucharest Tribunal. Also regarding the introduction of the preliminary complaint, we encounter a situation in which the mediation between parties is interrupted, and the mediation period is not taken into account when establishing the term of introduction, being considered suspended.[7]

In the case of flagrant finding of the offenses of which the criminal proceedings are triggered, is conditioned by the existence of the preliminary complaint, the criminal prosecution or finding body shall be obliged to state the perpetrator, to record the minutes, then the criminal prosecution body to ask the injured person if he/she wants to file a preliminary complaint.

*Practical aspect:*

- On May 14, 2015, a patrol of public order and safety, moving in the area of the block parking, in the city of Sinaia, surprised the named E.F. while hitting the door of a car. The author of the deed stated verbally that he had made this gesture because the car is parked on the place he usually parked. The police have drawn up a verbal record of the flagrant crime for destruction, and the criminal investigation authorities have identified the owner of the car that said he did not want to file a criminal complaint for the crime of destruction. A criminal case file was drawn up on the basis of the minutes and was submitted to the prosecutor's office for classification, as the preliminary complaint was missing.

If the criminal prosecution for an offense has started and the legal classification of a criminal offense has subsequently changed depends on the existence of the prior complaint, the criminal prosecution bodies will ask the injured person if he wishes to make a preliminary complaint and the term for the forfeiture flows from that time.

### 1.6. Conclusions

The common point of all the means of referral is that it always takes the written form, either by direct

[6] Mihail Udroiu. Procedură penală. Partea specială, 2017, pag. 23.
[7] Mihail Udroiu. Procedură penală. Partea specială, 2017, pag.24-25.

recording of the injured person or by the oral hearing. In practice, the document of referral is the document which will always contain the registration number of the prosecutor's office or, as the case may be, of the criminal prosecution body and resolutions of the hierarchical chiefs on the registration procedure and the worker to whom the work was assigned for verification and settlement.

The referral is the effect of a manifestation of will for the purpose of conducting criminal proceedings that may come from the criminal investigative body, the finding body or the injured person whose interests or rights have been violated as a result of committing an offense.

The referral is the procedural act by which a natural or legal person addresses the criminal prosecution body in order to achieve the object of criminal prosecution. The referral may refer to a partial or complete description of the offense, and the criminal investigative body is required to discover and collect material evidence to lead to the truth, even if some aspects are not to the liking of the person who made the referral.

According to the Code of Criminal Procedure the act of referral is not a material means of evidence, except for the rule, it makes the report of the flagrant offense.

The lack of the referral makes it impossible to draw up a procedural act of subsequent criminal prosecution such as the commencement of criminal prosecution, the continuation of criminal prosecution of the suspect or actuating criminal prosecution. The prosecutor or the criminal investigating body refers to the manner in which they are referred in most of the procedural or procedural acts that they draw up. Thus, the prosecutor reminds the act of referral in all the ordinances he makes when conducting the criminal prosecution.

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- Rămureanu V.,Proceduri penale, Bucuresti, Ed. Universul Juridic,2016.

# ROMANIAN COURTS HOLDING JURISDICTION IN THE IMPLEMENTATION OF THE PROBATION MEASURES

**Andrei-Dorin BĂNCILĂ***

**Abstract**

*The new law of enforcement of sanctions and non-deprivation procedural measures, namely Law no. 253/2013 regulates "the jurisdictional nature of execution". This jurisdictional nature of the enforcement of sanctions and non-deprivation procedural measures reflects through the involvement of the courts in the resolution of a significant number of issues related to enforcement.*

*Courts, either by judges delegated with administrative or judicial-administrative competences, or by judges in full capacity and who performs purely judicial duties specific to the judicial function, are called upon to perform activities designed to ensure the enforcement of the precepts contained in the court order or to regularize the actual execution by solving the incidents that arise during the execution.*

**Keywords:** *probation measures, the enforcement court, the judge delegated with the enforcement, the clerk delegated to the criminal enforcement department, the execution, the annulment and the revocation of the postponement of the punishment, the suspension of the execution of the punishment under supervision or the conditional release.*

## Introductory remarks

The new law on the enforcement of sanctions and non-custodial procedural measures, namely Law no. 253/2013 on the execution of sentences, educational measures and other non-custodial measures ordered by the judicial bodies during the criminal proceedings, reminds of the "jurisdictional nature of the execution", giving it an entire chapter[1].

This jurisdictional nature of the enforcement of sanctions and non-custodial measures is reflected by involving the courts in many enforcement matters.

In the following, we will see that the courts, whether by judges delegated with administrative or judicial-administrative competences, or by judges constituted in full court, who perform exclusive judicial functions specific to the judicial function, are called upon to perform activities designed to ensure the enforcement of the precepts comprised in the judgments or regularize the actual execution by solving the incidents that arise during the execution.

In this first part, it is useful to specify that we will approach the courts only from the perspective of their competences in relation to the execution of the probation measures, leaving in the authors' charge, above all, the rules of criminal procedural law and those of judicial organization to deepen the organization and functioning of the courts and from other perspectives.

## 1. The enforcement court

Of the relevant legislative provisions we find that the first entity with competences in connection with the execution of educational measures is **the enforcement court**. This is defined by the provisions of art. 553 Code of Criminal Procedure and it is, with only one exception, the court that handled the case in first instance. The only court that can not be a court of enforcement is the High Court of Cassation and Justice, which, when judging in first instance, has legally delegated most of the specific jurisdiction to the Bucharest Court of Appeal or the military court law.

In connection with this legal delegation of functional competence, we feel the need to have some discussions. Art. 553 par. (3) final thesis of the Code of Criminal Procedure is rather imprecise, using the singular form when referring to the military court law, without indicating its full name (as it does with regard to the civil court), although, according to art. 56 para. (1) letter a) and par. (2), referring to Annex 2 of Law no. 304/2004 regarding the judiciary organization, the military courts in the country are four: the Military Courthouse of Bucharest, the Military Courthouse of Cluj, the Military Courthouse of Iasi and the Military Courthouse of Timisoara. In order to answer the question which of the four military courthouses are competent to enforce a criminal judgment on a case before the High Court of Cassation and Justice, some authors[2] propose to choose the solution according to the relevant provisions of art. 41, which regulate territorial jurisdiction for crimes committed on the territory of the

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[1] Chapter III of Title I from Law no. 253/2013.

[2] L. Postelnicu and C. Meceanu, in the *Code of Crminal Procedure. Comments on teh articles*, coordinated by M. Udroiu, C.H. Beck Publishing House, Bucharestti 2015, p. 1453.

country or on Romanian flag vessels or aircraft registered in Romania. In particular, given the order of preference which is deduced from the provisions of art. 41 par. (5), we believe that the military court of execution in the case of first instance judgments of the High Court, is the one in whose circumscription the criminal act was committed or the one in whose circumscription the first Romanian harbour is situated, where the ship is anchored and the offense committed or the first place of landing on the Romanian territory of the aircraft in which the offense was committed.

We believe that these provisions can be added to the art. 42 of the Code of Criminal Procedure, useful in the case of crimes committed outside the territory of the country.

Even if, as I have shown, we agree with the provisions of art. 41 Code of Criminal Procedure, to which we add those of art. 42 Criminal Code, *de lege ferenda* we believe that a legislative amendment would be required to align the military enforcement order in the first instance judgments of the High Court to the type of the civil enforcement order.

In support of this proposal we call the historical perspective in relation to the teleological one.

Thus, in the old Code of Criminal Procedure the Territorial Military Courthouse was designated as a military court to execute the first instance judgments of the High Court of Cassation and Justice, which was abolished by the provisions of art. 20 of Law no. 255/2013 for the implementation of the new Code of Criminal Procedure, but also the fact that, according to art. 21 par. (1) of the same law, the cases before the disbanded Territorial Military Courthouse of Bucharest were taken over by the Military Courthouse of Bucharest. Also, the teleological argument that subsisted in the designation of the Bucharest Courthouse as a civil court for the execution of the first instance judgments of the High Court, namely that of the spatial approximation of the two courts, is found, in a stronger word, also as regards the election of the Military Courthouse of Bucharest as a military court for execution of the first instance judgments of the High Court.

In conclusion, we consider that the Military Courthouse of Bucharest should be designated as the military court to execute the first instance judgments of the High Court of Cassation and Justice.

The enforcement body has two main types of functional competencies in relation to the execution of probation measures: *enforcement competences* and *enforcement competences to regulate (by solving some of the incidents during the actual execution).*

Some of their competences in relation to the execution of the probation measures are enforced by the court of enforcement and they are exercised by its judges who are constituted in court. These are, in general, *those competencies to regulate execution* by solving some of the incidents that occurred during the actual execution, which require a simplified trial.

This category of competences includes, in the first place, those related to the contestation of execution for the cases provided by art. 198 par. (1) letter (a), (b) and (d) of the Code of Criminal Procedure.

In the same category of competence it was included expressing the agreement to leave the country since the person whom was given a solution for deferment of penalty or a solution of suspended sentence under supervision sentence has the obligation not to leave the territory of Romania without the consent of the court.

Also, according to the provisions of art. 48 of the Law no. 253/2013, corroborated with those of art. 87, art. 95 and art. 103 of the Code of Criminal Procedure, in the course of enforcement, the enforcement authority is competent to amend the content of some of the obligations imposed on the supervised person, to impose new ones or to order the cessation of the execution of some of the previously ordered ones.

## 2. Judge delegated whit the enforcement

The competences for the enforcement of criminal judgments in general of those who institute probation measures are in particular exercised by the executing court through the judge whom it delegates to carry out a series of activities necessary to ensure compliance to the individuals at the court's discretion. Thus, according to art. 554 par. (1) Code of Criminal Procedure, the court of enforcement "delegates one or more of its judges to conduct the enforcement".

The activity of the judge delegated to execution is, as it results from the very "delegate" particle governed by the *rule of specialization*, according to which it is necessary for the duties in question to be exercised by trained and experienced judges in criminal matters. The rule of specialization is also deduced from the provisions of art. 29 par. (2) of the Rules of Internal Order of the Courts, approved by the Decision of the Plenum of the Superior Council of Magistracy no. 1375/2015, which gives the possibility of partial or total relief of the delegated judge to the execution of the trial.

The activity of the judge delegated to the execution is also governed by the *rule of continuity*, expressly provided by art. 29 par. (3) of the Law no. 253/2013, also enshrined in the provisions of art. 29 par. (4) of the Internal Rules of the Courts, which requires that the judge delegated to the execution remains, as a rule, the same throughout the period of execution. This rule of continuity, which is a transposition in the matter of the enforcement of criminal judgments of the principle of continuity that governs the entire court activity, acquires a special importance in the conditions of diversification of the competences of the judge delegated to execution, to whom we will refer in the following.

In the context of the new regulations that illustrate the configuration of the institution of the judge delegated to the execution, its functional competence is

made up of two categories of attributions: *administrative* (through which the functional competencies of the executing enforcement authority, which we have referred to above and which were entirely delegated to the judge in question, materializes) and *jurisdictional-administrative* (which gives the delegated judge a part of the competence of the enforcement instance regarding the regularization of the execution by solving some of the incidents during the actual execution).

***The administrative tasks*** of the judge delegated with the execution are those through which he carries out the activity of enforcement of the criminal decisions.

The tasks in question are subsumed, according to art. 15 letter a) of Law no. 253/2013, as regards the probation measures, in order to ensure enforcement by communicating to the probation service and other community institutions involved in the execution of sentences and non-custodial measures, the children of the judgments they had the respective punishments or measures.

This task is reflected by an activity which is also known as the preparation *works of execution*, a phrase which is legally enforced by the provisions of the Rules of Internal Order of the Courts.

Of course, in carrying out this activity of mainly administrative and technical nature, the judge delegated to the execution is helped by the *clerk delegated with the execution*, a clerk whose special task is precisely to constitute real support for the judge delegated with the execution.

Besides, the importance but also the complexity of this administrative and technical activity to carry out criminal enforcement work is underlined by the need to delegate some of the judges and court clerks to deal exclusively or predominantly with this activity.

In the courts with a high workload, several judges and court clerks can be delegated with execution, and they carry out their work in the context of a functional court dismemberment called the *criminal enforcement department*.

The *execution works* (or under the equivalent designation of *enforcement*) include those activities that the delegated judge and the clerk delegated to the criminal enforcement department performs after the moment the judgment becomes enforceable in order to ensures the fulfilment of the provisions that are likely to be executed. It must be said that the meaning of the syntagma in question is quite broad, comprising not only the works which refer to the enforcement of the sanctions, the obligations, the express prohibitions contained in the provisions of the judgments, but also the works referring to the achievement of more distant effects of criminal proceedings, such as consequences (dismissal from the office, for example) or prohibitions not expressly contained in the provisions of the judgments and intervening as a result of provisions of the law (*opelegis*).

The execution work to be carried out in order to ensure that the provisions contained in the judgments are complied with, are: issuing various procedural documents (such as the mandate to execute the imprisonment or life imprisonment, such as the ban on leaving the country if we refer to custodial sentences); the drawing up of various addresses or other correspondence documents in connection with the enforcement activity; the communication of various procedural documents or extracts from them to the authorities with responsibility for the enforcement of judgments; transmission of data and extracts from judicial documents; the return, consisting of sending an address to an authority to which, previously, was sent or submitted procedural documents extracted from them or data relating to the enforcement of judgments; the request for information, which is an execution work complementary to the return; verification, which is a work of execution similar to the request for information and which is expressly provided by art. 154 par. (4) of the Rules of Internal Order of the courts regarding the situation of the collection of fines sent for execution; the referral, which is an enforcement work whereby unjustified delays in the execution of criminal judgments (as in the case of referrals under Article 154 (5) of the Rules of Court Internal Courts) or it is intended to clarify certain aspects of enforcement (as in the case of the referrals referred to in Article 554 (2) of the Penal Code and Article 29 (1) (f) of the Rules of Procedure of the courts).

In connection with the latter enforcement work, consisting in informing the executing court to clarify the unclear aspects of execution or to remove the obstacles to execution, a serious problem was raised in the doctrine regarding the incompatibilities that may arise when the judge who seizes is also entrusted with the resolution of the referral.

In view of the many aspects that may lead the delegated judge in charge of enforcement to bring the matter to court for clarification or to remove obstacles to enforcement, the answer to the question raised can only be that the degree of involvement of the delegated judge must be analysed in the expression of a point of view on the matter raised by the court of enforcement[3].

***The judiciary-administrative competences*** of the delegated judge with the execution are a new category of tasks introduced with the latest reform of criminal and criminal law enforcement in our country, which took place in 2014 with the entry into force of the new criminal codes and enforcement laws.

This category of tasks of the delegated judge with the execution is also an expression of the judicial nature of the execution of sanctions and non-custodial measures, expressly enshrined in Law no. 253/2013 and to which I referred to the beginning of this work.

[3] D. Lupașcu, *Aspecte teoretice si de practica judiciara privind punerea in executare a pedepselor principale*, Universitatea București – Facultatea de drept, teză de doctorat, nepublicată, p. 98.

The development of the functional competences of the delegated judge with the execution by winning this new category of judicial-administrative attributions is natural in the context in which the alternative ways of executing sentences and measures depriving of liberty have been significantly diversified in the context of the new criminal law.

This diversification meant the rethinking of the criminal execution paradigm, by strengthening the role of the probation counselor in supervising the execution, by involving the community institutions in execution, but also by widening the competences of the delegated judge with the execution, which, according to the provisions of art. 14 par. (3) of the Law no. 253/2013, guides and controls the oversight process carried out by the probation service or the other authorities responsible for the execution of sanctions and non-custodial sentences.

In order to carry out its new guidance and control functions, the following administrative-judicial tasks were associated with the delegated judge with the execution:

**The task to solve the incidents arising during the execution and which are not within the jurisdiction of the enforcement instance by the judges constituted in common law**. In this subcategory there are tasks such as:

- the payment of the penalty in monthly instalments, attributed by art. 22 par. (1) and (2), with respect to the convicted natural person, and by art. 25 par. (2) and (3) of Law no. 253/2013, on the convicted legal person;
- granting permissions during the execution of the complementary punishment of prohibition of certain rights, attributed by art. 31 of the Law no. 253/2013;
- the designation of an institution in the community in which the unpaid work is performed if its execution is no longer possible in any of the two institutions in the community specified in the decision of the court of first instance, art. 51 par. (2), in case of delay of punishment, and art. 57 par. (2) of the Law no. 253/2013, in the case of suspended custodial supervision.

**The task to solve complaints against the probation counselor's decisions,** generally governed by art. 15 lit. f) and art. 17 par. (4) of the Law no. 253/2013. We will list below some situations, for executing the measures of probation, the probation officer shall take decisions which may form the subject of complaints competence appointed judge:

- the decision by which, according to art. 50 par. (1) of the Law no. 253/2013, the probation adviser establishes the course to be followed and the institution in the community in which the course is to be carried out, in case the supervised person is obliged to attend a school or vocational training course;
- the decision by which, according to art. 51 par. (1) of the Law no. 253/2013, the probation counselor establishes in which of the two institutions in the community specified in the judgment the community service work and the specific type of activity are to be performed, assuming the supervised person is obliged to perform unpaid work for the benefit of the community;
- the decision by which, according to art. 53 par. (1) of the Law no. 253/2013, the probation adviser establishes the program or programs to be followed and, where appropriate, the institution or institutions in the community in which they are to take place, if the supervised person is required to attend one or more social reintegration programs, conducted by the probation service or organized in collaboration with community institutions;
- the decision by which, according to art. 54 par. (1) of the Law no. 253/2013, the probation counselor establishes the institution in which the control, treatment or medical care is to be carried out, in case the supervised person is obliged to undergo control measures, treatment or medical care and where the institution has not been established by the court decision.

**The task of judicial fines** is provided, with a general norm value, through the provisions of art. 15 lit. g) of Law no. 253/2013.

In particular, in the matter of the execution of probation measures, the delegated judge with enforcement may apply fines in cases such as those provided by art. 19 par. (1) of the Law no. 253/2013, where community institutions contributing to the execution of sentences and non-custodial measures do not fulfill or inadequately perform the duties assigned to them and to which the judge entrusted with the execution may apply a judicial fine in an amount between 500 lei and 5,000 lei.

**The task to empower community institutions with competencies in the execution of probation measures** is another manifestation of the judicial nature of enforcement. The task is stipulated in art. 20 and art. 21 of Law no. 253/2013.

## 3. Court hearing at first instance to postpone punishment or suspension of custody

Besides the executing court, exercising its tasks regarding the execution of probation measures, as we have seen, either by the court hearing the execution or by judges constituted in panels court of common law, the law maker granted functional competences to *the court that pronounced at first instance the postponement of the punishment or the suspension of the execution of the punishment under supervision*. This category of courts is, as we will argue below, insufficiently complete and precisely outlined.

Through the provisions of art. 582 par. (2) and art. 583 par. (2) Code of Criminal Procedure, the court that issued in the first instance the postponement of the punishment or the suspension of the execution of the punishment under supervision, the competence to order the revocation of the postponement of the punishment and the revocation of the suspension of execution of the punishment under supervision in case of non-fulfilment

of civil obligations in the court decision is explicitly granted.

Of course, in most cases, the court that ruled in first instance the postponement of the punishment or the suspension of execution of the sentence under supervision is the very first instance court and thus also the court of execution.

However, there are also situations in which there is no identity between *the court of enforcement* and *the court that pronounced in first instance the postponement of the punishment or suspension of the execution of the sentence under supervision*, the simplest example being given by the hypothesis of the enforcement of the rulings issued by the High Court of Cassation and Justice in the first instance.

However, the previous example is not the only one, because, depending on the solutions contained in the criminal judgments and depending on whether or not the appeals are to be filed, either the first instance judgment will be delivered or the decision of the first instance as amended by the appeal judgment or the judgment given in the appeal.

For a better understanding, we believe we can evoke perfectly possible examples in practice, as follows:

- the hypothesis of postponing the punishment or conviction with suspension of execution of the punishment under supervision in the appeal after acquittal or cessation of the criminal proceedings in first instance;
- the hypothesis in which the decision of the first instance was abolished, through which a solution other than the acquittal or cessation of the criminal trial was adopted, but no solution to defer punishment or conviction with suspension of the execution of the punishment under supervision has been adopted, and the control court re-judged and pronounced for the first time a solution for postponement of punishment or conviction with suspension of the execution of the punishment under supervision.

Assuming that we reasonably argued the existence of the situations in which the enforcement instance is not identical with the court that pronounced in first instance the postponement of the punishment or suspension of execution of the punishment under supervision, we return to the analysis of the provisions of art. 582 par. (2) and art. 583 par. (2) Code of Criminal Procedure.

The legal texts invoked are, in our opinion, *incomplete* and *inaccurate*.

We say that they are *incomplete* because they should have covered the assumptions of revocation in cases of non-execution of the probation measures, more precisely of any measures and obligations of supervision out of those stipulated in art. 85 par. (1) to (4) and art. 93 par. (1) - (4) Criminal Code.

Such an addition is necessary in the context in which the functional court competent to order revocation in such cases is not sufficiently precise determined by the provisions of art. 86 par. (4) letter b), corroborated with those of art. 88 par. (1) Criminal Code, and the provisions of art. 94 par. (5) letter b), corroborated with those of art. 96 paragraph (1) Criminal Code, but neither those of art. 56 para. (1) or art. 57 par. (2) of the Law no. 253/2013. After reading the legal texts mentioned above, which refer only to "court", without specifying whether the court or other court (for example, the court that ordered in first instance the postponement of the sentence or the suspension of custody) remains the question *which is the functional court competent to order the revocation of the postponement of the sentence or the suspension of the execution of the punishment under supervision in case of non-execution or inadequate execution of the probation measures.*

We say that the provisions of art. 582 par. (2) and art. 583 par. (2) Code of Criminal Procedure are *inaccurate* because they use imprecise attributes to actually identify the competent court to order the revocation of the postponement of the sentence or the suspension of the execution of the sentence under oversight in case of non-fulfillment of civil obligations, namely the *first instance adjudication* of the postponement of the sentence or suspension of the sentence under supervision. The literal interpretation of this attribute, which should be the first interpretation to be used but sufficient to attempt to discover the true intention of the law maker, will lead to the conclusion that there are also situations that remain uncovered, namely those in which the delay of the sentence or the suspension of the sentence under supervision are pronounced for the first time in the appeal procedures. In such a case, perfectly possible in practice, there will not be a *court to first adjudicate* the postponement of the sentence or the suspension of the execution of the sentence under supervision, but only a *court that finally pronounced* the solutions in question. Therefore, a further question arises as *which is the court competent to order the revocation of the postponement of the sentence or the suspension of the execution of the punishment under supervision in case of non-observance of the civil obligations, but also in case of non-compliance - the inadequate execution or execution of the probation measures, when the solutions in question were given in the first phase of the call.*

We can give an answer to the first of the two questions (namely, which is the functional competent court to order the revocation of the postponement of the punishment or the suspension of the execution of the penalty under supervision in case of non-execution or inadequate execution of the probation measures) in the sense that the functional competent court is the *enforcement court*, once reading the provisions of art. 15 letter e) of Law no. 253/2013, which gives the judge delegated with execution the duty to notify the *enforcement court* in the cases provided by the law, inter alia, for the "revocation of non-custodial sentences or measures".

For drafting answer to the second question (which court is competent to order the revocation of the postponement of the sentence or the suspension of the execution of the sentence under supervision in the case of non-compliance with civil obligations, and in the event of non-execution or inappropriate enforcement of the probation measures, were the solutions had been given for the first time in the appeal) also an example of jurisprudence[4] leads us, from which it follows that although the suspension of the execution of the sentence under supervision was condemned by the final court[5], competent to revoke the suspension for non-execution of the probation measures was declared the first instance[6], which is also a court of enforcement.

In support of the same answer, we can also rely on another case-law[7] example, from which it results that although the suspension of execution of the punishment under supervision was first issued in the appeal, the competence to solve the request to revoke the suspension for non-payment of civil damages belongs to the first instance court execution.

Since the criminal procedural provisions here analyzed underpin the same criticisms and under the Code of Criminal Procedure of 1968, whose pertinent provisions regarding the revocation of the conditional suspension of the execution of the sentence or the suspension of the execution of the sentence under supervision[8] were similar, we believe it is useful to show that the jurisprudence developed in the light of those provisions has held that "the examination of the request to revoke the conditional suspension of the execution of the punishment (for non-payment of civil damages, nn) belongs to the court which judged in the first instance the case with the offense for which the sentence was the suspension of conditional execution, even if that suspension was ordered as a result of the appeal being upheld by the higher court"[9].

Although it seems that the jurisprudence has somewhat surpassed the legislative inaccuracy and the lack of coverage of all the assumptions that can be encountered in practice, based on the fact that the revocation is a matter of regularization of the execution, we believe that we could formulate *a lege ferenda* proposal that the law maker explicitly stipulates (as we will see below that it did in the case of conditional release) that the enforcement authority has the functional competence to order the revocation of the postponement of the punishment or the suspension of the execution of the sentence under supervision, both in the case of non-civil obligations and in the case of non-execution or inadequate execution of probation measures, i.e the supervision measures and the obligations and prohibitions accompanying the two alternative ways of judicially identifying criminal sanctions.

Such legislative clarification would be particularly welcome, especially when the High Court of Cassation and Justice ruled on the substance of the case in first instance, where, *de lege lata*, the supreme court has the functional competence to rule on the revocation of the postponement of the punishment and the revocation of suspension of the execution of the punishment under supervision at least for the case of non-fulfillment of civil obligations, i.e a matter of regularization of the execution, in the context in which the principle established by the provisions of art. 553 par. (2) Code of Criminal Procedure is in the sense of relieving this instance the taks of the enforcement court.

## 4. The court that ordered conditional release

With regard to the execution of the probation measures ordered in the case of conditional release with a remaining period to be executed for 2 years or more, the law gives tasks of regularizing the execution of the competent court to order the conditional release. We would like to point out that, as regards the enforcement competences of judgments ordering conditional release, the competent court to order conditional release also acts as an executing court.

According to art. 587 par. (1) the competent court to order conditional release is always "the court in whose jurisdiction the place of detention is located"[10].

According to the provisions of art. 588 par. (3) Code of Criminal Procedure "the court mentioned in art. 587 par. (1) also rules on the revocation of conditional release" in two cases:

- when, during the surveillance, the conditional

[4] By criminal sentence no. 11/2016 of the Court of Appeal of Târgu Mureş, the court, as executing court, declared competent to solve the petition regarding the revocation of the suspension of execution of the punishment under supervision, although this solution was given for the first time by the High Court of Cassation and Justice in appeal; the judgment is accessible in the electronic data base *Lege5.*

[5] As it is clear from criminal decision no. 4119/2011 of the High Court of Cassation and Justice - the Criminal Division, whereby the appeal as the last ordinary attack path according to the Code of Criminal Procedure 1986 reduced the penalty and changed the way of individualisation execution, effective enforcement, suspension under the supervision of the execution of the punishment; the court decision is accessible in the electronic database of the portal www.scj.ro.

[6] From criminal sentence no. 18/2010 of the Târgu Mureş Court of Appeal it results that this court has ruled on the merits of the case in the first instance; the judgment is not public.

[7] Criminal Sentence no. 27/2015 of the Bacău Court of Appeal, accessible in the electronic database of the portal *www.rolii.ro*, final by the criminal decision no. 705/2015 of the High Court of Cassation and Justice - Criminal Section, accessible in the electronic data base *Leg5*.

[8] See the provisions of art. 447 par. (2) of the Code of Criminal Procedure of 1968.

[9] Criminal Sentence no. 39/2005 of the Cluj Court of Appeal, cited by L. Lefterache in the *Annotated Criminal Code*, C.H. Beck Publishing House, Bucharest 2007, p. 292

[10] With regard to this way of conferring jurisdiction on the issue of conditional release exclusively for the first category of courts in the judicial system, namely the courts in whose territorial jurisdiction the places of detention are located, we only have the duty to state that, within the Constitutional Court of Romania there are four complaints submitted that criticize the law maker's option, as it results from the analysis of the electronic portal of the constitutional court www.ccr.ro.

released does not exactly execute the probation measures and

- when, after the release, the released one commits a new offense discovered in the term of supervision and for which a sentence was pronounced for imprisonment even after the expiration of that term, and the competent court to order the revocation of the release (that is the court that judges, or judged in first instance the offense of revoking, as it results from the provisions of article 588 (2), the last sentence of the Code of Criminal Procedure) did not rule on the revocation.

The latter functional competence granted to the conditional release court to order the revocation of conditional release for the commission of a new offense in the period of custody of conditional release, when the court which judges the new offense did not itself order the revocation, it reflects another difference of regime between the revocation of conditional release and the revocation of the postponement of the execution of the punishment or the suspension of the execution of the sentence under supervision, on the other hand, in these latter hypotheses, the court ordering the adjournment or the suspension without having revocation competences for committing new offenses within the surveillance terms.

As it can easily be seen in art. 588 par. (3) Code of Criminal Perocedure, the law maker uses the normative reference technique to designate the competent court to rule on the revocation of conditional release in the assumptions of the previous paragraph, which may rise difficulties in interpretation and application, since the text referred to reflects that "the court where the place of detention is", but at the time when the question of the revocation of conditional release is made, the convict may be either in a state of liberty or imprisoned at another place of detention, which may give rise to a question about which place of detention is concerned.

We believe that, as other author[11] has stated, the law maker wished to give, by questioning, the competence to rule on the revocation of conditional release in the hypotheses in question to the same court that ordered conditional release, but we believe, in order to remove any discussion, *de lege ferenda*, this intention should be expressed explicitly and directly.

From the analysis of the relevant legal provisions, we will find that the court that ordered conditional release does not have the functional jurisdiction to order the suspension of conditional release.

## 5. The court that judges or judged in first instance the offense that could lead to the revocation or annulment of the postponement of the punishment, the suspension of the execution of the sentence under supervision or the conditional release

Another court to which the law confers *competence to regulate the execution* of probation measures is, according to the provisions of art. 582 par. (1), art. 583 par. (1) and art. 588 par. (1) and (2) Code of Criminal Procedure, the court "that judges or judged in the first instance the offense that could lead to the revocation or annulment".

From reading these texts, undoubtedly it results that the law maker understood mainly to confer the functional competence to order the annulment or revocation of the three alternative means of enforcement to the court that "judges or judegd in first instance the offense that might entail the revocation or cancellation". This choice is a logical one, capable of promptly regulating the execution of the probation measures accompanying the postponement of the punishment, suspension of the execution of the punishment under supervision and conditional release.

But, as I have already pointed out, the law maker has shown inconsistency, choosing to regulate, without proper justification, a partially different regime from the point of view of the competent jurisdiction to order the annulment or revocation on condition of conditional release, on the one hand the hypothesis of the postponement of the punishment and suspension of the punishment under supervision, on the other. This different regime makes the provisions of art. 588 par. (2) Code of Criminal Procedure be inaccurate, as we will argue below.

The difference in question is that while in the case of postponement of the punishment and the suspension of the execution of the punishment under supervision, the competence to order the annulment and revocation (when committing a new offense) belongs exclusively to the court that judges or judged in the first instance the offense and that could be the subject of the revocation or annulment, in the case of conditional release, the jurisdiction in question remains exclusive only to the court which judges or judged in first instance the offense which leads to the *annulment*, because, in the case of an offense involving the *revocation* of conditional release, the revocation is no longer the sole responsibility of the court which in first instance judges the offense in question, but it is also granted to the conditional release court, which, according to the provisions of art. 588 par. (3) the last sentence of the Code of Criminal Procedure, it becomes competent to order revocation when the court which in first instance ruled the offense of revocation has not ruled on that.

[11] E. Dumbravă, *Conditional release in new codes*, Universul Juridic Publishing House, Bucharest 2016, p. 135.

The difference of the regime in question makes, as I stated above, that the provisions of art. 588 par. (2) Code of Criminal Procedure be inaccurate. The inaccuracy consists in using (by the method of referring to the previous paragraph of the law) at a past time of the verb *to judge*, when identifying the court competent to order the revocation of conditional release. In other words, if the conditional release body has the functional competence to order the revocation of a new offense when the court that in first instance judged this new offense did not rule on the revocation, it means that it is inaccurate to say that the court that judges or *judged* in first instance the offense of revoking conditional release is competent to order revocation.

More specifically, the court in charge of prosecuting the offense of revoking conditional release may order revocation only if it makes a decision on the offense of revocation and if it has not done so in that context to become competent to order even the revocation of the conditional release.

So, we believe that, *de lege ferenda*, if the law maker keeps the option of devoting alternative competences, the provisions of art. 588 par. (1), (2) and (3) Code of Criminal Procedure should be correlated with each other in order to give a precise meaning to the provisions governing the functional competence to order the revocation of conditional release in the case of a new offense, so that what follows implicitly from the corroborated interpretation of the said texts results explicitly, namely that the court in charge of the prosecution of the offense that leads to the revocation of conditional release may order revocation only if it makes a ruling on the offense of revocation, otherwise the jurisdiction in question will lie with the court of conditional release.

Considering that, in the matter of conditional release, the court which ordered the release is competent not only to revoke the release in case of non-execution of the probation measures, but also to revoke a new offense if the court that judged the case in first instance the offense that would lead to the revocation did not rule on the revocation of conditional release, *de lege ferenda* it would also be useful to regulate such a functional competence of the enforcement instance if the court that in first instance judged the offense that might attract the revocation of the postponement of the punishment or the suspension of the execution of the punishment under supervision did not give rise to the revocation.

This would bring about a regime unification in terms of functional competence in the matter of revoking (and in case of a new offense) the postponement of the punishment and the suspension of the execution of the punishment under supervision on the one hand and the revocation of conditional release, on the other hand.

## Conclusions

In the matter of the enforcement of probation measures, but not only of them, there are several categories of courts that have different competences, such as: the enforcement court (either through the judges who are in full force, exercising exclusive jurisdictional tasks, or through the judge delegated with execution, which mainly exercises administrative powers), the court that gave in first instance the postponement of the punishment or the suspension of execution of the punishment under supervision, the court of conditional release and the court that judges or judged in first instance the offense that could lead to the revocation or cancellation of the postponement of punishment, suspended custody or conditional release.

Also after the analysis, including the reference to the case law, we have drafted some proposals of the law *de lege ferenda* that are meant to emphasize the need for the Romanian law maker to be more consistent when it regulates the competences of the courts in the enforcement of the probation measures.

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# OVERCROWDING – CURRENT ISSUES IN ROMANIAN DETENTION CENTERS. CAUSES, EFFECTS AND REMEDIES

**Dorian CHIRIȚĂ***

**Abstract:**

*The overcrowding phenomenon in detention centers generates serious issues with respect to the human dignity – corollary of the fundamental human rights. Both international legislation and the jurisprudence of the European Court of Human Rights relating to article 3 and 8 of the European Convention of the Human Rights address the issue of prison overcrowding, stating that this can lead to violation of fundamental human rights, causing severe physical and psychological trauma, which is aggravating as the prisoners spend more time in the detention center.*

*If this issue wasn't given much attention in the past, being considered an inevitable mental sufferance of the execution of punishment, respectively a reasonable constraint determined by the conviction, lately it has been approached more seriously, at both national and international level and, as a result, new standards are set for ensuring the protection of the fundamental human rights.*

*The purpose of this study is to identify the problems that prison overcrowding generates for both the detainee, on a personal level, and for the detention centers, from the administrative point of view. Moreover, this study critically analyses the national and international evolution of the legislation and the national policies of the competent institutions and authorities in dealing with this issue. At the same time, the author offers practical legislative and administrative solutions which may lead to reducing the phenomenon of prison overcrowding.*

**Keywords:** *Conditions of detention; treatment of detainees; prohibition of inhuman and degrading treatments; relevant international and European standards, legislative measures on prison overcrowding.*

**Introduction**

Prison overcrowding has currently become a social issue in contemporary times and this phenomenon generally occurs when the necessities of the detainee space in prison within a certain jurisdiction exceed the capacity of the facilities to hold the detainees provided in that jurisdiction.

The prison overcrowding phenomenon is a current problem for the government of all countries. Considering its negative impact on the people directly involved in the process (detainees and the prison staff) and on the society in general, it requires a quick and efficient intervention.

This article is aimed at showcasing the problems created by prison overcrowding on both the personal and administrative levels, on the one hand, and at describing the efforts of the competent national authorities to solve these problems, on the other hand. Moreover, we propose administrative and legislative solutions that would lead to a decrease in the prison overcrowding phenomenon.

In Romania, the problem of prison overcrowding is not of late interest, but it has recently been brought to the attention of the competent state bodies and the society, as a result of the numerous European Court of Human Rights judgements holding the State responsible for the conditions of detention in prisons and in the detention facilities attached to police stations, and of the Pilot judgement in the case of Rezmiveș and others vs. Romania[1], in which the Court held that there had been a violation of Article 3 of the European Convention on the Human Rights (prohibition of torture and of inhuman and degrading treatment) and that Romania had to implement a series of measures and remedies to address these problems.

This pilot judgement has also led to the initiation of legal actions against the State in which the detainees, unsatisfied with the overcrowded prisons and the conditions of detention, attempted at holding the state and the relevant institutions responsible for moral prejudices suffered during their detention period caused by the breach of fundamental rights, such as the right to health and human dignity. This state of affairs imposed that Government should adopt immediate measures, hasty measures in our opinion, which not only proved inefficient, but also produced a negative social impact. The efficiency of these measures will be further analysed hereinafter.

## Paper Content

Examining the evolution of the detention conditions in Romania and the legislator viewpoint regarding the minimal standards of living for a detainee demonstrates that, although the overcrowding phenomenon in the Romanian prisons is not recent, it has increased so much in the late years that it is currently seen as a major problem for the detention system and implicitly for the judicial system.

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[1] Case of Rezmives and others v. Romania (Applications nos. 61467/12, 39516/13, 48231/13 and 68191/13) - https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-173351%22]}

During the Communist Regime, the overcrowded prisons or the conditions of detention had not held the attention of the competent authorities in the sense of trying to find urgent solutions to this problem. On the contrary, the prisons had been used as a means of torture against the political detainees. After 1989, this phenomenon has gradually become of maximal interest and the state, alongside its empowered institutions, was compelled to look for measures in order to remedy the situation.

Undoubtedly, after Romania adopted the European Convention of the Human Rights and after our country joined the European Union, the way in which the competent authorities perceived the conditions of detention, the overcrowding phenomenon and the minimal living standards in prisons has subsequently changed. Thus, the Romanian State was forced to take action and adopt measures so that to address this situation and to comply with the European standards.

Starting from the premise that the effects produced by a problem and the solution proposed for that problem have to stem from the causes which led to that particular problem, we consider it necessary to begin this endeavour with the analysis of the causes and effects of the overcrowding phenomenon.

## 1. Causes

Contrary to popular opinion, we consider that the crime rate does not represent a major cause for the prisons overcrowding phenomenon. The answer has to be looked for elsewhere, since the crime rate indicator has constantly decreased in the last twenty years, reaching half of its maximal value registered at the end of the 1980s.

The explanation for this decrease lies in the analysis of the socio-economic factors which have significantly influenced the evolution of the crime rate in Romania, and according to the statistics provided by Eurostat[2], in our country the crime rate related to patrimony offences in principal, but also related to offences against life and bodily integrity in particular, is not the highest in the European Union, despite the fact that the overcrowding issue is more serious in our country than in other member states of the European Union.

Therefore, from this perspective, the responsibility must be placed on the inadequate state policies in the justice system with regard to the regime of application and enforcement of deprivation of personal liberty punishments.

Firstly, it should be taken into consideration that the most obvious factor is the insufficient number of available detention centres. The reason is that most of these detention centres were built and used at the applicable standards prior to 1989, and as mentioned above, the need to create decent detention conditions for the detainees was not regarded as a priority at that time.

It should be noted that only 3 detention facilities have been built after 1989 in Romania and, given the existent financial politics, the state was not interested in investing funds in this domain.

In addition to the above mentioned causes of prison overcrowding, we point out that until quite recently the regime of punishment enforcement was very strict and there have hardly been situations in which the legislator allowed for preventive measures to be taken or for a form of executing the punishment involving the deprivation of personal liberty other than detention.

Accordingly, an important step was the adoption of the current Criminal Procedure Code which regulated the institution of house arrest as a preventive measure and led to a decrease in the number of detainees in the detention facilities attached to police stations.

Among the causes that generate the overcrowding phenomenon, we should not overlook the judge's sentencing harshness in delivering the punishments, there having been many cases presented in the media in the which some people were sentenced to deprivation of personal liberty despite the fact that their wrongdoings were not so serious as to require such sanctions and the deprivation of personal liberty.

Paradoxically, the causes can be partially found in the effects that detention conditions have on the individuals deprived of personal liberty and on their evolution subsequent to the moment they are released from prison.

The impossibility to assure a proper education in prison, that would allow the detainees to acquire useful work-related abilities so that to enable them to find a job after detention or to make them acknowledge the negative effects of their deeds on the life of the victims and on the society, deemed the educational role of detention unattainable. Therefore, in many cases, the detainees end up committing wrongdoings after their release and so they return to prison.

Against this background, we also note that beyond the lack of engaging the detainees in different activities, there are other factors that determine this state of affairs, namely the lack of culture, the lack of proper psychological support, all these contributing to the perpetuation of aggressive conduct at liberty. Moreover, it should be highlighted that in the case of the recidivists, successive detention periods, cumulated with the lack of rehabilitation programmes, create an affective depression when confronted with the conditions in the prison, so that the effect of enforcing the punishment has a diluted nature.

[2] https://ec.europa.eu/eurostat/en/web/products-statistics-in-focus/-/KS-SF-13-018;

## 2. Effects

With regard to the last aspect presented above, one of the negative effects caused by the inability of the state to adopt policies suitable for the detention system regime is on the society, which is at risk of reincorporating persons prone to continually committing criminal offences.

Considering the impact that the overcrowding phenomenon has on the prison conditions, the most important effect is certainly felt by the detainees. The lack of sufficient space and adequate detention conditions led to the violation of fundamental rights, as constantly stated by the European Court of Human Rights in the cases regarding other states, as well as in the legal actions initiated by detainees from Romania.

For that purpose, the Court argued that Article 3 of the Convention "imposes that the State be held responsible for the protection of the physical comfort of the people deprived of personal freedom, in the sense that it should offer, for example, the necessary medical assistance. The Court lays emphasise on the right of all detainees to detention conditions compatible with the human dignity, so that to guarantee that the manner and method of executing the imposed measures does not bring hardship or suffering beyond the unavoidable level of suffering inherent in deprivation of liberty; additionally, except for the health of the detainees, their comfort is to be adequately assured, taking into consideration the practical circumstances of detention "(the cases of *Bragadireanu vs. Romania*[3], *Kudła vs. Poland* [MC], no. 30.210/96, § 94, ECHR 2000-XI[4], and *Mouisel vs. France*, no. 67.263/01, § 40, ECHR 2002-IX[5]).

Likewise, in the case of Micu vs. Romania, the Court held that there had been a violation of Article 3 of the Convention, concluding that "the respective detention conditions of the applicant, especially the overcrowding in his cell, cumulated with the length of his incarceration in these conditions, constitute inhuman and degrading treatment".

It should be noted that during 2007-2012, the European Court of Human Rights has delivered 93 judgements against the Romanian state for violations of Article 3, finding that there had been cases of overcrowding and inadequate detention conditions in prisons and in the detention facilities and custody centres, and delivered the Pilot Judgement in the case of Rezimveș and others vs. Romania, in which the Court held that Romania had to implement urgent measures to remedy the situation.

Hence, in the pilot judgement of 25 April 2017, the Court requested that no later than 6 months the State provide, in cooperation with the Committee of Ministers of the European Council, a calendar for the implementation of suitable general measures to remedy the problem of overcrowding and inadequate detention conditions, in accordance with the principles of the Convention as stipulated in the pilot judgement. The Court has also ruled in favour of postponing similar cases that were not yet communicated to the Government of Romania until the implementation of necessary measures at the national level[6].

In the Pilot judgement, the Court recommends the Romanian State to take general measures for the remedy of the structural problem. These measures are of two types:

1. Measures for prison overcrowding decrease and improvement of detention conditions

d) With view to pre-trial detention, the Court stated that the detention centres attached to the police stations were considered by CPT (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) and the Committee of Ministers as "structurally inadequate" for detentions exceeding the duration of a few days. Moreover, the Court reasserts that these detention centres are intended for very short-term detentions. Considering all the above, the internal affairs must make sure that the persons deprived of personal liberty be transferred to prison at the end of the temporary custody. Likewise, the Court encouraged the Romanian State to explore the possibility of facilitating the implementation in a greater extent of alternative measures to temporary custody.

e) With view to post-trial detention, the Court acknowledged the reform initiated by the Government focused, among other things, on reducing the punishment terms for certain crimes, on criminal penalties as alternative to detention and on postponing the enforcement of the sentence, as well as on the positive effects of the probation system. Although the immediate results of this reform have not significantly influenced the prison overcrowding rate, which still is at rather high levels, such measures, dubbed by diverse alternative punishments to detention, could have a positive impact on decreasing the number of prison population. Other ways to be explored, such as simplifying the conditions on renouncing at punishment enforcement and delaying punishment enforcement, and especially extending the possibilities to access probation and increasing the efficiency of the probation service, could constitute sources of inspiration for the State in their endeavour to remedy the problem of the inflated number of detainees and the inadequate material conditions in detention.

[3] https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-83879%22]};
[4] https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-58920%22]}
[5] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60732%22]}
[6] https://www.juridice.ro/507966/hotararea-pilot-cauza-rezmives-si-altii-impotriva-romaniei-materia-conditiilor-de-detentie.html

Referring to the necessity to provide additional detention places, the Court made reference to Recommendation No. R (99)22 of the Committee of Ministers, according to which this measure of extending the prison capacity is not likely to offer a sustainable solution for the remedy of the problem. Moreover, considering the precarious living conditions and hygiene of the Romanian detention centres, the State should continue to invest in refurbishing the existent detention facilities.

Adopting the measures recommended by the European Court of Human Rights in the pilot judgement will certainly determine the allocation of supplementary budgetary funds in this domain, additional to the current expenses of the detention system, expenses which are necessary for the provision of food and shelter to the detainees, as well as expenses for prison staff salaries and employment.

Therefore, even the State experiences the negative effect of prison overcrowding and reflects this effect mostly at the financial level, as a result of the additional costs that the detention system generates for the state budget and, finally, for the contributors who pay fees and taxes to the state budget.

## 3. Solutions

Considering the effects discussed in the previous section of this article, the State has looked for urgent solutions to solve the problem of prison overcrowding, yet some of the measures taken did not have a positive impact.

If measures such as allowing the prisoners to benefit from early release for good conduct during detention or regulating the house arrest as a preventive measure proved to be useful, leading to a decrease of the overcrowding phenomenon up to a certain extent, in our opinion solutions such as the appeal for compensatory measures has not yet been proved beneficial.

According to Law no.169/2017, known to the public as the law of the compensatory appeal, for the amending and completion of Law no. 254/2013 regarding the enforcement of punishments and freedom-privative measures laid out by judiciary bodies during the criminal cause, it is stated that when calculating the executed punishment, regardless of the regime of executing the punishment, it should be taken into consideration, as a compensatory measure, the execution of punishment in improper conditions, a case in which, for every 30 days of detention in improper conditions, even if these are not consecutive days, 6 more days are added and considered executed. These dispositions are also considered when calculating the executed punishment in preventive detention facilities and centres of improper conditions.

In determining the notion of improper conditions, the aspects generated by the prison overcrowding phenomenon were also taken into consideration, namely the confined space accommodation of the detainees of less or equal to 4 sqm per detainee, which is calculated excluding the area for sanitary and food storage facilities and diving the total surface of the detention rooms to the number of accommodated persons in the respective rooms, regardless of the facilities provided.

The adopted legislative act mentioned above has not reached its stated purpose and this is proved by the fact that, from the 14,000 inmates who benefited from early release based on the enforcement of this law, more than 900 of them returned behind bars for committing serious violent offences - murders, rapes and robberies.

The cases presented in mass-media, such as the case of the rapist released on the basis of this law who raped and robbed a young woman returning from a club during night time, shortly after his release, or the case of the man charged with robbery and attempted rape, released on the basis of the same law, who violently attacked a young woman at the entrance of a block of flats with the purpose of robbing her, are all relevant examples in support of this view.

Consequently, the enforcement of this normative act was exclusively based on considering the detention conditions without any regard to the difference between the non-violent inmates and the dangerous ones, namely without taking into consideration the offences of the inmates executing their freedom-privative punishments and the consequences brought along to the society by the early release of these individuals, before executing the entire punishment or the minimum period required for early release.

In this article, we show that from our point of view, not time is the factor that generates the negative effects in the post-release period presented above, but the fact that the early-released detainees have not finished their educational programmes and have not acquired aptitudes, job-related skills and capacities that would help them earn a living in the post-release period. This implies that the purpose of re-educating the detainees has not been reached.

As a matter of fact, in the Pilot judgement of 25 April 2017, the European Court of the Human Rights did not impose on the Romanian state the initiation of legislative measures that would have the immediate result of early-releasing a great number of detainees from prisons, by abandoning the educational programmes and activities. The Court recommended instead a set of correlated measures that would generate an extension of the detainee's space in detention on the one hand, and prevent the overcrowding problem in the future, on the other hand.

Equally so, it can be observed that the conventional court recommended that the Romanian state should adopt viable solutions, with long-term effects, not with short and very short-term palliative effects.

The non-governmental associations regarding the protection of the human rights have also criticized the measures taken by the legislator in Law no.169/2017, expressing their concern for the negative social impact of these measures.

Thus, APADOR CH, an important non-governmental organisation involved in the protection of the human rights took public stand and acted against the adoption of the law granting compensatory appeal by stating that:

„Both full-term release, much too hasty as a result of the enforcement of the compensatory appeal law, and the conditional release of convicts who had not proven themselves rehabilitated or ready to be reinserted, an excess stimulated by the lack of sufficient detention space, do nothing but encourage the criminal phenomenon. The availability of this release option induces the idea that offenders might easily escape after committing a crime, no matter how serious the crime may be. Thus, they end up committing new crimes, in fact more and more serious crimes, having more new victims as a result of these crimes, and finally, returning to prison after their much sooner release, without the chance to be fully rehabilitated and socially reinserted. Accordingly, it is quite likely that prisons will be overcrowded as a direct result of hasty early release"[7].

In agreement with the opinion stated above, we envisage that the measures adopted for the reduction of the overcrowding prison phenomenon should not ignore the interest and security of the citizens, being necessary to maintain a balance between the right of the inmates on the one hand, by assuring a proper detention regime, and on the other hand the right of the citizens, whose rights to safety, physical integrity and property are equally important and need to be protected.

Starting from the benefits brought along by the regulations regarding house arrest as a preventive measure for the reduction of overcrowded detention facilities, we propose *de lege ferenda* to adopt similar measures regarding the execution of freedom-privative punishments, by means of regulating the possibility to execute the punishment as house arrest, at present being available technical devices to electronically monitor the activity of the convicted offenders within the perimeter of their homes. Such a measure would be beneficial as it allows the convicted individuals to remain within their own community, having the possibility to find jobs and keep in touch with their families, reinserting and rehabilitating themselves at a much rapid pace.

Another solution that could favourably solve this problem is to build new detention centres or to renovate and refurbish the existent ones, providing larger spaces which satisfy the demand and exigencies imposed by the compliance with the fundamental rights of the detainees.

Furthermore, there is also the need to organise and develop in the detention centres and facilities modern programmes for the rehabilitation and reinsertion in society of detainees. This naturally implies the creation of mechanisms for inter-institutional cooperation so that to encourage the social reinsertion of former detainees after their release, to provide employment possibilities and social protection with the aim of preventing recidivism.

## Conclusions

The prison overcrowding phenomenon has continued to be part of the Romanian detention system, despite the recent measures adopted by the authorities, which have had minimal effect on the reduction of this phenomenon. However, the only visible effects were the numerous negative effects on the social level.

Prison overcrowding is distinctively complex and with a powerful social impact, so a new approach to this issue should be implemented, not a unilateral approach but one that would involve a series of longer term measures at different levels (legislative, administrative, psychological, social).

As pointed out in this study, there is a complex set of causes and effects, characterised by diverse intensity and targeting multiple levels, which are of interest for both the society, and the detainee - future free individual. It is at this complex set that the European Court for Human Rights has drawn attention in its jurisprudence in the domain, holding each state responsible for the necessity to deal with such issues, since a minimization of these aspects could lead to a waste of human, financial-economic resources and not only, whose effects might be contrary to the intended purpose.

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# THE BENEFITS OF A SPECIAL CRIMINAL PROCEEDINGS *IN ABSENTIA*

**Ioan-Paul CHIȘ***

**Abstract:**

*A criticism of the national legislator's decision not to introduce a shortened hearing as a special criminal procedure in absentia, which would exclude the Preliminary Chamber and would leave the civil action unsolved. In our opinion, such a procedure would definitely contribute to the efficiency of the judiciary system by significantly reducing the duration of trials, seeing that the evidence of the case would not be administrated in the absence of the accused and, as a consequence, the witnesses and the victim would not be repeatedly subjected to the stress of the hearings. Moreover, not solving the civil action would be a measure of protecting the interests of the civil party, seeing how a simple request of the defendant would suffice to invalidate the court's decision given in absentia, and with it, the ruling on the civil claims of the case.*

**Keywords:** *special criminal procedure, trial in absence, in absentia, abbreviated procedure*

## 1. Context.

The perpetration of an offense gives rise to the *exercise* of criminal proceedings, and in the case of offenses resulting in damages, the criminal proceedings can be joined by the civil action. The relation between the public and the civil (private) action has seen several systems, the Romanian legislator preferring as early as 1864, *the hybrid system*, namely the system allowing the two actions to be exercised jointly within a single criminal trial[1].

Therefore, within our legal system, the party injured by the perpetration of a deed stipulated by the criminal law is entitled to choose between seizing the civil court and joining the civil action to the criminal proceedings exercised concerning that unlawful deed.

I find that the reason for joining the two actions is twofold. Thus, first of all, regard must be taken to the more favourable terms under which the civil action is settled, in this case the evidence is the same for the two actions and it can even be ordered by the court *ex oficio* or at the prosecutor's application, the proceedings unfold with greater celerity etc. At the same time, it must not be neglected the fact that the direct opponent of the civil party, the defendant, might be interested in paying the civil claims in order to benefit from this conduct in the criminal aspects of the trial by nearing some mitigating circumstances stipulated by the criminal law, a resort unavailable in the hypothesis of settling the civil action by a civil court.

From another point of view, I believe that the state might have a real interest for the civil party to bring the civil action in front of the criminal court, given that in this context he/she might submit evidence unknown to the judicial bodies which might serve for the correct settlement of the criminal aspects, especially as far as the individualisation of the penalty is concerned.

### 1.1. Introducing the civil action in the criminal proceedings and the options of the injured party.

According to the criminal procedural law, the civil action seeks to establish the civil liability in tort of the persons responsible for the damage produced by the perpetration of the deed subject to the criminal action. To this end, the injured party must express his/her wish to bring the civil action in the criminal proceedings, a step which implies becoming a civil party; this indication of will can be made at any time throughout the criminal trial but no later than the commencement of the judicial inquiry.

Note that the injured party is entitled to choose between becoming a civil party in the criminal trial, thus joining the individual civil action to the criminal action exercised by the prosecutor, or seizing directly the civil court, one choice excluding as a matter of principle, the other *(electa una via non datur recursus ad alteram)*. Thus, in case the injured party has become a civil party within the criminal trial, he/she can seize the civil court only if the criminal court has not settled the civil action [article 27 paragraph (2) of the Criminal Procedure Code], if the criminal trial has been suspended [article 27 paragraph (3) of the Criminal Procedure Code] or if the damage has not been fully repaired [article 27 paragraph (5) of the Criminal Procedure Code] or if the damage was generated or discovered after becoming a civil party [article 27 paragraph (6) of the Criminal Procedure Code].

It follows that the injured party who chose to bring the civil action in front of the criminal court will not be able to leave this court regardless of the fact that he/she finds useless the settlement of the private action by the criminal court.

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[1] I.P. Chiș, Soluționarea laturii civile în procesul penal în caz de dezincriminare. Situații tranzitorii, in the Magazine „Caiete de drept penal" no. 4/2014.

**1.2. The trial in absentia of the defendant.**

Further, it must be reminded that the Romanian criminal proceedings allow the trial *in absentia* of the defendant, regardless of what the penalty he/she is facing on the criminal side of the trial, *i.e.* fine, imprisonment or life detention, as well as regardless of the amount of the civil damages to which he/she might be held liable on the civil side of the trial. At the same time, it does not matter whether the criminal court could order certain security measures against the defendant, *e.g.* special confiscation, extended confiscation etc., the criminal trial can lawfully take place without them.

Obviously, for the trial *in absentia* of the defendant to be possible, the summoning procedure must be fulfilled according to the law, irrespective of whether the communication to the defendant concerning the criminal trial has been successfully accomplished or not.

Indeed, the law makes no distinction in this regard, between the three possible situations, the continuation of the criminal judicial proceedings being possible when the accused has actually taken note of the criminal trial but waived his/her right to appear before the judicial bodies either *i)* explicitly, by formulating an application to be tried *in absentia* or *ii)* implicitly, by the unjustified absence after being summoned by the judicial bodies; as well as when *iii)* the accused has not been formally informed about the criminal trial against him/her, the summons procedure being accomplished by a mere legal fiction such as posting the notice/summons.

In the first case, if there is evidence pointing that the accused has actually taken note of the criminal trial against him/her, we are in the presence of a waiver to the right to appear in front of the judicial bodies, the accused thus disposing of his/her right to participate to trial.

If to the contrary, there is no evidence that the accused has actually been informed about the criminal proceedings against him/her, the trial *in absentia* shall continue and in the case of a conviction solution the law stipulates the possibility of reopening the criminal trial by merely formulating an application to this end within a month from the communication of the final criminal ruling.

Note that in the case where the accused tried *in absentia* has knowledge about the criminal proceedings and refuses to respond to the summons of the judicial bodies, as well as in the case where the accused has no knowledge about these proceedings, the criminal trial shall take place according to the general trial procedure, following the preliminary chamber procedure and assessing during the trial all the evidence of the case as if the accused had been present for trial.

The legal assistance is guaranteed throughout the criminal trial and in the case where the accused is underage, admitted to a detention centre or an educational centre, detained or arrested even in a different case, where the accused is subject to a safety measure or placed in a medical institution, even in a different case or where the offense brought to the accused charge is punished by life detention or an imprisonment penalty exceeding 5 years, the legal assistance shall be provided *ex oficio* (article 90 of the Criminal Procedure Code).

**1.3. The preliminary chamber procedure.**

The preliminary chamber procedure is the phase of the criminal trial[2] ensuring the judicial context for verifying the lawfulness of the criminal investigation acts. Within this procedure, after checking the court's competence, the preliminary chamber judge examines the lawfulness of receiving the indictment, the lawfulness of evidence-gathering and of the performance of the criminal investigation acts.

The preliminary chamber procedure is essential to the economy of a criminal case given that this is the only procedural moment where the accused can criticise the lawfulness of the criminal investigation acts, the result of this procedure influencing the continuation of the criminal trial or the return of the case to the prosecutor's office.

## 2. Reopening of the criminal trial in the case of trial in absentia.

Reopening the criminal proceedings in the case of a trial in the absence of the convicted person[3] is a procedural remedy, at the convicted person's disposal, which can be used after the criminal ruling pronounced *in absentia* has become final, but no later than a month from its communication. Thus being, in our legal system, reopening the criminal proceedings is considered an extraordinary legal remedy, limited to points of law, within the jurisdiction of the court that issued the challenged ruling, of withdrawal, designed to ensure the compatibility of the Romanian legislation with the standards imposed by the conventional block, as well as by the right to a fair trial in the broadest meaning of the term.

If the court finds grounded the application for reopening the criminal proceedings, it will admit it in principle, the final ruling pronounced *in absentia* being thus reversed by the law itself, both concerning the solution pronounced on the criminal side of the case and the solution pronounced on the civil side of the

[2] For solid arguments for the qualification of the preliminary chamber procedure as a pre-trial stage, see A. Zarafiu, *Procedură penală. Parte generală. Partea specială,* C.H. Beck Publishing House, Bucharest, 2015, p. 376-378. In arguing this view, the author shows that the stages of the criminal trial must be represented as those sections of the criminal trial where the competent judicial bodies exercise one of the main judicial functions (investigation or trial) and where one of the solutions of cease of the criminal action can be ordered or pronounced.

[3] Further, to ensure the flexibility of the commentary, whenever I will refer to this legal remedy, I will use the wording *Reopening of the criminal trial.*

case, the trial being resumed from the stage of the trial in first instance, with all its consequences: reassessing the evidence of the case, the taking of a new first instance ruling, the pronunciation of a ruling in appeal and the enforcement of the new final ruling.

### 3. The criticisms of the present system.

The criticisms can be divided in two: criticisms concerning the conceptual aspect of the notion of reopening the criminal proceedings and criticisms concerning the incompatibility of the national system with the conventional block, as well as with the right to a fair trial.

As a matter of principle, any legal remedy takes the form of procedural remedies aimed at removing the mistakes that the courts might have made in impairing justice. Therefore, these procedural remedies are based on the idea of a mistake that can be made by the lower judicial body, an error which the judicial review court, placed on a higher level and being composed of more experimented judges, is presumed to eliminate.

Even if the reopening of the criminal trial is placed by the Romanian legislator among the extraordinary legal remedies, the idea of a mistakes on which such a remedy should be based, is not in all cases true.

Indeed, the premise of this procedural remedy does not necessarily reside in the court's failure to summon the accused to the trial or in a summoning procedure which was not dully accomplished.

Truly, the hypothesis of procedural error must not be *de plano* excluded, in the end, justice is achieved by an eminently human activity which is by nature, subject to error *(errare humanum est)*. Therefore, the accused who has never been summoned nor informed officially about the criminal trial or the accused concerning whom the summoning procedure has not been duly fulfilled is entitled to apply for the reopening of the criminal trial, with the consequence of resuming the trial stage starting from the first instance trial.

Nevertheless, in most cases of reopening the criminal trial, the premise shall not reside in an error related to the summoning of the accused, but in the lawful conduct of the criminal procedures in the absence of the accused who has not been genuinely informed about it.

The summoning procedure is lawful because in these hypothesis, the judicial bodies usually use the legal fictions stipulated by the law, such as considering legally summoned the person concerning who a notification about the summoning has been posted at the seat of the judicial body or who, having changed the procedural address during the criminal investigation, has been summoned at the address previously chosen although it was no longer up to date.

Transposed into practice these situations are met in the case where the accused is not found at the addresses where the state bodies have information that he/she might be (the legal domicile or the residences irregularly used etc.), the summoning procedure and the communication of the procedural acts being accomplished by posting a notice at the seat of the judicial body.

As a first conclusion, it must be remembered that the reopening of the criminal trial is wrongly regulated as a legal remedy while it has the appearance of a procedural remedy characteristic for a special trial procedure as I shall demonstrate.

From the perspective of the right to a fair trial, it must be highlighted that the premise for reopening the criminal trial is the justified absence of the accused from the criminal trial. This justification resides on the fact that the accused had no knowledge about his/her criminal trial. Thus being, starting from this premise, it can be said that as far as the accused is regarded, the proceedings that follow the reopening of the trial is the first he/she has knowledge of, the first in which he/she can defend himself/herself using the whole range of procedural rights and guarantees.

For all this, reminding as well the fact that resuming the procedure shall only take place with the first instance trial, the preliminary chamber procedure *in absentia* remaining final, the criticism focuses on the obvious reduction of the possibilities of the accused to defend himself/herself, especially concerning the possibilities to criticise the lawfulness of the criminal investigation acts, from the clarity of the wording of the accusation to the rightness of the administration of certain evidence.

### 4. Positive aspects that the regulation of a special procedure of trial in absentia would entail.

Starting from the premise that our legal system accepts the trial in the absence of the accused, whatever the reason of this absence might be, a deliberate absence as a result of the explicit or implicit waiver to the right to participate to one's own trial, or an absence which is not based on an informed choice, one wonders whether a special procedure for the trial of the accused absent should not be regulated.

Note that our legal system acknowledges several special trial procedures based either on the procedural conduct of admission of guilt adopted by the accused (the plea of guilt), or on the special situation of the accused (the defendant is underage or is a legal entity).

Therefore, once accepted these special procedures by the legislator, the question arises whether the absence from the trial of the accused implies a necessity to embody a set of rules derogating from the general procedure. In other words, it must be established whether in the case of the trial *in absentia* the general trial procedure is sufficient from the perspective of the procedural guarantees and, otherwise, whether a special procedure is fully

justified[4] by number, content, systematization and operation.

**4.1. The trial in absentia according to the general procedure.**

I have previously pointed out why in the case of the trial *in absentia,* the general procedure does not meet the minimum guarantees of the right to a fair trial.

It is thus noted that the trial *in absentia* gives the accused the right to apply for the reopening of the criminal trial but the procedure shall be resumed not from the preliminary chamber, but from the trial stage. Thus being, starting from the premise of reopening the criminal trial, namely the trial in the justified absence of the accused, it is clear that he/she did not have the genuine possibility to contest the evidence and the criminal investigation acts, this essential part of the trial being finally settled in his/her absence. Under these circumstances, reopening the criminal trial should not be limited to the reopening only of the trial stage, the reopening of the preliminary chamber procedures being necessary as well.

At the same time, as regards the civil side of the trial, it is quite clear the violation of the civil party right to the settlement of the case within a reasonable period. I have a slight reservation making this statement given that the time necessary for the settlement of the civil action can be either shorter or longer according to the difficulty and the complexity of the evidence brought, as well as according to the choice of the accused during retrial: the general procedure implying the reassessment of all the evidence and necessitating more trial dates in the case, or the abbreviated procedure implying the settlement of the case based on the evidence assessed during the criminal investigation, the activity usually taking place in a single trial date. In the case where the accused wishes the reassessment of the evidence, the time elapsed between bringing the civil action within the criminal trial and the final settlement of the action, to which the time elapsed between the admission of the application for reopening the trial and the final settlement of the action is added, can easily exceed the party's right to a fair trial as regards the reasonable period.

On the same note, one can retain the precariousness of the final ruling given by the criminal court for the settlement of the civil action. Indeed, the right of access to court necessarily calls for the right to a final ruling and, furthermore, the right to the actual enforcement of that ruling. Or, if the civil aspects of a criminal trial are settled through a final ruling subject to reversal *ipso jure* by the mere application of the accused, there is a problem concerning the fairness of the procedures towards the civil party, especially in the context that he/she can only leave the criminal trial in order to claim damages in a civil court under extremely restrictive conditions. Therefore, the very settlement of the civil action under these circumstances appears as an activity not only lacking efficiency (the ruling being subject to reversal), but also likely to unjustifiably delay the obtainment of a final ruling issued by the civil court.

On another note, concerning the first procedural cycle, it can be seen that the criminal court assesses the evidence with a view to ensuring an adversary procedure for the defendant, even if he/she is absent from the proceedings. Therefore, it seems that within the first procedural cycle unfolded in the absence of the accused, the adversarial principle is merely simulated, the main character, the accused, being absent to this procedure.

Also as regards the accused, I find that a procedure which necessitated high efforts on the part of the judicial bodies is an extremely costly one, the legal costs being then borne by the accused. From this angle too, the lack of any culpable absence from the accused and holding him/her liable for the payment of the legal costs generated precisely by this absence appears as a contradiction of terms.

In conclusion, it must be remembered that the general trial procedure closes in a final manner the preliminary chamber procedure so that, during the retrial, the accused has no genuine possibility to contest the criminal investigation acts. At the same time, the absolute precariousness of the ruling pronounced on the civil side of the trial must be noticed as well as the fact that, under certain circumstances, the settlement of the civil action might exceed a reasonable period by resuming the procedures.

The foregoing are all reasons that justify the regulation of a special trial procedure eliminating all the deficiencies identified, through derogating provisions.

**4.2. The special criminal proceedings in absentia.**

The special criminal proceedings *in absentia* must be a rapid, abbreviated one allowing the examination of the case within an extremely short time, without going through the preliminary chamber procedure and without settling the civil action.

I find thus that procedural cycle *in absentia* must start by observing the absence of the accused from the criminal trial, the special trial procedure being accordingly open. Under these circumstances, the criminal proceedings shall be taken directly to the trial stage, the court adopting a solution strictly based on the evidence collected during the criminal investigation. Of course, the procedure *in absentia* shall imply the representation of the absent defendant by a lawyer, either chosen or designated *ex oficio* (a case of mandatory legal assistance).

Further, irrespective of the solution pronounced by the court on the criminal side of the trial, the possible civil action shall be left unsettled, the right to choose of the injured party being thus reactivated. Therefore,

[4] N. Volonciu, *Drept procesual penal,* Editura Didactică și Pedagogică, Bucharest, 1972, p. 502-503.

according to the special procedure, the civil action shall not be settled, the right of the injured party to seize the civil court to receive damages being immediately reinstated.

After the criminal ruling of conviction pronounced following this procedure, the possibility to apply for the reopening of the criminal trial shall be open, the trial resuming from the preliminary chamber procedure with all that this entails, the procedure unfolding as if the accused had never been absent.

## Conclusions.

The judicial activity in the preliminary chamber and of trial imposed by the current regulation in the case of the trials with absent accused is not only time consuming and unfair, but also useless. This is why I consider that a special procedure having the foregoing as its main landmarks must take its place into the substantive law.

Such a procedure would be capable of settling the conflict of law within a short period, without too much effort from the judicial bodies or high expenses and it will allow the injured party to switch a moment earlier to the other option, the bar to leave the criminal court no longer existing within this procedure.

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# THE EUROPEAN ARREST WARRANT. THE ENFORCEMENT OF THE EUROPEAN ARREST WARRANT IN THE UNITED KINGDOM.

**Cosmin Iulian CRETU**[*]

**Abstract**

*The European arrest warrant has replaced the extradition procedure between the Member States of the European Union. Thus, by the introduction of the European arrest warrant, the administrative-judicial procedure was replaced by a purely judicial procedure. This article analyzes the implementation of the Framework Decision no. 2002/584/JHA in the United Kingdom through the Extradition Act 2003 and, more precisely, the enforcement of the European arrest warrant in the United Kingdom, as provided by Part 1 of the Extradition Act 2003. This article presents the steps that need to be followed in the process of the requested person's surrender from the United Kingdom and it analyzes the evolution of the number of European arrest warrants received by the United Kingdom over the years.*

**Keywords:** *European arrest warrant, mutual recognition, implementation and enforcement in the United Kingdom, bars to extradition, criminal procedure.*

## 1. Introduction

It is undisputable that the extradition procedure represents the most important instrument of international judicial cooperation in criminal matters.

One of the fundamental problems that caused countless discussions at political and legal level between the countries of the world was of course the extradition of their own citizens[1].

This problem was resolved at the level of the European Union by the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States.

The most important modification brought by the introduction of the European arrest warrant has been the transition from a judicial-administrative cooperation to a purely judicial cooperation[2].

However, this purely judicial cooperation does not entail that the requested state has no option but to extradite its own citizens once a European arrest warrant is issued. It rather leads to a more expedited procedure based on mutual recognition between the member states of the European Union.

The ambition of this article is to review the enforcement of the European arrest warrant in the United Kingdom as provided by the Extradition Act 2003, considering all the amendments brought by the several pieces of legislation enacted since its adoption, 16 years ago.

Further, we shall analyze the evolution of the number of European arrest warrants received by the United Kingdom over the years, as well as the number of surrenders ordered by the competent courts following the issuance of these European arrest warrants.

## 2. The European arrest warrant

The Amsterdam Treaty of 1997 represented a starting point for the idea of freedom, security and justice. Later, this idea has been developed in the conclusions of the Tampere European Council, where the Council stated that the principle of mutual recognition of judicial decisions "should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union".

Even though the conclusions of the Tampere European Council were seen as an important step towards the adoption of the European arrest warrant ("**EAW**") and it was clear that the member states of the European Union (the "**Member States**") were inclining towards having simplified extradition procedures, it is undisputable that the EAW was speeded up by the 11th of September 2001 terrorist attacks from the United States of America.

Not only did the terrorist attacks strengthen the importance of certain measures in respect to the EU's internal security, but they also put pressure on the European Union's justice, leading to substantial legal actions taken in a short period[3].

Thus, on 13th of June 2002, the Council of the European Union adopted Framework Decision 2002/584/JHA on the European Arrest Warrant and the

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[1] Alexandru Boroi, Ion Rusu, Minodora-Ioana Rusu, Treaty of international judicial cooperation in criminal matters, C.H. Beck Publisher, 2016, p 343;

[2] Rodica Panainte, Considerations on the European Arrest Warrant, Journal of Public Administration, Finance and Law, January 2, 2015, p 163;

[3] Laura Maria Stanila, the European arrest warrant. The problem of implementing framework decision 2002/584/JHA in the EU Member States, The Journal of Judicial Sciences, 2007, p 111;

surrender procedures between Member States (the "**Framework Decision**").

The new system provided by the EAW has replaced since 1 January 2004 the traditional procedures of extradition between Member States, procedures that were no longer adapted to the requirements of a common space of freedom, security and justice, but exposed to crimes, in which national borders are becoming less important in order not to be impediments in the fight against crime[4].

The EAW is defined as being a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order[5].

In order to better understand the modifications brought by the introduction of the EAW, we shall relate to a definition given to the extradition procedure in the Romanian doctrine.

Thus, the extradition is the procedure whereby a sovereign state (the requested state) accepts to surrender, at the request of another state (the requesting state), a person located on its territory and who is being prosecuted or sent to trial for a crime or is being sought in order to execute a punishment in the requesting state[6].

Therefore, it can be observed that the Framework Decision on the one hand uses the term "*surrender*" instead of "*extradition*", and on the other hand uses the term "*Member State*" when referring to both "*the requesting state*" and "*the requested state*", as they appeared in the classic extradition procedure.

It is important to mention that, as a general rule, the classic extradition procedure did not allow the extradition of a state's own citizens, which was only accepted as an exception and under restrictive conditions.

The EAW brought a significant change in what regards the extradition of a state's own citizens.

Art. 20 par. (1) of the Treaty on the Functioning of the European Union provides that "every person holding the nationality of a Member State shall be a citizen of the Union" and "citizenship of the Union shall be additional to and not replace national citizenship".

Thus, starting from the idea of European citizenship, the principle of non-extradition of a state's own citizens was basically waived and it merely became a ground for refusal.

The Member States were given a deadline to take the necessary measures to comply with the provisions of the Framework Decision. However, only 13 Member States managed to meet the deadline for implementation.

Although in some cases the respective national implementing law fails to fully transpose the Framework Decision 2002/584/JHA on the European arrest warrant, it can be concluded that Member States have largely implemented it properly[7].

## 3. Implementation of the Framework Decision in the United Kingdom

The Framework Decision has been implemented in the United Kingdom through the Extradition Act 2003 (the "**Extradition Act**").

The Extradition Act is divided into five parts:

Part 1 – *Extradition to category 1 territories*

This part deals with extradition to all European Union Member States and it basically corresponds with the requirements of the Framework Decision.

The main features introduced by the EAW in the first part of the Extradition Act are:

- *mutual recognition* – a foreign warrant is accepted without getting into the facts of the case;
- *the dual criminality rule is no longer required for 32 categories of offences* – under the condition that the punishment for the offence is at least three years' imprisonment;
- *the procedure is now entirely judicial* – the competent authority in the United Kingdom only has to certify that the EAW is properly drafted by the competent authority from the issuing state;
- *no exception on the grounds of citizenship*.

The extradition procedure under Part 1 of the Extradition Act is detailed in the next section.

Part 2 – *Extradition to category 2 territories*

This part deals with the extradition to all other countries with whom the United Kingdom has international extradition arrangements, other than the countries included in part 1.

The extradition of a requested person to these territories entails, besides the information required for the category 1 cases, that the court must be satisfied that the request contains admissible evidence of the offence sufficient to establish a *prima facie* case against the person.

Part 3 – *Extradition to the United Kingdom*

This part deals with requests issued by the competent authorities in the United Kingdom to both European Union Member States as well as all other countries.

Part 4 contains provisions in relation to police powers, while Part 5 contains a number of miscellaneous and general provisions[8].

[4] Rodica Panainte, Considerations on the European Arrest Warrant, Journal of Public Administration, Finance and Law, January 2, 2015, p 159;

[5] Article 1(1) of the Framework Decision 2002/584/JHA on the European arrest warrant;

[6] Florin Razvan Radu, International judicial cooperation in criminal matters, C.H. Beck Publisher, Bucharest, 2008, p 23;

[7] Libor Klimek, Mutual Recognition of Judicial Decisions in European Criminal Law, Springer Publisher, 2017, p 673;

[8] Details regarding these parts of the Extradition Act 2003 can be found in the Explanatory Notes (https://www.legislation.gov.uk/ukpga/2003/41/notes/contents) published by the Government of the United Kingdom;

Since its adoption, the Extradition Act has been amended four times, through (i) the Police and Justice Act 2006, (ii) the Policing and Crime Act 2009, (iii) the Crime and Courts Act 2013 and (iv) the Anti-social Behaviour, Crime and Policing Act 2014.

If we were to compare the initial version of the Extradition Act with the version amended through the aforementioned pieces of legislation, we would ascertain that the latter barely resembles the one that was enacted 16 years ago.

As we stated in the introduction part of this article, the most important change brought by the EAW is that the extradition procedure within Europe is entirely judicial, as opposed to a judicial-administrative procedure.

In the United Kingdom, prior to the Extradition Act, after an extradition request was granted by the court, there was still a step that had to be met, namely the approval of the Home Secretary.

So the wanted person who claimed that it was "all a fix" could ask the Home Secretary to refuse permission, and if he would not listen, he could attack the Home Secretary's refusal in the courts by a series of maneuvers which, if played with skill, could delay his removal for many years (and, incidentally, cost the taxpayer a vast amount of money)[9].

## 4. The Enforcement of the EAW in the United Kingdom under the Extradition Act – Extradition to category 1 territories

The steps that need to be followed in the process for extradition from the United Kingdom to the category 1 territories are:

1. a EAW is submitted;
2. the certificate is issued;
3. the arrest of the requested person;
4. the initial hearing;
5. the extradition hearing.

**The issuance of a European arrest warrant**

Pursuant to the provisions of art. 2 par. (1) from the Framework Decision, "a European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months".

**The issuance of the certificate**

In the United Kingdom, the National Crime Agency is the designated authority for European arrest warrants, which can only issue a certificate if the requirements provided under section 2 of the Extradition Act are met.

More precisely, the National Crime Agency may issue a certificate under this section if it believes that the authority which issued the warrant has the function of issuing arrest warrants in the category 1 territories.

**The arrest of the requested person**

Once the request has been certified, the warrant for the requested person's arrest is issued. Based on this warrant, the requested person is arrested and he/she must be brought before a District Judge at the Magistrates' Court for the initial hearing as soon as practicable.

In urgent cases, a requested person can be arrested before the receipt of a EAW. In this case, the EAW must be received in time for a court hearing which must be held within 48 hours of the arrest[10].

**The initial hearing**

The 'appropriate judge' in the UK, according to section 67 (1) EA, is a District Judge (Magistrates' Courts) designated for that purpose by the Lord Chancellor in England and Wales[11]. In England, the extradition cases are heard at the Westminster Magistrates' Court.

The purpose of this hearing is to establish the identity of the arrested person and, more precisely, that the person brought before the District Judge is the person in respect of whom the warrant was issued.

Pursuant to section 7(3), the District Judge is required to take the decision on the requested person's identity on the balance of probabilities.

Thus, if the District Judge decides the person brought before him is not the person in respect of whom the warrant was issued, then he must order the person's discharge.

Otherwise, if the District Judge decides the person brought before him is the person in respect of whom the warrant was issued, then he must:

- inform the person about the procedures for consenting to be surrendered to the issuing state;
- fix a date for the extradition hearing if the requested person does not consent to extradition;
- remand the person in custody or on bail.

The extradition hearing should normally begin within 21 days of arrest[12]. However, if proceedings in respect of the extradition are adjourned under section 8A or 8B, the permitted period is extended by the number of days for which the proceedings are so adjourned[13].

Thus, if, before the beginning of the extradition hearing, the District Judge is informed that the person is charged with an offence in the United Kingdom, any further proceedings in respect of the extradition must be adjourned until the prosecution performed in the

[9] Spencer J.R., Fair trials and the European arrest warrant, The Cambridge Law Journal, July 1, 2010, p 227;
[10] Section 6(2) of the Extradition Act 2003;
[11] Mar Jimeno-Bulnes, The Enforcement of the European Arrest Warrant: A Comparison Between Spain and the UK, European Journal of Crime, Criminal Law and Criminal Justice, August 1, 2007, p 271;
[12] Section 8(4) of the Extradition Act 2003;
[13] Section 8(4A) of the Extradition Act 2003;

United Kingdom is finalized. However, even this term can be exceeded in case a custodial sentence is imposed in respect of the offence, when the proceedings may be further adjourned until the person is released from custody.

Also, if, before the beginning of the extradition hearing, the District Judge is informed that the person is in custody serving a sentence of imprisonment or another form of detention in the United Kingdom, any further proceedings in respect of the extradition may be adjourned until the person is released from custody.

In case the hearing does not begin on or before the date fixed, and no reasonable cause is shown for the delay, then the judge must order the person's discharge.

In what regards the duration of the initial hearing, in practice, in England and Wales the average period between arrest and first instance surrender decision is 28 days in consented cases, and 65 in non-consented cases[14].

**The extradition hearing**

In England and Wales, the powers available to the District Judge are (as nearly as possible) the same as those available to a magistrates' court at a summary trial[15].

In the initial stage of the extradition hearing, the District Judge must decide whether the offence specified in the warrant is an extradition offence as defined in section 64 (the requested person was not sentenced for the offence) or section 65 (the requested person was sentenced for the offence).

The conduct specified in the warrant must either (i) meet the *dual criminality test*[16] or (ii) the appropriate issuing authority must indicate that the offence is included within the European framework list.

In the case of framework list offences, the offence in the warrant amounts to an extradition offence if:

- the conduct occurs in the category 1 territory and no part of it occurs in the United Kingdom;
- the conduct falls within the European framework list;
- the conduct is punishable under the law of the category 1 territory with imprisonment or another form of detention for a term of 3 years or a greater punishment.

Thus, it can be observed that in the case of European framework list offences, even though the dual criminality test is not necessary, extradition is only available if no part of the conduct took place in the United Kingdom. Otherwise, no matter how insignificant the conduct performed in the United Kingdom, the dual criminality test becomes mandatory in relation to European framework list offences.

Further, if the District Judge decides that the conduct specified in the EAW does not amount to an extradition offence then he must order the person's discharge. Otherwise, the District Judge must proceed to consider whether there are any statutory bars to extradition. The bars to extradition are:

- *rule against double jeopardy* – if the requested person was previously either convicted or acquitted for the same conduct specified in the EAW;
- the absence of a prosecution decision;
- *extraneous considerations* – if the EAW was issued for the purpose of prosecuting or punishing the requested person on account of race, religion, nationality, gender, sexual orientation or political opinions;
- *passage of time* – when it appears it would be unjust or oppressive to extradite the requested person due to the passage of time since the alleged conduct described in the EAW;
- *the age of the requested person* – if the requested person would not be criminally liable in the United Kingdom due to his/her age at the time of the alleged conduct described in the EAW;
- *specialty* – there are no arrangements between the United Kingdom and the issuing state that would prevent the prosecution of the requested person for other offences than the one he/she is being extradited for;
- *earlier extradition to the United Kingdom from a category 1 territory or transfer from the International Criminal Court*;
- *human rights concerns* – if the extradition of the requested person would not be compatible with fundamental rights provided by the European Convention on Human Rights;
- *proportionality* – if the extradition of the requested person would be disproportionate in relation to (i) the seriousness of the conduct alleged to constitute the extradition offence, (ii) the likely penalty that would be imposed if the requested person was found guilty of the extradition offence and (iii) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of the requested person;
- *forum* – if the requested person's extradition would not be in the interests of justice;
- *physical and mental health considerations which would make extradition unjust or oppressive*;
- *no guarantee that the requested person who was convicted in his/her absence will benefit of a retrial.*

Thus, after assessing on the applicability of the bars to extradition, the District Judge must order the person's discharge if any of the bars to extradition do apply.

Otherwise, if none of these bars to extradition apply and the District Judge decides that extradition is both proportionate and compatible, then he must order the extradition of the requested person.

[14] European Arrest Warrants: ensuring an effective defence, a JUSTICE report, London, 2012, available at www.ecba.org;

[15] Within a summary trial, the district judges from the magistrates' court are judges both of law and fact; as opposed to the trial by jury, where the questions of law are decided by the Crown Court judge, while questions of fact are decided by the jury;

[16] The dual criminality test entails that the conduct for which extradition is being requested must constitute a crime both under the law of the category 1 territory and under the law of the relevant part of the United Kingdom;

## 5. Appeal and surrender following appeal

Appeals may be lodged by either the requested person or the issuing judicial authority with the High Court and, as the case may be, with the Supreme Court.

Where an appeal against an extradition order is unsuccessful or where the issuing judicial authority successfully appeals against a discharge order and the appeal court orders extradition, the person must be extradited within 10 days, starting with the day on which the decision of the relevant court becomes final.

However, if the relevant court which made the appeal decision and the issuing judicial authority agree a later date, extradition must take place in the 10 day period following the agreed date. If the deadlines are not complied with the judge must, on the person's application, order his discharge, unless reasonable cause is shown for the delay.

## 6. The evolution of the number of EAWs received by the United Kingdom over the years[17]

Between 2010 and 2015, the United Kingdom has received 48,766 EAWs. Following these requests, the competent authorities in the United Kingdom have made 9,305 arrests and ordered the surrender of 6,514 persons.

Thus, it can be observed that the competent authorities in the United Kingdom have only ordered the surrender of the requested persons in 13.36 % of the cases.

The number of EAWs received per year between 2010 and 2013 was in the average of 5,500 (4,369 in 2010, 6,512 in 2011, 6,290 in 2012 and 5,522 in 2013). In 2014, the number of EAWs received has more than doubled, from 5,522 in 2013 to 13,460 in 2014, while in 2015 it remained above the 10,000 mark (i.e. 12,613).

In what regards the number of surrenders ordered by the United Kingdom following EAWs issued by the Member States, over the years this number remained in the average of 1,000 per year.

Thus, it can be observed that, even though the number of EAWs has increased, the number of surrenders remained constant.

If we look at the percentages, we see that in 2015 the competent authorities in the United Kingdom ordered the surrender of the requested person in 9.1 % of the cases, as opposed to 24 % in 2010.

The top 3 countries who issued the EAWs received by the United Kingdom between 2010 and 2015 are: Poland (11,638 requests), Germany (7,288 requests) and Romania (5,382 requests).

Thus, only these 3countries issued almost half of the total number of EAWs received by the United Kingdom during the said period.

However, the number of surrenders to these countries is still rather small: Poland (3,752 surrenders or 32.2 %), Germany (161 surrenders or 2.2 %) and Romania (332 surrenders or 6.17 %).

## Conclusion

The European arrest warrant has replaced the extradition procedure between the Member States of the European Union. The judicial-administrative procedure was basically replaced by a purely judicial one, which lead to simplified extradition procedures between the Member States of the European Union.

In this context, although the European arrest warrant entails a simplified extradition procedure, the Extradition Act 2003 provides sufficient safeguards for the citizens of the European Union, so that their fundamental rights are observed. The bars to extradition provided by the Extradition Act 2003, as well as the requested person's possibilities to appeal the decision ruled on his/her extradition show that, although this procedure is a purely judicial one and therefore, a more expedited one, the requested person's extradition is carefully assessed by the competent courts in the United Kingdom and the requested person's right to a defense is observed.

This aspect is confirmed by the fact that, over the years, the percentage of surrenders ordered by the competent courts in the United Kingdom has decreased significantly, although the number of requests has increased.

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[17] The statistics related to the European arrest warrant from 2010 to 2015 can be found on the website of the National Crime Agency – www.nationalcrimeagency.gov.uk;

# THE INFLUENCE OF ARTIFICIAL INTELLIGENCE ON CRIMINAL LIABILITY

**Maxim DOBRINOIU***

**Abstract**

*The nowadays deployment of Artificial Intelligence (AI) and its expected relatively rapid integration into various instances of the socio-economic or governmental life (e.g. household, health, industry, trade and so on) represent a great development opportunity for every nation, as well as a key element for the evolution of the mankind. The elements of AI have already started to take over certain human-type workouts or tasks, while it will take not so long until they will almost completely replace individuals in performing their jobs, and thus evolve from the status of simple tools to the status of "electronic persons" or even subjects of law. During their interaction with the human-dominated world, the AI-driven entities may either be in compliance or a conflict relationship with the law and the society protected by the law, especially when a loss, a damage or a casualty occurs. The article aims at studying the electronic persons' behavior and pointing out whether would be possible or not to further treat the elements of AI as liable against the law, in general, and criminal law, in particular.*

**Keywords:** *Artificial Intelligence, criminal law, criminal liability, electronic person*

## 1. The concept of artificial intelligence and its impact on social life

At the European level, the term "artificial intelligence" (AI) was officially referred to as "systems that display intelligent behavior by analyzing their environment and taking actions – with some degree of autonomy – to achieve specific goals".[1]

From its already far deployment in areas like: medicine, transportation, industry, agriculture, military, public order, Cybersecurity, client-interaction, technology research and improvement, Internet of Things – IoT and so on, the AI proved to be "real", to be "live", and to be a significant part of our socio-economic life.

It is worth understanding, in a first phase, what really means both "artificial" and "intelligence". While "artificial" may be regarded as a good "made by people, often as a copy of something natural"[2], "intelligence" has at least the following meanings: "the ability to learn and understand or to deal with new or trying situations", "the skilled use of reason", and "the ability to apply knowledge to manipulate one's environment or to think abstractly as measured by objective criteria"[3].

Other authors[4] define AI as artificially developed intelligence, which is, to some extent, correct and logic.

It is pretty much obvious that AI was created as an alternative to humans, a crafted machine with embedded learning and analysis capabilities, mastered to comply with real-life situations and to perform, as much as accurately possible, the tasks and works once done by men. Thus, the combined above definitions may conclude that an element of AI could be perceived as a unnatural product designed with human-like form of intelligence.

However, as written in the preamble of the Montreal Declaration for a Responsible Development of Artificial Intelligence (2018), AI poses a major ethical challenge and social risks, with intelligent machines that can restrict the choices of individuals and groups, lower living standards, disrupt the organization of labor and the job market, influence politics, clash with fundamental rights, exacerbate social and economic inequalities, and affect ecosystems, the climate and the environment.[5]

The evolution of AI-type entities (such as robots) conducted in time to the development of autonomous and even cognitive features – such as the ability to learn from experiences and take independent decisions, thus evolving them more and more to agents that interact with their environment and are able to alter it significantly. That's why the European experts came to the conclusion that "*the legal responsibility arising from a robot's harmful action becomes a crucial issue*".[6]

In terms of liability, the same EU legal document (mentioned above) states that "the most autonomous robots are, the less they can be considered simple tools in the hands of other actors (such as the manufacturer, the owner, the user, etc.)" and this, in turn, "makes the

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[1] See the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Artificial Intelligence for Europe*, COM(2018) 237 final, Brussels, 25.04.2018

[2] The Cambridge Dictionary, available at https://dictionary.cambridge.org/dictionary/english/artificial, accessed 25.04.2019

[3] The Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/intelligence, accessed on 25.04.2019

[4] Stuart Russell, Peter Norving, *Artificial Intelligence: A Modern Approach*(3rd edn, NJ Prentice Hall 2009) 4-5

[5] https://docs.wixstatic.com/ugd/ebc3a3_c5c1c196fc164756afb92466c081d7ae.pdf

[6] See the Committee on Legal Affairs Draft Report with recommendations to the Commission on Civil Law Rules on Robotics 2015/2103 (INL) available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML%2BCOMPARL%2BPE-582.443%2B01%2BDOC%2BPDF%2BV0//EN

ordinary rules of liability insufficient and calls for new rules which focus on how the machine can be held – partly or entirely – responsible for its acts or omissions", while "as a consequence, it becomes more and more urgent to address the fundamental question of whether robots should poses a legal status".[7]

Another interesting point driven to the attention of the EU Parliament's Committee on Legal Affairs is that "robot's autonomy raises the question of their nature in the light of the existing legal categories – of whether they should be regarded as natural persons, animals or objects – or whether a new category should be created, with its own specific features and implications as regards the attributions of rights and duties, including liability".[8]

It seems to be commonly agreed at the European level that "the existing rules of liability cover cases where the cause of the robot's act or omission can be traced back to a specific human agent such as the manufacturer, the owner or the user and where that the agent could have foreseen and avoided the robot's harmful behavior".[9]

Among other significant aspects, the experts calls on the European Commission, when carrying out an impact assessment of its future legislative instrument, to explore the implications of all legal solutions related to the AI entities (robots), by far the most important one being the "creation of a specific legal status for robots, so that at least the most sophisticated autonomous robots could be established as having the **status of electronic persons with specific rights and obligations**, …, and applying electronic personality to cases where robots make smart autonomous decisions or otherwise interact with third parties independently".[10]

Some authors[11] developed a scale of AI, based on different forms of intelligence they poses and the implication of humans, such as: level 1 – AI with human supervision, level 2 – AI with deterministic autonomy, level 3 – machine learning-type AI, and level 4 – multi agents systems AI.

## 2. Doctrine views on Criminal Liability

A crime is the only legal ground for the criminal liability. For a crime to be indicted to a specific person (individual or legal), certain elements must exist, such as: a legal provision (depicting the offence), the commission of one or several material acts (*actus reus*), the mental state (*mens rea*) of the person charged with that offence, the unjustifiable ground for the person's criminal behavior, and the attribution (one's moral involvement in committing a crime).

In the large majority of the national criminal systems, one of the most important elements of a crime is *mens rea* – the mental element[12] which drives a person to commit a crime or to trespass a legal provision.

As all the legal practitioners know, that guilty mind of a culprit consists of three different forms: the intent (with its sub-categories: direct intent – when the person foresees the result of his actions and pursue that result, and oblique intent – when the person foresees the result of his actions, and, while not pursuing that result, only accepts the occurrence of that result), the guilt (with its sub-categories: recklessness – when the person foresees that a particular result may occur and further acts without taking care whether that result happens or not, and criminal negligence – when the person does not foresee the result of his actions while he could or should have foresee it), and the overt intent.

From the Romanian legislation perspective, the guilt or the moral responsibility (involvement) of the person who commit a crime is a subjective process consisting of two factors: the consciousness and the will.[13]

In what regards the consciousness, the culprit has the representation of his actions, of the conditions he acts in, and of the causal relation between the culprit's action/inaction and the result. In his mind there comes the idea of committing the crime and, furthermore, the deliberation of the reasons why he, however, should commit the crime. At the end of this process, the culprit takes the decision to commit the crime.[14]

In what regards the will, the culprit moves from the mental state to the physical state of his actions, thus mobilizing his energies (at his disposal) towards realizing the external behavioral acts. This will comes to be very important, because the person, being in full control of its actions and without any (internal or external) constraints (physical or moral), has a free and unconditioned determination to act in the desired manner, thus to also commit a crime.

These above analyzed factors are entirely acknowledged and fully recognized as being human-related. They are specific to any individual, whose conscience and will are not affected in any way by various forces, and there is no clue that they may be associated with any form of machine, even world class high performance computers, run with the most advanced pieces of software and applications.

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[7] Ibid, pct S on Liability
[8] Ibid, pct T on Liability
[9] Ibid, pct U on Liability
[10] Ibid, pct 31, p.11
[11] Ikenga Oraegbunam, Uguru Uguru, *Artificial Intelligence Entities and Criminal Liability: A Nigerian Jurisprudential Diagnosis*, in African Journal of Criminal Law and Jurisprudence, no. 2, 2018
[12] Malice aforethought (US Criminal Code)
[13] V. Pasca, *Criminal Law. General Part*. 2nd Edition, UniversulJuridic Publishing House, Bucharest, 2014, p.156
[14] V. Dobrinoiu and colab., *The New Criminal Code Commented. General Part.*, 3rd Edition, UniversulJuridic Publishing House, Bucharest, 2016, p.134

## 3. From "electronic person" to active subject of a crime

The human-level AI seems to be the next generation of AI, capable of performing almost all the intellectual tasks an individual can do, and also to have feelings (worries, angers, happiness or maybe love) and to control them through autonomous human-like behavior. Many[15] believes that it is a question of time until the AI will become a true forms of intelligence (or a human-based or human-type intelligence), replacing human judgement, also think independently and act for itself.

As we all know, nowadays, in law, a *person* is identified as *individual* (human) person and *legal* person, both having certain degrees of liability when involved in any way in the commission of a crime.

Different authors identified some particular aspects that shape the elements of AI, and play a significant role in explaining the difficulties of assessing the criminal liability share between the "synthetic person" and the "natural person". And these are: increasing autonomy[16] (that meaning a decreasing control from humans), unpredictability[17] (meaning AI lacks of cognition may lead to reactions totally different than human like), and unaccountability[18] (while not applied with legal personality, AI elements cannot be held responsible for their harmful actions).

In order to analyze the actual and real involvement of an AI entity in committing a crime, it is first needed to clarify the role of different other actors in the *doing* or *undoing* (action or inaction – meaning *actus reus*)[19]. And here the "user", the "supervisor" and the "producer" of the AI entity have an important role in a respective criminal investigation, as being the humans behind the machine, thus firstly questionable about the conditions the AI entity acted upon, the software they designed and implemented into the machine, and the computer instructions they performed on it or even the omission to intervene when they are noticed about the AI element acting wrongfully, harming an individual or damaging goods.

When it comes to autonomous agents or machine learning, the real problem is the way they actually "learn" from the environment or from their own experiences. With little or even no human control of the learning process (in the future), we will have to deal with unpredictable entities, which may turn harmful or at least unlawful in performing their actions.

The doctrine is still reluctant to clearly attribute the responsibility of committing a crime entirely to the AI element, and rather prefers to identify a human being as the offender – the main actor liable (see the "user", the "supervisor" or the "producer" of the AI element).

According to some authors[20], "the harm from the actors' behavior does not occur immediately, but it may occur in the future when the AI acts", while "the launch or use of any AI somewhat presupposes a duty of control and supervision over the AI and its actions".

On the other hand, other authors[21] believe that AI criminal liability requires legal personhood for the AIs, and that would be similar to corporate criminal liability that some legal systems are recognizing. And, therefore, legal personhood for AI is consequently a question whether AIs should have rights and duties in accordance with the law.

Moreover, the general opinion is that, in contrast with corporations, the AI elements should be liable only for their own actions or inactions (behavior), and not for those initially attributed to certain individuals.

There is an idea that a possible solution would be a system enforcing AI criminal liability within a system that accepts only the *actus reus* condition when assessing a crime, but this seems to be unacceptable from the general principles of the criminal law. We agree with the opinion that such a case, when *mens rea* is excluded, would be similar to the involuntary acts that excludes criminal liability at all.

In one of his remarkable articles on this subject, an author[22] envisaged three models of liability concerning the AI entities, that can be considered separately of in conjunction (for better liability solutions): 1) Perpetration-via-Another Liability Model, 2) Natural-Probable-Consequence Liability Model, and 3) Direct Liability Model.

We agree with the author that in the first model, when a crime involves an AI entity, this AI entity should be regarded as "innocent agent" (like in the *longa manus* theory), thus mere an instrument in the commission of that crime, and not an active (principal

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[15] Karel Nedbálek, *The Future Inclusion of Criminal Liability of the Robots and Artificial Intelligence in the Czech Republic*, Paradigm of Law and Public Administration, Interregional Academy for Personnel Management, Ukraine, 2018, available at http://maup.com.ua/assets/files/expert/1/the-future-inclusion-of-criminal.pdf

[16] Ryan Calo, Robotics and the Lessons of Cyberlaw, California Law Review, 2015, p. 532

[17] Sherer M, Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies and Strategies (2016), Harvard Journal of Law and Technology, p. 353

[18] Mireille Hildebrandt, Criminal Liability and "Smart" Environments in R.A. Duff and Stuart P Green (eds) Philosophical Foundations of Criminal Law (2011), p. 506

[19] Weaver J F, Robots Are People Too: How Siri, Google Car and Artificial Intelligence Will *Force Us to Change Our Laws.* (2014)

[20] AP Simester, A von Hirsch, *Crimes, Harms, and Wrongs. On the principles of criminalisation*, Hart Publishing, 2011 at https://www.researchgate.net/publication/241643522_AP_Simester_and_Andreas_von_Hirsch_Crime_Harms_and_Wrongs_On_the_Principles_of_Criminalisation

[21] Ashworth A, *Principles of Criminal Law* (4th edn, OUP 2003) and Mireille Hildebrandt, *Criminal Liability and "Smart" Environments* in the thesis of Matilda Claussen-Karlson, *Artificial Intelligence and the External Element of Crime*, Orebro University, Sweden, 2017

[22] Gabriel Hallevy, The Criminal Liability of Artificial Intelligence Entities – From Science Fiction to Legal Social Control, Akron Intellectual Property Journal No. 4, University of Akron, 2016

or secondary) participant. In this case, due to the lack of *mens rea* of the actual perpetrator, the criminal charge will always pursue the producer, the programmer or the end-user of that particular AI entity.

The second model addresses the cases of the "foreseeable offences committed by AI entities", where, in the opinion of the author, the producer or the programmer do not have any involvement, nor they acknowledge of any offence until this is actually committed by the AI entity they designed, produced or programmed.

In this scenario, we agree that human activity is merely linked to the malfunction of the AI entity in the manner that the producer, the programmer or the user should have thought about (or should have considered the possible consequence of) a crime being committed (in certain circumstances) by that AI entity. Therefore, we support author Gabriel Hallevy that considers the criminal liability of the human factor rather negligence[23], than intention, although there may be situations when the (human) offender foresees the result of its actions (upon AI entity), does not pursue it, while accepting this result to occur one day.

The third model of Gabriel Hallevy focuses on the AI entity itself[24], while considering the direct liability as similar applicable to societal individuals (offenders). While there are argues that AI elements should be put aside of the criminal liability similar to children and mentally ill persons (*doli incapax*), the new technology developments prove that AI entities are able to interpret large amounts of data from its sensors, to make difference between "right" and "wrong", and even to analyze what is "permitted" or "forbidden".

It is still a question whether these capabilities (irrespective they are the result of a good programming or the result of its own learning feature) may be seen as signs of consciousness or internal elements (*mens rea*) needed for the existence of the criminal liability.

If so, we also need to consider the various forms of participation to the crime commission, depending on the relations between the AI entity and the other human perpetrators, and each other's involvement in pursuing the criminal activity. In these scenarios, the AI entity may find itself in the capacity of principal, accessory, accomplice or abettor.

Although some authors believe the contrary, we consider that is beyond reasonable acceptance to consider AI elements as qualifying to all the defenses against criminal liability (e.g. self-defense, necessity, consent, error, physical or mental constraint etc.), due to the fact that, in our opinion, there are more other internal elements to be taken into account when analyzing the possible fulfillment of all the requirements.

## Conclusions

Trying to find the best solutions for AI-related legal problems, some authors[25] envisaged various approaches, from a "precautionary" one – in which the autonomous agents are precluded or prohibited due to their associated risks and uncertainties, to a "permissive" one – permitting the deployment and development of AI entities and autonomous agents, while accepting the risks and the social costs until properly regulating the domain.

As revealed by the above analysis, in the crimes committed with the involvement of AI elements, for the criminal liability to exists there is a strong need for both *actus reus* and *mens rea* to exist in the behavior of the respective artificial intelligence agents.

And we observed that at least *mens rea* is hard to be taken into consideration in what regards AI.

But, before "thinking" and "acting", there is a strong need for an AI element to learn (or to be taught) about the law. Civil and criminal. And if is about a autonomous AI or an advanced machine learning, the producer, the programmer or the user must ensure that the most important routines of instructions comply with the existing laws and regulations, and the entity is (somehow) forced to "learn" the most prevalent principles of the living societies (not to kill, not to harm, not to steal, not to destroy etc.), to abide these laws and regulations and to keep away from any sort of autonomous actions that may be considered as unacceptable harmful behavior.

And this should be the main task of all the future projects involving the development of AI or legal bids to consider (and further treat) AI as "electronic person", with rights and obligations, similar to human beings.

Also, considering that the future will probably belong to the AI elements, the basics of the criminal law must be adjusted according to the principle *nullum crimen sine lege*, assuming that for the new society (electronic) members we may need to create special legal provisions and maybe a new legal system[26].

We share the same views with other authors[27] claiming that the AI entities should be considered as both objects and subjects of legal relations, "perhaps somewhere between legal entities and individuals, combining their individual characteristics with regards to relevant circumstances".

Another system that should be revised in the future is the penalty one, as it is hardly believable that actual criminal sanctions may apply to AI accordingly (such as: imprisonment, penal fine, safety measures or educative measures). There are multiple possibilities to be considered, such as: the destruction, the dismemberment, the decommissioning (partially or totally), the removal from duty or the reprogramming.

[23] Ibid

[24] Ibid

[25] See Peter M. Asaro, The Liability Problem for Autonomous Artificial Agents, presented to the Association for the Advancement of Artificial Intelligence (www.aaai.org ), Spring Symposia 2016

[26] See also Karel Nedbálek

[27] Radutniy Olecksandr Eduardovich, *Criminal Liability of the Artificial Intelligence*, in Problems of Legality, issue 138, 2017

In all the cases, we think that there will be no effect on both re-education of the "convicted" AI entity, and the prevention of future crimes – as the principal aims of any penalty system in place, due to the fact that AI existence and behavior rely on computer programs and logic instructions and not on human-like emotions or feelings like shame, fear, care, love, guilt, outrage, regret, suffering, worry, rejection, social connection, need, sense of freedom etc.

For all that, the national criminal justice systems are required to adapt themselves and include clear and comprehensive provisions in order to ensure the public order, the safety of people and their goods and property.

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# REFLECTING THE RIGHT TO PRIVACY IN THE DECISIONS OF THE CONSTITUTIONAL COURT OF ROMANIA

**Eliza Ene CORBEANU***

**Abstract**

*The need to protect has deep roots in the history of law. Paradoxically, the more humanity has endeavored to legislate, the abuse and the lack of real support from those responsible for ensuring security and peace have increased.*

*That is how society felt that, besides the internal regulation of privacy, it had to appeal to international organisations whose purpose was to persuade states that they alone could be able to resist any abusive interference in the individual's privacy.*

*The Universal Declaration of Human Rights established in 1948 that no man would be the object of arbitrary interference in his private life, as long as there is legal protection against these intrusions[1].*

*Article The Right to Privacy written by Samuel Warren and Louis Brandeis, appeared in the Harvard Law Review, volume IV, issue 5 of December 15, 1890, is considered to be one of the most influential essays in the history of American law[2], and the right to private life is defined by the authors as the right to be left alone or the right to loneliness[3].*

*The social evolution and the transformations of law have gradually led to an increasing distance between the initial desideratum - that of loneliness - and the real need to ensure a safety and protection environment for each individual.*

*Even if at the theoretical level any individual has the right to be left alone, in reality this right is not necessarily illusory, but rather impossible to be respected in the way we would probably want each one of us.*

*Complex threats, from wars, civil movements, terrorism, to cyber attacks, and the need for strong nations to dominate, have transformed the right to private life into a promising slogan whenever interest calls for it, or, worse, have reduced to noticeable dimensions invoking the need for over-protection of the individual by the state.*

*But what are governments doing in the name of protecting their own citizens? They violate private life, but they do it under the protection of the law, they do not respect fundamental rights, but their action appears justified, they restrict liberties and even suppress any intimacy in the name of the protection of the general good.*

*What does ultimately mean private life and how much should the state be interested in protecting it?*

*Of course, the notion itself is all-encompassing, with unspeakable valences and hidden ramifications throughout our existence.*

*We have a private life from the moment we are born, but others are responsible for it, private is the home with all its dependencies, private information about the state of health, or personal data, at work we have the right to intimacy, even a detainee has the right to ensure and respect his private life in designated spaces and the list can continue.*

*By making a parallel between private life in the American model and the way it is protected in European law, a fundamental difference emerges.*

*If in American law individual autonomy is the expression of absolutism, being the core of the existence of social rights, Europeans did not think this notion as an independent, stand alone, supreme relation to the other rights recognized by the individual but as an important, but not exclusive component or outside any limitations or restrictions.*

*In European law, the balance between the protection of the general interest and the need to guarantee, within reasonable limits, respect for the right to privacy was maintained.*

*Although Romania signed the Universal Declaration of Human Rights in 1948, the constitutional right to privacy did not find a distinct regulation either in the 1848 constitution or in 1952 or in 1965.*

*At present, the Romanian Constitution protects and regulates the right to private life and the authorities have the obligation to respect it.*

**Keyword:** *the constitutional court of Romania, the right to private life, the right to family life, unconstitutionality*

## 1. The proper regulation

### 1.1. The Right to Private Life in the Romanian Constitution

- Article 26 of the Romanian Constitution
  Intimate, family and private life

1. Public authorities respect and protect their intimate, family and private life.
2. The individual has the right to dispose of himself if he does not violate the rights and freedoms of others, public order or good morals. "

Although Article 26 of the Constitution of Romania recognizes the right to private life with all its valences (intimate, family), it does not define the notions, for the simple reason that a fundamental law does not have the role of limiting the situations that the practice could generate, leaving the lawyer, the courts,

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[1] http://www.un.org/en/universal-declaration-human-rights/

[2] Susan E. Gallagher, Introduction to "The Right to Privacy" by Louis D. Brandeis and Samuel Warren: A Digital Critical Edition, University of Massachusetts Press, forthcoming.

[3] Warren & Brandeis, paragraph 1

the doctrine, the freedom to interpret and create the right.

### 1.2. The right to privacy in the Civil Code

The Civil Code, which entered into force on 1 October 2011, dedicates a whole chapter (Chapter II) of respect for the human being and its inherent rights, and in Section II deals with respect for the privacy and dignity of the human person.

According to Article 71 of the Civil Code, every person has the right to respect for his private life, just as no one can be subjected to any interference in his or her private, personal or family life, or at home, residence or correspondence without his consent or without complying with the limits laid down in Article 75 of the Civil Code[1].

Particular importance is attached to correspondence, manuscripts or other personal documents, as well as to the personal information of a person, which can not be used without its consent or without observing the limits provided by Article 75 of the Civil Code.

With a wider scope of privacy, Article 58 of the Civil Code speaks about the right of personality, giving another valence to the protection we are talking about.

Thus, everyone has the right to life, to health, to physical and psychological integrity, to dignity, to their own image, to respect for private life, and other such rights recognized by law.

Let us say that all these regulations would be deprived of practical utility, as long as there were no punitive measures meant to sanction any violation of the values under the protection of the law.

As superficial as it may seem at first glance, or because of excessively long periods in national courts, we can not deny their importance and necessity, because the only way to prevent abuse is by imposing rules and imposing sanctions.

Speaking of civil sanctions, the Civil Code in Article 252 protects the human personality by establishing that every individual has the right to protect the intrinsic values of the human being, such as life, health, physical and mental integrity, dignity, private life, freedom of conscience , scientific, artistic, literary or technical creation.

### 1.3. The right to privacy in the Criminal Code

We have decided to end with the Romanian Penal Code, which came into force in February 2014, precisely because its regulations should be, in essence, a stepping stone for potential criminals, and coercion measures get more serious, going as far as affecting the freedom of the guilty person and the damage to her property through the imposition of fines or civil damages.

In Chapter IV on offenses against freedom of the person, Article 208 governs the offense of harassment, according to which the action of a person who repeatedly pursues, without right or without a legitimate interest, a person or oversees his home, work or other frequented places by causing it a state of fear, shall be punished by imprisonment from 3 to 6 months or by fine.

Making telephone calls or communications by means of remote transmission which, by frequency or content, causes a person to fear, shall be punished by imprisonment from one month to three months or by a fine if the act does not constitute a more serious crime .

The initiation of criminal proceedings takes place at the preliminary complaint of the injured party .

At first sight, the punishments could be considered ridiculous, but the fact that there was a concern to regulate this kind of acts denotes an anchoring of the current legislation to social transformations and the evolution of inter-human relations.

Even if the state is the one who intervenes to sanction, by bringing to account the guilty ones, it remains to the victim's discretion if they choose to bring the offenders before the law, so that the initiation of criminal proceedings only takes place at the preliminary complaint of the person injured.

Domicile, as a component of privacy, is protected in Chapter IV, Article 224, on Domestic Violence.

Intangible access in any way to a house, room, dependency or enclosure connected to the house without the consent of the person using it or the refusal to leave them at its request shall be punished by imprisonment from 3 months to 2 years or a fine. If the act is committed by an armed person, during the night or by use of lying qualities, the punishment is imprisonment from 6 months to 3 years or a fine.

The initiation of criminal proceedings takes place at the preliminary complaint of the injured party .

And in the case of this crime, criminal liability depends on the injured party's decision, but sanctions are more drastic, and there is even an aggravating variant.

A new incrimination in Romanian criminal law is the introduction of Article 226 on the violation of private life.

Although, at first glance, it could be considered a reiteration, or even a duplication of other offenses (such as home violence), in fact this offense concerns the attainment of privacy by specific methods, involving the use of techniques more or less sophisticated surveillance, using instruments and means capable of intruding a person's private life in a way that is sometimes inscrutable.

Taking pictures, capturing or recording images, listening with technical means, or recording audio are ways to accomplish this type of offense, and the disclosure, broadcasting, presentation or transmission

[1] article 75 Civil Code Limits: (1) Do not violate the rights set out in this section, which are permitted by law or international human rights conventions and pacts to which Romania is a party. (2) The exercise of constitutional rights and freedoms in good faith and in compliance with the international covenants and conventions to which Romania is a party shall not constitute a violation of the rights provided for in this section.

without right of the sounds, conversations or images provided in the form of a crime, have the character of aggravating, the limits of punishment being increased.

The fact that even in the case of this crime the legislator left the injured person the right to decide whether the offender was to be held criminally liable was originally justified as a guarantee that the individual is free to decide for himself what actions he / she is injuring or not.

In fact, the practice has shown that the number of cases concerning the investigation of this last crime, for example, is low, the victims often choose to remain passive.

The reasons why the passive subjects of this crime decide not to denounce this type of antisocial behavior that affects their right to private life are multiple, starting from the social implications of such an approach, fear of repression, shame, or simply distrust of force government to stop these abuses.

## 2. Decisions of the Constitutional Court of Romania on the analysis of private life

### 2.1. DECISION[2] no. 1258/2009 regarding the admission of the unconstitutionality exception of the provisions of Law no. 298/2008 regarding the retention of the data generated or processed by the providers of electronic communications services for the public or public communications networks, as well as for the amendment of the Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector

The subject of the exception of unconstitutionality was Article 1 and Article 15 of Law no. 298/2008 on the retention of data generated or processed by providers of publicly available electronic communications services or public communications networks and amending Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector ", published in the Official Gazette of Romania, Part I, no.780 of 21 November 2008.

- Article 1. - "(1) This law establishes the obligation for the providers of public electronic communications networks and services to retain certain data generated or processed in the framework of their activity of providing electronic communications services, for making them available to the competent authorities for use in research, discovery and prosecution of serious crimes.

(2) This law applies to the traffic and location data of natural and legal persons as well as related data necessary to identify the subscriber or the registered user.

(3) This law shall not apply to the content of the communication or the information consulted during the use of an electronic communications network.

(4) The enforcement of the provisions of the present law is done in compliance with the provisions of the Law no. 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data, as subsequently amended and supplemented, as well as of Law no. .506 / 2004 on the processing of personal data and the protection of privacy in the electronic communications sector, with further additions. ";

- Article 15. - "Providers of public communications networks and providers of publicly available electronic communications services shall, at the request of the competent authorities, on the basis of the authorization issued in accordance with the provisions of Article 16, transmit immediately the data retained under this law, except in cases of force major. "

The author of the unconstitutionality exception criticized the retention of the data generated or processed by the providers of publicly available electronic communications services or public communications networks and the amendment of the Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector .

These regulations, claimed the author of the exception affect the exercise of the right to free movement, the right to private life, private and family life, affect the secrecy of correspondence and freedom of speech.

Regarding the clarity and precision of the regulations under consideration, the Constitutional Court has found that they give rise to abuses in the retention, processing and use of data stored by providers of publicly available electronic communications services or public communications networks.

Even if it is remembered that the right to privacy, the secrecy of correspondence and freedom of expression may be restricted or limited, however, any interference must be regulated in a clear, predictable and unambiguous manner.

Lastly, the Court reminds the importance of the obligation to refrain from any interference in the exercise of citizens' rights and freedoms in the matter of personal rights such as the right to intimate and free speech and the processing of personal data.

[2] Text published in the Official Gazette of Romania, in force since November 23, 2009

**2.2. DECISION[3] no. 440 of 8 July 2014 on the exception of the unconstitutionality of the provisions of Law no.82 / 2012 on the retention of data generated or processed by the providers of public electronic communications networks and of the providers of publicly available electronic communications services, as well as for the modification and completing the Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector and Article 152 of the Code of Criminal Procedure.**

The subject of the exception of unconstitutionality was the provisions of the Law no.82 / 2012 on the retention of the data generated or processed by the providers of public electronic communications networks and the providers of publicly available electronic communications services, as well as for amending and supplementing Law no.506 / 2004 on the processing of personal data and the protection of privacy in the electronic communications sector, republished in the Official Gazette of Romania, Part I, no. 211 of March 25, 2014, and article 152 of the Criminal Procedure Code:

- Article 152 of the Criminal Procedure Code: "(1) The criminal investigation authorities, with the prior authorization of the judge of rights and freedoms, may require a provider of public electronic communications networks or a provider of publicly available electronic communications services to transmit retained data under the special law on the retention of data generated or processed by providers of public electronic communications networks and providers of publicly available electronic communications services other than the content of communications where there is reasonable suspicion of an offense; and there are grounds for believing that the requested data constitutes evidence for the categories of offenses provided by the law on the retention of data generated or processed by the providers of public electronic communications networks and the providers of elec- tronic communications services for the public.

(2) The judge of rights and freedoms shall pronounce within 48 hours on the request of the criminal prosecution bodies to transmit the data, through reasoned conclusion, to the council chamber.

(3) Providers of public electronic communications networks and providers of publicly available electronic communications services who cooperate with the criminal investigation bodies are obliged to keep the secret of the performed operation. ".

The author of the unconstitutionality objection said that the criticized texts violate the constitutional provisions of Article 26 on intimate, family and private life.

In 2012, following the defeat to the Constitutional Court by Decision[4] No. 1258/2009, a new transposition of Directive[5] 2006/24 / EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58 / EC in the national legislation, by Law no.82 / 2012, republished in the Official Gazette of Romania, Part I, no.211 of 25 March 2014.

According to the Constitutional Court, Law no.82 / 2012 did not bring substantial modifications to the previous unconstitutional law, which provided identical solutions ignoring Decision No. 1258 of October 8, 2009[6].

A second rejection of the law at the Constitutional Court on July 8, 2014 came after, not long before, even the EU Data Retention Directive 2006/24 / EC was invalidated.

"We are aware that on 8 April 2014, the Court of Justice of the European Union invalidated Data Protection Directive 2006/24 / EC from the date on which it was issued, considering that there was a wide-ranging interference and the seriousness of the fundamental rights to respect for privacy and the protection of personal data, without such an interference being limited to what is strictly necessary, "the Court's press release states[7].

Regarding violation of the right to privacy, the Constitutional Court notes that in terms of access and use of data, the issue of unconstitutionality arises, given the access of the judicial bodies and other state bodies with attributions in the field of national security to the stored data.

As such, the law does not provide the safeguards necessary to protect the right to intimate, family and private life, the secrecy of correspondence and the freedom of expression of persons whose stored data are accessed. "(Paragraph 61)

This decision has sparked vehement reactions both from the Romanian Intelligence Service and from the representatives of the prosecutor's offices, going to the assertion that the national security of Romania is jeopardized and the criminal investigations can no longer run in good conditions, because, overwhelmingly, criminal investigations were based on data stored by operators.

On September 18, 2014, the Constitutional Court of Romania issued a statement[8] attempting to justify taking the above-mentioned decisions: "We mention that other Constitutional Courts or European Courts

[3] Text published in the Official Gazette of Romania, in force since September 4, 2014
[4] Text published in the Official Gazette of Romania, in force since November 23, 2009
[5] https://eur-lex.europa.eu/eli/dir/2006/24/oj
[6] https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-106, 18.09.2014
[7] http://unbr.ro/wp-content/uploads/2014/04/CP140054EN.pdf
[8] https://www.ccr.ro/noutati/COMUNICAT-DE-PRES-106

have already declared unconstitutional national laws on data retention, in this situation - with Germany, Austria, Czech Republic or Bulgaria, with the same object appearing in the role of the constitutional courts in other states. On the other hand, as it appears from the motivation of the decision establishing the unconstitutionality of Law no.82 / 2012, the Court does not said unconstitutional data retrieval and storage operations in themselves, but only that access to and use of data is not accompanied by the necessary safeguards to ensure the protection of the above-mentioned fundamental rights, in particular the fact that the judicial bodies with attributions in the field of national security have access to these data without the judge's authorization.

**2.3. DECISION[9] No. 580 of 20 July 2016 on the Citizens' Legislative Initiative entitled "Law on the Revision of the Romanian Constitution"**

It was through this decision that a citizen's initiative, supported by several non-governmental organizations, was to change the content of Article 48 of the Constitution:

Present as follows: "(1) The family is based on the freely consented marriage between spouses, on their equality, and on the right and duty of parents to ensure the raising, education and training of children. (2) The conditions for termination, termination and invalidity of marriage shall be established by law. Religious marriage can only be celebrated after civil marriage. (3) Children outside the marriage are equal before the law with those in marriage. "

The proposal[10] was in the following sense: "The family is based on the freely agreed marriage between a man and a woman, on their equality and on the right and duty of parents to ensure the raising, education and training of children."

In other words, it was desired to replace the phrase between husbands with the phrase between a man and a woman.

The motivation for this citizens' initiative to review the Constitution has come from the fact that in Romania the right to marry belongs only to a man with a woman, being excluded from the same sex.

In the initiators' view, the attempt to clarify the term "spouses" in Article 48 of the Constitution was intended to remove any interpretation contrary to that of a woman and a man in a family.

Another argument used has started from the definition of the family as it results from Article 16 of the Universal Declaration of Human Rights, namely that of a natural and fundamental element of society.

According to Article 16 (1) of the Universal Declaration of Human Rights adopted by the United Nations General Assembly on December 10, 1948, "men and women have the right to marry and to found a family".

Article 12 of the European Convention on Human Rights[11] states that "From the age of the law the husband and wife have the right to marry and to found a family under the national law governing the exercise of this right."

Romania remains tributary to the old traditions, and society as a whole is not yet ready to cope with changes in perceptions rooted centuries in the culture of this people.

Romania is still in Europe, a country where the marriage rate is among the highest, and this is the fear of embracing innovative experiments, decadent for most and destabilizing for others.

Article 258 (4) of the Civil Code, speaking of spouses, describes them as the man and woman united by marriage[12], and marriage is the freely consented union between a man and a woman (Article 259 of the Civil Code).

Perhaps the large number of citizens who have consented to the Constitutional Court's request to ask the Court to clarify the notion of spouses shows precisely the traditionalism that I mentioned above and the need to preserve the values that have remained unaltered or perhaps, was just a speculated subject of organizations or political actors interested in acquiring notoriety or image capital.

Being a sensitive issue at European level, the European Court of Justice has left the role of regulating permissively or restrictively each state, considering it to be their absolute attribute to decide on the definition of marriage, civil status, the possibility of validating a legal union between same-sex couples.

It is worth recalling the Judgment of the Court of Justice of the European Union of 1 April 2008 in Case C-267/06[13] Tadao Maruko v Versorgungsanstalt der deutschen Bühnen, which established more than eleven years ago that "the civil status and benefits derive from it, are matters which are the responsibility of the Member States and Community law does not affect that competence. '

The same approach we find in the Judgment of 10 May 2011 in Case C-147/08 Jürgen Römer v Freie und Hansestadt Hamburg[14].

The Resolution of the United Nations Human Rights Council on Family Protection of July 3, 2015 defines the family as a natural and fundamental group of society that must be essentially protected by the state.

It must be mentioned some of the arguments of the Constitutional Court in Decision 580/2016 because they describe its concept of marriage, private life,

[9] published in the Official Gazette no. 857/2016 - M. Of. 857/27 October 2016

[10] http://www.cdep.ro/proiecte/2017/100/20/7/pl34.pdf

[11] https://www.echr.coe.int/Documents/Convention_RON.pdf

[12] (4) For the purposes of this Code, spouses are men and women united by marriage.

[13] Repertoriul de jurisprudență 2008 I-01757, https://eur-lex.europa.eu/legal-content/RO/TXT/?qid=1553454942837&uri=CELEX:62006CJ0267

[14] Cauza C-147/08, Repertoriul de jurisprudență 2011 I-03591, https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:62008CJ0147

family life: "The Court holds that Article 48 of the Constitution enshrines and protects the right to marry, and family relationships resulting from marriage, distinct from the right to family life / respect for and protection of family life, with a wider legal content enshrined and protected by Article 26 of the Constitution, according to which "(1) Public authorities respect and protect the intimate, family and private life . (2) The individual has the right to dispose of himself if he does not violate the rights and freedoms of others, public order or good morals. "

The notion of family life is complex, including family relationships in fact, distinct from family relationships resulting from marriage, the importance of which the constituent legislator has emphasized distinctly in Article 48 the protection of family relationships resulting from marriage and from the link between parents and children.

**2.4. DECISION[15] No.51 of 16 February 2016 on the objection of unconstitutionality of the provisions of Article 142 (1) of the Code of Criminal Procedure**

The subject of the exception of unconstitutionality was the provisions of Article 142 paragraph (1) of the Code of Criminal Procedure, according to which "*the prosecutor enforces the technical supervision or may order it to be carried out by the criminal investigative body or specialized police officers or other specialized bodies of the state* ".

The authors of the exception considered that Article 1 (5) on the Romanian State, Article 20 on international human rights treaties, Article 21 on free access to justice, Article 53 on restricting the exercise of rights or freedoms , as well as the provisions of Articles 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the right to a fair trial and the right to respect for private and family life.

As a first conclusion, the Court has held that the phrase "*or other specialized bodies of the state"* is lacking in clarity, precision and predictability, as it does not allow the identification of those competent authorities to carry out measures with a high degree of intrusion into the privacy of individuals.

Also, the lack of clear, precise regulation would lead, in the Court's view, to an abusive violation of some of the essential fundamental rights in a state of law: intimate, family and private life and the secrecy of correspondence.

**2.5. DECISION[16] no. 336/2018 concerning the rejection of the unconstitutionality exception of the provisions of Article 231 (2) with reference to Article 229 (1) lit. b) and d) and para. (2) lit. b) the second sentence of the Criminal Code, published in M.Of. of Romania, in force since 6 September 2018**

By the Conclusion of June 1, 2016, pronounced in File no. 3.319 / 328/2015, the Turda District Court notified the Constitutional Court, except for the unconstitutionality of the provisions of Article 231 paragrapf (2) with reference to Article 229 (1) letter b) and d) and paragrapf (2) letter b) second sentence of the Criminal Code.

The exception was invoked by the public prosecutor in the case of concerning criminal liability for committing the offense of qualified theft, an offense under Article 228 paragraph (1) in relation to Article 229 (1) letter b) and d) of the Criminal Code.

The prosecutor requested the change of legal classification - by retaining and the provisions of Article 229 paragraph (2) letter b) of the Criminal Code, in the sense that the act was also committed by violation of the professional headquarters of the injured person. In the case, one of the defendants reconciled himself with the injured person.

In justifying the objection of unconstitutionality, the prosecutor, as the author of the exception, claims in essence that the provisions of Article 231 (2) of the Criminal Code, which establishes the possibility that the reconciliation, which removes the criminal responsibility, also intervenes in the case of theft theft crimes under Article 229 paragraph (1) letter b) and d) and paragraph (2) letter b) second sentence of the Criminal Code - serious crimes and with a very high impact on society - violates the constitutional provisions of Article 1 paragraph (3) on the rule of law, in which citizens' rights and freedoms and justice are the highest and guaranteed values of Article 26 on the intimate, family and private life of Article 27 (1) on inviolability of domicile, Article 44 (1) on the right of private property, Article 53 on the restriction of the exercise of certain rights or freedoms and Article 131 (1), according to which, "*In the judicial activity, the Public Ministry represents the general interests of society and defends the rule of law, as well as citizens' rights and freedoms."*

In paragraph 21 of the aforementioned decision, which has been called upon to adjudicate on the violation, inter alia, of Article 26 of the Constitution of Romania on Intimate, Family and Private Life, it leaves the legislator's appreciation of the measures necessary to protect the social values invoked by to the author of the exception of unconstitutionality.

It also reminds the Constitutional Court in the same paragraph that the criminal policy of a state is not its attribute, which is a priority of the lawyer according

[15] Official Gazette of Romania no. 190 of 14 March 2016
[16] Text published in the Official Gazette of Romania, in force since September 6, 2018

to priorities, opportunity, frequency of violations, gravity and consequences of antisocial acts.

**2.6. DECISION[17] No 498 of 17 July 2018 on the unconstitutionality of the provisions of Article 30 (2) and (3) and the phrase "the system of electronic patient patient file" in Article 280 (2) of the Law no.95 / 2006 on health reform**

The texts invoked in support of the objection of unconstitutionality were Article 1 (5) on the quality of law, Article 26 on intimate, family and private life, and Article 53 on the restriction of the exercise of fundamental rights and freedoms in the Constitution of Romania, as well as Article 8 The Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the right to respect for private and family life.

This exception was raised directly by the People's Advocate, arguing that in the matter of healthcare provision, the legal regulation must not contravene the fundamental rights provided by article 26 of the Constitution, according to which the public authorities are obliged to respect and protect the intimate, family and private life .

In the opinion of the author of the objection of unconstitutionality, the regulation contained in Article 280 paragraph (2) of Law no. 95/2006 on healthcare reform is of a general nature, without any guarantee of confidentiality of personal data of medical nature, contained in electronic health records.

The views expressed in public space by physicians 'and patients' associations have also been invoked, meaning that the implementation of the electronic health records could seriously violate the intimate, family and private lives of patients, through the possibility of disclosing personal data of a medical nature public.

Even the Constitutional Court in its previous jurisdiction has established that, in order to ensure respect for privacy and the confidentiality of medical data, it is necessary to limit the access of persons to such data (see, in this regard, Decision[18] No 17 of 21 January 2015 and Decision[19] No.440 of 8 July 2014.)

Referring to the violation of the individual's right to privacy, the Constitutional Court considered the personal data and the processing of this information, recalling, inter alia, the case[20] of 4 May 2000 in Rotaru v. Romania, paragraph 43.

The Court recalls a series of judgments handed down by the European Court of Human Rights in the area of patient healthcare protection as follows: (Judgment of 17 July 2008 in Case I v. Finland, paragraph 36) [Judgment of 17 January 2012 in Varapnickaitė-Mažylienė v. Lithuania[21], paragraph 41) (Judgment of 17 July 2008 in Case I v. Finland, paragraph 37) (case of 17 July 2008 in Case C- Finland, paragraph 38) (Judgment of 17 July 2008 in Case I v Finland, paragraph 38, Judgment of 25 February 1997 in the case of Z. v. Finland, paragraph 95, or Judgment of 10 October 2006, pronounced in the LL case against France, par.44]. (Judgment of 6 June 2013 in Avilkina and Others v. Russia, paragraph 45) (Judgment of 25 February 1997 in the case of Z. v. Finland, paragraph 95).

All the arguments that we find in this decision are based on a comparative analysis of the case law of the European Court of Human Rights on the violation of Article 8 of the Convention, concluding that the disclosure of medical data can seriously affect the person's family and private life, such as and its social and employment situation by exposing it to public atrocities and the risk of ostracization (Judgment of 17 January 2012 in Varapnickaitė-Mažylienė v. Lithuania, paragraph 44, or the judgment of 6 June 2013 in Avilkina and others against Russia, p.45][22]

Paragraph 42 of the decision concludes with regard to the issue at stake in the debate, meaning that "if the State has established by law a measure in the application of the right to the protection of the health of a person, it is also incumbent on it to protect and guarantee the confidentiality of information medical treatment, through a normative act of the same level, respectively by law. ,,

Moreover, the Court uses the syntagm of the legislator's silence, in other words, it speaks of a passivity in ensuring minimum guarantees that the right to intimate, family or private life is respected.

In the Court's view, the introduction of electronic health records is only an interference of the state in the intimate, family and private life of the individual.

Such a lack of concern to ensure minimum leverage can not be overlooked by arguments such as the existence of a constitutional obligation to protect the health of the individual, because its accomplishment must not violate other rights, as laid down in the Constitution.

It was therefore found that although the legal interference in the law provided for in Article 26 of the Constitution may have a legitimate purpose (protecting the health of a person by ordering his medical history and holding it by a state authority), it is appropriate and necessary for the purpose does not maintain a fair balance between competing interests, namely the public interest in public health, the interest of the person in protecting his or her health, and the interest of the person in protecting his private, family and private life.

[17] Published in the Official Gazette no. 650 of July 26, 2018
[18] Text published in the Official Gazette. of Romania, in force since January 30, 2015
[19] Text published in the Official Gazette of Romania, in force since September 4, 2014
[20] Text published in the Official Gazette. of Romania, in force since 11 January 2001
[21] http://health-rights.org/index.php/cop/item/case-of-varapnickait%C4%97-ma%C5%BEylien%C4%97-v-lithuania-2012
[22] https://www.globalhealthrights.org/health-topics/hospitals/avilkina-and-others-v-russia/

**2.7. DECISION[23] no.91 of 28 February 2018 on the objection of unconstitutionality of the provisions of article 3, article 10, article 11, paragraph 1, letter d) and article 13 of the Law no.51 / 1991 on the national security of Romania, as well as the provisions of article 13 from Law no.51 / 1991 on the national security of Romania, in the form prior to the amendment by the Law no.255 / 2013 for the implementation of the Law no. 135/2010 on the Criminal Procedure Code and for the modification and completion of some normative acts containing provisions criminal proceedings**

The subject of the exception of unconstitutionality constituted the provisions of Articles 3, 10, 11 and 13 of Law no. 51/1991 on the national security of Romania, in the form before the amendment by Law no. 255/2013, as well as the provisions of Article 13 of the same normative act, in the form in force at the time of notification to the Constitutional Court.

It was argued that the texts of the abovementioned articles contradict the constitutional provisions contained in Article 1 paragraph (5), according to which, in Romania, compliance with the Constitution, its supremacy and the law is mandatory, Article 21 paragraph (3), according to which the parties right to a fair trial and the settlement of cases within a reasonable time, Article 26 on intimate, family and private life, Article 28 on the confidentiality of correspondence, and Article 53 on the restriction of the exercise of rights or freedoms.

This decision is relevant from the point of view of the Court's analysis of the phrase *"seriously undermining the rights and fundamental freedoms of Romanian citizens"* in Article 3 let f) of Law no 51/1991.

In paragraph 79 of the Decision, the Constitutional Court recalls the Joint Opinion of the Venice Commission and the Human Rights Directorate, citing a passage that we consider relevant and exposing it exactly: *"In the Law on the Functioning of the Service, the mandate given to this Service by Article 7 requires defending against actions that "violate the constitutional rights and freedoms of citizens and endanger the state" and against attacks against senior officials, etc. Undoubtedly, both situations can be considered to be clear criminal matters and not just a legitimate aim to protect national security. Therefore, their use in these cases, with no specific safeguards for criminal investigations and trials, can be justified only if the phrase "and jeopardizes the state" is read literally in the sense that only when the threat affects democratic order, in other words, when it is sufficiently concrete and serious that it becomes a matter that can come to the attention of the Service. For example, the Swedish Security Police mandate includes investigating attacks and threats directed against the high dignitaries (when they affect democratic order), as well as actions that undermine the exercise of constitutional rights of citizens. This latter function has the relatively narrow meaning of investigating the activities of organized extremist groups that are hostile to certain groups of citizens or residents, for example of a certain ethnic origin "[Opinion No. 756 of 2 April 2014, paragraph 27, CDL-AD (2014) 009]*.

In essence, in analyzing the provisions criticized by the author of the objection of unconstitutionality, the Court has held that the lack of clear rules providing information on the circumstances and conditions under which national security authorities are empowered to resort to the technical supervision measure is violation of fundamental rights, essential in a state governed by the rule of law, concerning intimate, family and private life and the secrecy of correspondence.

Thus, the phrase "*seriously undermines the fundamental rights and freedoms of Romanian citizens"* contained in article 3, letter f) of Law no. 51/1991 on Romania's national security violates the constitutional provisions contained in article 1 paragraph (5) which enshrines the principle of legality , Article 26 on private life and Article 53 governing the conditions for the restriction of the exercise of certain rights or freedoms.

**2.8. DECISION[24] No 534 of 18 July 2018 on the objection of unconstitutionality of the provisions of Article 277 (2) and (4) of the Civil Code**

The subject of the exception of unconstitutionality was the provisions of Article 277 (2) and (4) of the Civil Code, republished in the Official Gazette of Romania, Part I, no.409 of 10 June 2011, according to which:

"(2) Marriages between persons of the same sex concluded or contracted abroad either by Romanian citizens or by foreign citizens are not recognized in Romania. [...]

(4) The legal provisions regarding the free movement on the territory of Romania of the citizens of the Member States of the European Union and the European Economic Area remain applicable "and, in the author's opinion, these texts represent a violation of the right to intimate, family and private life, the criterion of sexual orientation.

By doing a comparative analysis, the Constitutional Court lists the states that have adapted their legislation so that they can provide effective protection of the right to intimate, family and private life as regards homosexual couples.

It reminds the Court that thirteen Member States of the European Union recognized same-sex marriage: the Kingdom of the Netherlands, the Kingdom of Belgium, the Kingdom of Spain, the Kingdom of Sweden, the Portuguese Republic, the Kingdom of Denmark, the French Republic, the United Kingdom of

[23] Published in the Official Gazette of Romania no. 348 of April 20, 2018
[24] Published in the Official Gazette of Romania. no. 842 of 3 October 2018

Great Britain and Northern Ireland The United Kingdom (with the exception of Northern Ireland), the Grand Duchy of Luxembourg, Ireland, the Republic of Finland, the Federal Republic of Germany and the Republic of Malta and Austria, which by the Austrian Constitutional Court of 4 December 2017 (G 258-259 / 2017-9) the provisions of the Civil Code limiting the right to marriage to heterosexual couples, and furthermore stated that without the intervention of the legislator before that date, same-sex marriage would be possible from 1 January 2019.

In the Czech Republic, the Republic of Estonia, the Hellenic Republic, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, Hungary, the Republic of Austria and the Republic of Slovenia, there is the notion of registered partnership or civil partnership for homosexual couples, which, although distinct from marriage, recognizes, however, a series of rights similar to those derived from the marriage between a man and a woman.

States such as Canada, New Zealand, South Africa, Argentina, Uruguay or Brazil authorize same-sex marriage by law, and others, through Mexican judgments (Supreme Court Supreme Court ruling No. 155/2015 June 3, 2015), the United States[25] (Supreme Court ruling of June 26, 2015, "Obergefell et al. Hodges, Director, Ohio Department of Health, et al., 576 U.S. (2015), Colombia (Constitutional Court judgment SU-214/16 of 28 April 2016, Case T 4167863 AC) Taiwan[26] (judgment of the Constitutional Court of the Republic of China (Taiwan) of 24 May 2017, J.Y. Interpretation N ° 748, on Consolidated Claims of Huei-Tai-12674 and Huei-Tai-12771].

It is important that the comparative analysis which the Court made in the decision, because it led to the suspension of the judgment and to the lodging of a request to the Court of Justice of the European Union for a preliminary ruling on the following questions :

'(1)' Husband 'in Article 2 (2) (a) of Directive 2004/38, in conjunction with Articles 7, 9, 21 and 45 of the Charter, includes the same-sex spouse of a non- , of a European citizen with whom the citizen has legally married under the law of a Member State other than the host State?

2. If the answer to the first question is in the affirmative, Articles 3 (1) and 7 (2) (3) of Directive 2004/38, read in conjunction with Articles 7, 9, 21 and 45 of the Charter, require the Member State host country to grant a residence permit in its territory for more than 3 months to a same-sex spouse of a European citizen?

3. If the answer to the first question is in the negative, the same-sex spouse from a non-Member State of a European citizen with whom the citizen has legally married under the law of a Member State other than the host State may be 'any other family member ...' within the meaning of Article 3 (2) (a) of Directive 2004/38 or 'the partner with whom the Union citizen has a duly substantiated, lasting relationship' within the meaning of Article 3 (2) (b) of Directive 2004/38, with the host State's correlative obligation to facilitate entry and stay, even if the host State does not recognize same-sex marriages or provides for any alternative form of recognition legal partnerships such as registered partnerships?

4. If the answer to the third question is in the affirmative, then Articles 3 (2) and 7 (2) of Directive 2004/38, read in conjunction with Articles 7, 9, 21 and 45 of the Charter, require the host Member State grant the right to reside in its territory for more than three months to a same-sex spouse of a European citizen? "

The reasons justifying this move were that Romania, together with the Republic of Bulgaria, the Republic of Latvia, the Republic of Lithuania, the Republic of Poland and the Slovak Republic, are the only Member States of the European Union which do not offer any form of formal and legal recognition of the established couple relationships between the same sex.

By Judgment of 5 June 2018 in Case[27] C-673/16, the Court of Justice of the European Union (Grand Chamber) answered in the affirmative the first two questions.

Relevant is paragraph 36 of the judgment, according to which a Member State can not rely on its national law to oppose the recognition on its territory, solely for the purposes of granting a right of residence to a third-country national, of the marriage entered into by a citizen of the same sex in another Member State in accordance with the law of the latter State.

It has thus been established that the relationship of a same-sex couple is circumscribed to the notion of "private life" and "family life", with no distinction as to the relationships established between persons of different sex .

In those circumstances, the State is bound to ensure the protection of both categories of relations by virtue of respect for the fundamental right to private and family life guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union by Article 8 of the European Convention for the Protection of Human Rights and Freedoms Fundamental and Article 26 of the Romanian Constitution (paragraph 41).

## 3. Conclusions

This article aimed to draw attention to the relevant decisions of the Constitutional Court of Romania regarding the right to privacy, the evolution of its approach in the case law of the Court, and the need to bring the legislation subject to constitutional review into conformity with the Court's rulings.

[25] https://supreme.justia.com/cases/federal/us/576/14-556

[26] http://www.loc.gov/law/foreign-news/article/taiwan-constitutional-court-rules-same-sex-marriage-prohibition-unconstitutional/

[27] http://curia.europa.eu/juris/liste.jsf?num=C-673/16

Regarding the jurisprudence of the Court so far, we can note that, in its decisions, the Court has often replaced the passivity of the legislature or the parliament's refusal to regulate in accordance with the fundamental principles found in the international treaties Romania adhered to, increased attention to the necessity to comply with the Romanian legislation with the European one.

Not long ago, the Constitutional Court had to respond to challenges that generated social, sometimes institutional, discontent, but it is precisely its role - to restore the balance and supremacy of the Constitution by reconciling the law with the fundamental law.

The border between law and politics is a fragile one, and here the role of the Constitutional Court intervenes through actions designed to defeat any attempt to distort the purpose of a law so as to remind the lawmaker that its role is to pass laws respecting fundamental rights of citizens.

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# STATE RESPONSIBILITY IN THE PREVENTION OF TORTURE AND INHUMAN AND DEGRADING TREATMENT

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**Abstract**

*To produce intentional, systematic and cruel physical or mental suffering, acting on their own initiative or on the basis of order, in order to compel certain persons to confess or give information, was defined as torture.*

*To put a person in serious danger through actions, measures or treatments of any kind, affecting physical or mental condition is inhuman and degrading treatment.*

*The European Convention on Human Rights stated, with the overriding value, by the provisions of Article 3 that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment", imposing, by the provisions of the article, the obligations of the state authorities not to apply no form of suffering or inhuman treatment of persons under their jurisdiction, and the obligation to protect the physical and mental integrity of such persons.*

*On 9 October 1990, by promulgating Law No.19, Romania adheres to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and has thus established a mechanism for the prevention of torture and inhuman and degrading treatment.*

*The establishment of independent internal mechanisms for the prevention of torture and inhuman and degrading treatment is an express requirement contained in Part V of the Optional Protocol to the Convention for the Prevention of Torture. The scope of the institutions in which the mechanisms for the prevention of torture and inhuman and degrading treatment are exercising is largely covering both the penitentiary system, the detention and preventive arrest centers, the medical-social institutions for the persons with mental disabilities and other units in which may engage in inhuman or degrading treatment.*

**Keywords:** *torture, inhuman and degrading treatment, Convention, mechanism*

## Introduction

Respect for fundamental human rights as well as the formation of a system to guarantee these rights has been, since antiquity, a problem debated by important historical personalities. Thus, in 1770, Hammurabi's Code regulated social relations and promoted rules of social justice and humanitarian spirit[1], and from the beginning of the period of Stoicism and that of Christianity, the teachings on the principle of equality between people were developed. These principles were tinted in the modern era, during the Enlightenment, when the first legal provisions on human rights were formulated and edited in documents such as the "Magna Charta Libertatum" (Great Book of Freedoms) where it was stated for the first time that neither a free man can not be imprisoned without being tried, or the "Law of Rights" voted by the British Parliament in 1689, which definitively laid the foundations of the constitutional monarchy in England, formulating for citizens a series of rights.[2]

An important step on the line of human rights assertion was represented by the United States Declaration of Independence, which associates liberation from British domination with a series of citizens' rights and freedoms, underlining that "all people have have been created equal, are endowed by their creator with certain inalienable rights, and among them are life, freedom and the pursuit of happiness. The Declaration constituted the fundamental act underlying the elaboration of the Constitution of the United States of America in 1787, which is maintained, with some modifications occurring along the way, and at present[3].

The first European constitution based on democratic principles was the Polish Constitution of 3 May 1791 and introduced equality of political rights between townspeople and nobility, placing peasants under the protection of the government and alleviating the worst abuses against the serfs[4]. Until the Second World War, the constitutions of most states with democratic regimes contained extensive human rights provisions, but the tragedy of millions of victims during the Second World War revealed, among other things, that the great mid-century conflagration The XX has been unleashed precisely because the fundamental rights and freedoms of man and peoples have not been respected[5].

The stories of World War II have highlighted the need for global provisions to ensure the safeguarding of

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[1] I.MoroianuZlatescu, R.Demetrescu, From the History of Human Rights, Romanian Institute for Human Rights, Bucharest, 2003, p.5;

[2] http://www.scritub.com/stiinta/stiinte-politice/Drepturile-fundamentale-ale-om92277.php

[3] Ibidem 2

[4] https://ro.wikipedia.org/wiki/Constitu%C8%9Bia_de_la_3_mai_1791

[5] I.MoroianuZlatescu, R.Demetrescu, From the History of Human Rights, Romanian Institute for Human Rights, Bucharest, 2003, p.5;

human rights. Thus, on December 10, 1948, the United Nations considered that "ignoring and despising human rights led to acts of barbarism that revolted the conscience of mankind, proclaiming the" Universal Declaration of Human Rights, "specifying in the preamble of the act that this statement is a "common ideal to which all peoples and nations must strive, so that all persons and all organs of society strive, having this permanent statement in mind, to develop respect for these rights and freedoms through education and education, and to ensure, through national and international progressive measures, their universal and effective recognition and application both within the peoples of the Member States and those of the territories under their jurisdiction[6].

Starting from the provisions of Article 1 of the Universal Declaration of Human Rights, which states that "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and must act one another in the spirit of fraternity, "and corroborating Article 5 of the same statement that" no one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment degrading, we show that the recognition of equal and inalienable rights is the foundation of freedom and justice and assures the inherent dignity of the human person.

Also, by defining the notions of torture, inhuman and degrading treatment, the mode of violation of inalienable rights is reversed. To produce intentional, systematic and cruel physical or mental suffering, acting on their own initiative or on the basis of order, in order to compel certain persons to confess or give information, was defined as torture. This definition is also found in the Tokyo Tokyo Declaration on Torture and Degrading Treatment in 1975, developed by the World Medical Association, a declaration to which Romania has joined and is currently a party, and putting a person in serious danger through action, treatments of any kind, affecting physical or mental condition, are inhuman and degrading treatment.

From the perspective of human rights, the definition of "torture" involves four aspects:

- torture as a violation of human rights;
- torture as dehumanization, cruelty and degradation;
- prophylaxis of torture;
- the moral reward of the victim and her psychological recovery.[7]

The history of torture has its origins since antiquity when prisoner torture was a practice accepted and maintained by special methods and equipment, and these forms of torture have always had physical, mental and social consequences on the victims. For a period of time in the nineteenth century, torture has disappeared from Western Europe, as evidenced by Victor Hugo's speech at the International Peace Congress of August 21, 1849, when he said that "a day will come when the cannon is a piece of museum, such as the tools of torture today. And we will wonder that these things have ever existed! "But the twentieth century was the culmination of the ways of physical and mental torture.

As a result of these issues, in 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms stated, with imperative value, by the provisions of Article 3 that: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment" .

Definitions of the concepts in Article 3 of the European Convention have been made by jurisprudence. In the case of Ireland v. The United Kingdom (1978), the Court differentiated the three basic notions of Article 3 by the degree of severity of treatments or punishments:

a) torture: intentional inhuman treatment that causes very serious and very cruel suffering; the three main elements of torture are, therefore, the intensity of suffering, intent and purpose.
b) inhuman treatment or punishment: the application of intense, physical or mental suffering.
c) degrading treatment: treatment that creates a feeling of fear, restlessness and inferiority to the victim, which humiliates, degrades and eventually breaks his physical or moral resistance. Degrading treatment considers those grave human dignity, proving to be capable of descending the social status of a person, its situation or reputation may be considered to constitute such treatment, within the meaning of Art. 3 of the Convention, if it reaches a certain degree of severity.[8]

In ECHR case law, Article 3 is particularly applicable in cases considered inhumane, such as the situation of excessive police procedures in the event of arrest or interrogation, failure to ensure detention conditions, overcrowding of penitentiaries, failure to provide adequate medical care for private individuals the situation of degrading conditions in the case of hospitalization of mental health patients in psychiatric services, extradition or deportation to a country that does not guarantee the assurance of respect for human rights etc.

Thus, the provisions of the article also imposed the obligations of the state authorities not to apply any form of inhuman or degrading treatment to persons under their jurisdiction and the obligation to protect the physical and mental integrity of such persons.

Also, the International Covenant on Civil and Political Rights, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (known under the English acronym CAT -

[6] Preamble to the Universal Declaration of Human Rights

[7] Ruxandra Cesereanu, Panopticum Essay on Torture in the 20th Century, 2014, Polirom Publishing House, 2nd Edition, Introduction

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Convention Against Torture) or the European Convention for the Prevention of Torture of the Council of Europe are the most known norms and, at the same time, mandatory for the states that have ratified them. A number of other documents, such as the Beijing Rules (detention regime, mainly for minors), or the Istanbul Protocol with Practical Guides for Doctors and Legal Practitioners, the Minimum Basic Rules in Prisons in the UN version and the The Council of Europe and many others that should be applied by all democratic states or self-defining as such. Besides, there are a lot of studies, textbooks, reports, etc. in the field, drawn up by national and international human rights organizations or by independent experts.[9]

The European Court of Human Rights has the role of supreme protector of human rights norms in Europe. However, the European system of human rights is based on the expectation that Member States will provide the first line of defense. In particular, the national courts are expected to reflect ECHR jurisprudence in their day-to-day practice. This suggests a constructive interaction of national legal systems with the jurisprudence of the European Court of Human Rights. Thus, the focus is clearly and firmly on the national implementation of human rights guarantees. [10]

In this context, each State that has adhered to these norms has been required to put in place legislative, administrative or other necessary and effective measures to prevent acts of torture or other inhuman or degrading treatment.

The responsibility of the Romanian state for the prevention of torture and inhuman and degrading treatment was materialized by the following measures:

**A. Legislative measures**

On 9 October 1990, by promulgating Law No 19, Romania adhered to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and thus has the first legislative measures to establish a mechanism for the prevention of torture and inhuman treatment and degrading.

In the same context, by the adoption of the Constitution of Romania, on 21 November 1991, Chapter II - Fundamental Rights and Freedoms, Article 22 - Right to life and physical and mental integrity, paragraph (2), the provisions of Art. 3 of the European Convention on Human Rights: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Also, in order to express the obligation of the Romanian state to protect people from any act of torture, inhuman or degrading treatment, the domestic criminal law provides for and sanctions these acts as criminal offenses.

According to the provisions of Law no.286 / 2009 on the Criminal Code, torture is found in art. 282 and is considered by the legislator as a crime against justice, and not as a crime against the person as we would have believed, given that at international level torture is a violation of human rights, being a direct act of the person's physical and mental integrity. In this context, this classification suggests that the main subject of protection is in the proper administration and implementation of justice. Even if history shows that, over time, acts of torture have been committed, most often, in order to obtain information or statements during the exercise of state authority, in the current form of the classification of the legal provision in the Criminal Code, we consider that the protective purpose against the practice of torture is reduced only to the assertion of justice, which would be a restrictive approach to the spirit and nature of the prohibition of torture stipulated in international rights,

The objective aspect of the torture offense referred to in paragraph (1) of Article 282 of the Criminal Code is manifested by the offense of a civil servant who performs a function involving the exercise of authority or other person acting upon his instigation or with his express or tacit consent, , which results in a strong physical and mental suffering to a person. The term "deed" has a general meaning, including any activity or omission that is likely to cause severe physical pain or mental suffering, which may result in the death of the person, and is deemed consumed from the time of their occurrence. Incriminating torture is punishable by imprisonment and the ban on the exercise of certain rights.

As regards the state's responsibility for sanctioning inhuman and degrading treatment, the Romanian criminal law has criminalized these actions under the name of ill-treatment, the provisions of which are found in Article 288 of the Penal Code. The contents of this article bring together acts that affect the work of justice, preventing the pursuit of the purpose of safety or educational measures and of deprivation of liberty.

The aggravating variant of the offense of subjection to ill-treatment, provided for in paragraph (2) of Article 281, is formulated under the influence of the provisions of the European Convention on Human Rights and has the following content:

*"(2) The subjection to degrading or inhuman treatment of a person in detention, possession or execution of a security or educational measure, depriving of liberty, shall be punished by imprisonment from one to five years and the prohibition of the exercise of the right of to hold a public office. "*

Taking into account that the provisions of art. 281 Penal Code are aspects requiring the correct execution of criminal law sanctions measures, the legislator addressed these obligations both in the Law no.253 / 2013 on the execution of punishments, educational

[9] https://andreivocila.wordpress.com/2011/01/30/prevenirea-torturii-si-a-pedepselor-sau-tratamentelor-inumane-sau-degradante-2/accesat în 18.03.2019

[10] Jim Murdoch Vaclav Jiricka, Penitentiary System Manual on Prevention ill-treatment in penitentiaries, combating ill-treatment in penitentiaries, Cover and Format: SPDP, Council of Europe, page 11 https://rm.coe.int/2

measures and other non - Freedom by the judicial bodies in the course of criminal proceedings, art. 7 paragraph (2), which states that the execution of punishments, educational measures and other measures ordered by the judicial bodies can not involve the application of inhuman or degrading treatment, No.254 / 2013 on the execution of sentences and detention measures ordered by the judiciary in the criminal proceedings, where, under Article 5, imperative, it is forbidden to obey any person in the execution of a sentence or a measure depriving himself of liberty torture, inhuman or degrading treatment or other ill-treatment.

**B. Administrative measures to prevent torture, inhuman or degrading treatment**

The daily improvement of the protection of human rights is one of the fundamental tasks of the Council of Europe. To this end, he has set four main lines of action:

- establishment of effective control and protection systems for fundamental rights and freedoms;
- identifying new threats to human rights and human dignity;
- raise public awareness of the importance of human rights;
- promoting education and training in the field of human rights[11].

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) is set up at European level in 1987 to establish effective control and protection systems for fundamental rights and freedoms[12].

Following the European model, in order to monitor the promotion and respect of human rights, the Romanian State created an independent and autonomous institution, called the People's Advocate Institution, with the purpose of protecting the rights and freedoms of individuals in their relations with public authorities . The institution was established by Law no. 35/1997 on the organization and functioning of the People's Advocate Institution, and has been designated as the only national structure that fulfills the specific attributions of the National Mechanism for Torture Prevention in places of detention.

The field of prevention of torture in places of detention within the People's Advocate Institution resolves petitions addressed to the institution about torture, cruel, inhuman or degrading treatment in places of detention, and visits or inquiries to address these issues. In the prevention and monitoring of acts of torture or ill-treatment, the People's Advocate Institution cooperates with the representatives of NGOs, as the participation of representatives of non-governmental organizations is mandatory for the visits to the places of detention.

The People's Advocate presents reports to the Romanian Parliament annually or at his request, and part of these reports also refer to the field's activity to prevent torture in places of detention.

Also, the Ministry of Justice and the National Penitentiary Administration oversee the observance of the rights of the persons deprived of their liberty through the control structures (the Control Corps of the Minister of Justice and the Penitentiary Inspection Department) and check any activity that raises suspicions of the act of torture or bad treatments.

As has already been pointed out, in domestic criminal law, in the case of torture in the type variant, the guilt is the direct intention, but a subjective part is included outside the intent. In this context, in order to establish the existence of the torture offense, it must be committed for the purpose of obtaining information or statements or for the purpose of punishing the person for an act which he has committed or is suspected of committing or intimidating or to put pressure on it or on a ground based on any form of discrimination. If the deed is followed by the death of the victim, then the conditions of the aggravated variant are fulfilled, and in case of subjection to ill-treatment, their pursuit is only criminalized if the victim is in the state of restraint, detention or in the execution of a safety measure or educational deprivation of freedom. With such a case, which took the form of a crime of torture and other ill-treatment, faced the Romanian penitentiary system, in 2010, when 13 civil servants with special status of the Galati Penitentiary were sent to trial due to the eviction treatments for CS prisoner aged 36, who degenerated with the death of the victim on June 4, 2010. The person of liberty C.S. was in custody of the Galati Penitentiary on June 1, 2010, as a result of a term of execution of a three-year prison sentence for theft. When placed in a penitentiary, the medical assessment did not reveal acute medical conditions, but it was established that the person in question was known as a chronic alcohol consumer, for whom he had received medical care 1 year ago. On June 4, 2010, the National Penitentiary Administration announced that the person in custody died as a result of a delirium tremens due to sudden alcohol withdrawal, a syndrome that culminated in a cardio-respiratory arrest. At that time, apparently the person deprived of liberty did not show signs of bodily violence, had been washed and cared for, but the autopsy one day after death revealed that the person deprived of liberty had “straight C6-C11 fractures with anterolateral C7 - C9, retroperitoneal right haematoma and thoraco-abdominal trauma with hepatic crack and renal rupture “, medical certificate of death no. 293 / 05.06.2010 establishing that the person deprived of liberty died as a result of a cardiac arrest caused by the traumatic shocks he was subjected to.

[11] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment - Convention text and Explanatory report, Series of European Treaties - 126. Amended text in accordance with the provisions of Protocol Nr. 1 (STE No. 151) and Nr. 2 (STE No 152) which entered into force on 1 March 2002

[12] Jim Murdoch Vaclav Jiricka, Penitentiary System Manual on Prevention ill-treatment in penitentiaries, combating ill-treatment in penitentiaries, Cover and Format: SPDP, Council of Europe, page 11 https://rm.coe.int/2

In this context, informing the National Administration of Penitentiaries and the criminal investigation bodies was immediate, but there were many unknowns about this negative event. Immediately the National Administration of Penitentiaries established a first control team to carry out the first checks at the Galati Penitentiary, which would identify that the person deprived of liberty had suffered several psychomotor agitation episodes for which he had been immobilized in bed with means of immobilization - handcuffs metal, and during this time he made his physiological needs in bed. At this first check from the National Penitentiary Administration, in collaboration with the criminal investigation authorities, it was argued that the detainee could have been beaten to death by the other detainees. However, the documents drawn up by the penitentiary, both operative and medical, gave rise to certain misinterpretations in the description of the event, which led to the creation of a new control team, of which he was also a member. For an uninterrupted period of two days, all the aspects that have been carried out were analyzed and all the attempts to cover up the employees of the Galati penitentiary were countered. The images recovered from the surveillance cameras also had a significant impact on the control team, and the moments when the detainee was handcuffed and lengthened on the detention facility's lobby were punched and legged by penitentiary employees and dragged along the length of the hall, while the hitting of the employees continued.

Following this event, the National Penitentiary Administration has stepped up its training and awareness actions on the obligation to respect a person's physical and mental integrity, irrespective of their status or judicial status.

**Ensuring material conditions of detention**

The constant development of jurisprudence regarding the treatment of detainees is directly attributable to the impact of CPT standards. The European Court of Human Rights states that the effects of prolonged exposure to degraded material conditions of detention may be such as to constitute ill-treatment or, alternatively, may exacerbate other forms of treatment or punishment so as to rely on Article 3 of the Convention. The CPT request is that each detainee has at least 4 m2 of personal space in cells for multiple accommodation, this being the minimum standard. The standardization provided by the CPT, which has been driven by concerns not only to prevent ill-treatment but also to combat the psychological effects of imprisonment, has directly prompted the European Court of Human Rights to adopt a firmer approach to detention conditions. Thus, it is to be expected that the state authorities will ensure that the detainee's detention under conditions that are "compatible with respect for his human dignity, that the manner and method of execution of the measure do not subject him to an attempt or suffering of an intensity exceeding the inevitable level of suffering inherent in detention and that, given the practical requirements of incarceration, and that his or her health and well-being are adequately ensured, in particular by providing the necessary medical assistance."[13]

In this context, ensuring the conditions of detention is another responsibility of the Romanian state against the application of ill-treatment and one of the main preventive actions is the reduction of overcrowding in penitentiaries.

**Combating overcrowding in penitentiaries**

The first cases of convictions in the European Court of Human Rights against the Romanian state were recorded in 1998. In July 2012, a ruling was made in the case of Iacov Stanciu, where the ECHR noted that, despite the efforts of the Romanian authorities to improve the situation conditions of detention, there is a structural problem in this area. The decisive element in this context was the pilot judgment of 25 April 2017 in Rezmiveş and Others v. Romania, whereby the Court requested the Romanian State to provide within a period of 6 months from the date of the final judgment of the decision to provide a calendar precisely for the implementation of appropriate general measures to address the problem of overcrowding and inadequate detention conditions, in accordance with the principles of the Convention.[14]

As a result of these issues, new legislative measures have been developed to impose the standardization of detention facilities in line with international recommendations and in particular those of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. By the Order of the Minister of Justice no. 2772/C/17 October 2017 were approved the mandatory minimum standards regarding the conditions of accommodation of persons deprived of their liberty, stipulating in Article 1, paragraph (1) of the Annex to the norms, that the spaces intended to accommodate persons deprived of their liberty must respect human dignity and meet minimum sanitary and hygienic standards and, in accordance with paragraph (3), the accommodation rooms shall be arranged (...) for the purpose of allocating more than 4 spaces m2 for each person deprived of liberty". The National Penitentiary Administration permanently monitors the number of persons deprived of their liberty in each subordinate unit in terms of accommodation capacity (calculated at 4m2, 6m2 and 7m2 depending on the specifics of the place of detention), the number of beds installed and the occupancy index.

Therefore, the new legal provisions require minimal detention conditions. Also, the entry into force of Law no. 169/2017 by establishing a compensatory mechanism for the benefit of detainees consisting of 6

[13] Jim Murdoch Vaclav Jiricka, Penitentiary System Manual on Preventionill-treatment in penitentiaries, combating ill-treatment in penitentiaries, Cover and Format: SPDP, Council of Europe, pg.27 https://rm.coe.int/2

[14] National Administration of Penitentiaries, Annual Activity Report 2018, p.8

days deemed to have been executed for a period of 30 days in custody in detention facilities was an acceleration in order to implement the measures taken at at the national level, in the wider context of the Memorandum on the "Approval of the 2018-2024 timetable for the resolution of overcrowding and detention conditions in the execution of the judgment in Rezmiveș and Others v. Romania, delivered by the ECHR on 25 April 2017".[15]

The entry into force of the Compensation Act directly influenced the evolution of the number of detainees detained by the penitentiary system. Thus, since the entry into force of the Law, there has been a steady decrease in the number of custodial detainees, with direct positive consequences on accommodation standards, the increase of the minimum individual space insured in the detention room, but also the easier access to the range of activities and programs available in the detention environment.[16]

Since 2017, other measures to reduce overcrowding have focused on increasing and modernizing accommodation capacity by investing in design services for the design of 2 new penitentiaries - the Berceni Penitentiary with 1000 seats and the Unguriu Penitentiary with 900 accommodation places, as well as on improving the material conditions of detention.

**Providing medical assistance to persons deprived of their liberty**

The provisions of Article 3 of the Convention prohibiting torture, punishment or inhuman or degrading treatment are closely linked to the protection of the right to life provided for in Article 2, implicitly by guaranteeing an adequate state of health.

Thus, medical care must be given to each detainee properly and failure to guarantee the physical integrity of a detainee by providing appropriate medical care can lead to a violation of Article 3 of the Convention. The essential point is that inappropriate healthcare can quickly generate situations that fall under Article 3, which prohibits "inhuman or degrading" treatment. A sudden deterioration in the health of a prisoner inevitably gives rise to problems related to the adequacy of health care, and state authorities will be obliged to respond to the treatment they apply to inmates. Thus, there is a need to ensure that a detainee's health is monitored on a regular basis not only at the time of receiving, but also throughout the discharge of deprivation measures.[17]

Concerning the provision of medical assistance in prisons, the following principles are closely monitored by the CPT:

a) Access to doctors;
b) Equivalence of medical assistance from the penitentiary to the public health system;
c) Patient Consent and Privacy;
d) Preventive health care (hygiene, communicable diseases, prevention of suicide and violence, social and family ties);
e) Humanitarian medical assistance (vulnerable: mother and child, adolescents, pathological personalities, serious conditions / disease terminals);
f) Professional independence of medical staff;
g) Professional competence

In this respect, Romania's intention to improve the medical assistance of persons deprived of their liberty has materialized through the organization of their own health care network for the provision of medical assistance to detainees, under the coordination of the National Administration of Penitentiaries. The sanitary network of the National Penitentiary Administration serves the entire penitentiary population on the territory of Romania in order to maintain, improve health, and has subordinate family medicine cabinets, dental clinics and 6 hospital penitentiaries.

The medical staff in the facilities shall ensure that the persons deprived of their liberty are protected in case of aggression, so any traumatic bodily injury found in the medical examination of the detainees (especially as a result of violent incidents in the penitentiary, but also in other situations where integrity is affected body of detainees) is duly documented, with three key points being pursued:

a) recording as accurate as possible of objective findings regarding traumatic lesions (number, type, anatomical location, shape, color, dimensions, etc.);
b) recording the detainee's statements about the circumstances and how to produce the traumatic bodily injuries found (whether or not he / she declares in writing how the injuries have occurred, the medical establishment that he / she has found is obliged to summarize - under his / her signature - the detainee stated in his presence), and in the case of a refusal to declare or an inability to speak, a record of the fact that the person refuses / does not wish to declare the origin of the traumatic injuries is drawn up;
c) The examining physician distinctly records his conclusions on the compatibility of the objectively ascertained with the detainee's statements (ie, if the injuries are consistent with, or consistent with, those declared; However, this conclusion of the examination is by no means a finding forensic medicine on the cause or origin of injuries in terms of a causal relationship, but expresses only the opinion of the examining physician on the findings made - namely the extent to which the physician perceives or not a discrepancy between the declared and the established ones, thus a possible

[15] National Administration of Penitentiaries, Annual Activity Report 2018, p.3
[16] National Administration of Penitentiaries, Annual Activity Report 2018, p.10
[17] Jim Murdoch Vaclav Jiricka, Penitentiary System Manual on Prevention ill-treatment in penitentiaries, combating ill-treatment in penitentiaries, Cover and Format: SPDP, Council of Europe, pg.33 https://rm.coe.int/2

tendency to dissimulate the reality of the facts), the confirmation of these injuries is done by presenting the detainee to legal medicine;

Both the traumatic lesions identified during the examination of the newly detained detainees and those found after the violent incidents with aggression in the penitentiary are recorded chronologically in a unique register called the "Traumatic injuries register", and each position (current number) in the Register of traumatic injuries corresponds to an information note detailing the lesions found by both a morphological description and an annex containing their topographic representation on predefined topographic anatomical sketches such as those set out in the Istanbul Protocol and the Minnesota Protocol . This Information Note contains the medical information which, in conjunction with information on the circumstances of the occurrence of the event, serves the penitentiary unit when drawing up the immediate notification of the facts, to the territorial unit of the prosecutor's office and informing the judge of the deprivation of liberty about the incident with traces of violence body.

The CPT's recommendation is that there is a positive trust-based relationship between the treating physician and the patient as an essential factor in keeping and promoting the health and well-being of detainees.

According to the ECHR jurisprudence of recent years, the vulnerability of the Romanian state in the provision of medical assistance in the penitentiary system was due to the shortage of specialists employed in the penitentiary system, especially the psychiatrists, the non-dental care and the dental prostheses required for the detainees with dental conditions.

**Responsibilities in case of violence among detainees**

Along with the negative obligation of essentially not applying ill-treatment or causing the death of a person, the ECHR imposes significant positive obligations on state authorities. These obligations are especially important for penitentiary employees. The basic prerequisite is that detainees are in a vulnerable position precisely because they are in prison and thus state authorities have to counterbalance this vulnerability by adopting effective measures to protect them. This is particularly important in terms of violence among detainees. Penitentiary employees must ensure adequate protection against other detainees known to pose a threat to their offenders.[18]

This aspect has been materialized at the level of the penitentiary system in Romania, starting with 2014, through the implementation of a Strategy for the reduction of aggressive behaviors in the penitentiary environment, consisting mainly of the creation of multidisciplinary teams (medical staff at the level of each penitentiary unit) , psychologist, operative staff) who analyze all the aggressive behavior of the individuals to be released, interfering and counseling the persons deprived of their liberty. Annually, data on adverse events is analyzed from a multidisciplinary perspective and at the level of the National Penitentiary Administration in order to establish necessary adjustments for the measures to be integrated into the Annual Implementation Plan.

**Immobilization of detainees**

The mode of immobilization of detainees was another issue debated in ECHR judgments against the Romanian state as ill-treatment of detainees. The ECHR convictions in these cases have led to a new legislative approach, through the approval of the Order of the Minister of Justice no. 4800 / C / 2018 on the Regulation on the Safety of Detention Locations, normative act adapted to ECHR requirements and CPT recommendations. Thus, the description of the means of protection and immobilization used in stages, have been transposed as legal provisions in Article 12, paragraph (2), as follows:

*"(2) In order to prevent escape during the movement of persons deprived of their liberty, in order to protect persons deprived of their liberty from self-destruction, as well as to prevent the injustice of others or the damage, or to restore order and discipline, as a result of the opposition or resistance of the detainees to a provision of the judicial bodies or the staff of the place of detention shall be used, under the conditions of art. 16 of the Law, as the means of protection and immobilization, the following:*

a) metal handcuffs - a device made up of two metallic rings joined together, which applies to persons deprived of their liberty in accordance with the law, in order to limit their physical mobility;
b) Immobilisation belts - hand-made handcuffs fitted with a gripping system around the waist, which applies to persons deprived of their liberty who, by their behavior, risk to disturb the order and safety of their activities while traveling to the judicial bodies, sanitary units from outside the penitentiary system or other places outside the place of detention, on the occasion of the transfer from one place of detention to another and for journeys within the place of detention, in duly justified cases;
c) Hand-held disposable handcuffs - Resistant plastic devices to restrict the physical mobility of the upper limbs. (...);
d) means of immobilization during the movement / transport - hand-held metal handcuffs and legs of metal legs, which allow movement and are applied to the persons deprived of their liberty, following the analysis of the risk situation for each of them. These means apply during travel to the judicial organs, sanitary facilities outside the penitentiary system, other places outside the detention facilities, as well as during the transfer from one place of detention to another, including for journeys inside the place of detention, in duly

[18] Jim Murdoch Vaclav Jiricka, Penitentiary System Manual on Prevention ill-treatment in penitentiaries, combating ill-reatment in penitentiaries, Cover and Format: SPDP, Council of Europe, pg.28 https://rm.coe.int/2

justified situations;

e) Immobilization belts made of leather or textile material - are used in the case of persons deprived of their liberty who have personality or mental disorders in the decompensated phase, mentally retarded people with behavioral decompensation, those with psychomotor agitation with a high risk of car and / or heteroagression, of various etiologies, maintaining them until the effects of sedative drugs are established. They can also be used to immobilize other persons deprived of their liberty to prevent escape, or to endanger the safety of possession, threaten the life and integrity of staff or other persons, or to prevent the destruction of property. Immobilizing belts in leather are made to secure, separately, immobilisation of hands or legs. The textile strap can be used if immobilisation by means of leather straps is not sufficient if persons deprived of their liberty seek to destroy or remove medical equipment, attempt to become self-righteous or aggressive; it is applied over the chest and clings to the bed. The straps must be applied in such a way that they do not cause injuries or cracks, and after each application, check that the safety mechanisms are in operation.

## Conclusions

Aspects presented in the essay present only the main responsibilities of the Romanian state in transposing the recommendations of international human rights organizations. In this context, the efforts of the Romanian legislator to comply with the required standards should be emphasized, especially if a comparative analysis is made with the provisions prior to the conventions and pacts to which the Romanian state has joined or participates.

To avoid the emergence of negative aspects in the fight against torture and ill-treatment, it is necessary to strengthen the notion of professionalism among civil servants by adopting ethical standards and responsibilities to avoid any form of discrimination, provocative behavior that can lead to physical or psychological maltreatment.

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# FREEDOM OF THOUGHT, OPINION, AND RELIGIOUS BELIEFS IN THE CASE OF PERSONS DEPRIVED OF THEIR LIBERTY

**Radu Florin GEAMĂNU***

**Abstract**

*This paper[1] deals with the issue of freedom of thought, opinion, and religious beliefs in the case of persons deprived of their liberty.*

*The study has a first part which consists in a presentation of the international standards (United Nations, Council of Europe, European Union), followed by a presentation of the national standards (the freedom of thought, opinion, and religious beliefs being a fundamental freedom, prescribed by the Romanian Constitution).*

*An analysis is made based on the European Convention of Human Rights and of the European Prison Rules, in relation with national legal framework, touching the essential aspects of the freedom of thought, opinion, and religious beliefs in the case of persons deprived of their liberty: the exercise of the freedom of conscience and opinions, as well as of the freedom of religious beliefs; organization of religious service in prisons; proportionality of the measures ordered by the penitentiary administration; the limits of exercising the freedom of conscience and opinions, as well as the freedom of religious beliefs.*

*Further, the paper focuses on the main ECtHR judgements dealing with possible infringements of art. 9 from the European Convention, dealing with freedom of thought, opinion, and religious beliefs and then focuses on the national case law in this field.*

*Concluding, the study attempts to asess the national legislation and case law pleading on taking into consideration the solutions rendered by the ECtHR in its judgments, which can and should be applied at national level, in order to ensure the uniformity of judicial practice.*

**Keywords:** *prison; persons deprived of their liberty; freedom of conscience; religion; ECHR; ECtHR; Romanian legislation*

## 1. Introduction

Freedom of conscience, fundamental freedom, is traditionally included in the category of social and political rights and freedoms. As claimed by the doctrine[1], it is one of the first freedoms in the human rights catalogue, because especially religious freedom - as part of the freedom of conscience[2] - has had a long, long history, streaked with intolerance and rushes, with excommunication and prejudice, with many suffering and pain.

Individuals must be free in exercise of this, one of the most fundamental human rights available, to determine his or her own theological or philosophical convictions and to manifest such beliefs free from State interference, at least insofar as the religious practice does not infringe or impede the exercise of the fundamental rights of others.[3]

This absolute freedom to entertain any thought, moral conviction or religious view is not entirely without practical importance. It is true that thoughts and views, as long as they have not been expressed, are intangible and that valuable for the person concerned if he can express them. But that does not render the (inner) freedom of thought, conscience and religion useless. This guarantee also implies that one cannot be subjected to treatment intended to change the process of thinking (’brain-washing’), that any form of compulsion to express thoughts, to change an opinion, or to divulge a religious conviction is prohibited, and that no sanction may be imposed either on the holding of a view or on the change of a religion or conviction; it protects against indoctrination by the State.[4]

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[1] This paper is based on the research realised in the 3rd Chapter. Analysis of the rules applicable to persons deprived of their liberty, 4th Section. Freedom of thought, opinion, and religious beliefs, R. F. Geamănu, *Mijloace de protecție a persoanelor condamnate la pedepse privative de libertate* (Bucharest: Universul Juridic, 2019).

[1] I. Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice [Constitutional law and political institutions]*, 12th edition, volume I (Bucharest: All Beck, 2005), 180.

[2] We do not support the opinion expressed in the specialist literature - Ghe. Iancu, A.I. Iancu, *Evoluția unor drepturi fundamentale în contextul social actual [The evolution of fundamental rights in the current social context]* (Bucharest: C.H. Beck, 2017), 6 -, according to which freedom of conscience is also known as "religious freedom", as in our opinion there is no equivalence between the two notions, but a whole - part relationship.

[3] R. K.M. Smith, *Textbook on International Human Rights*, 5th edition (Oxford: Oxford University Press, 2012), 207.

[4] P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak (editors), Theory and practice of the European Convention on Human Rights, 4th edition (Antwerpen-Oxford: Intersentia, 2006), 752.

## 2. Freedom of thought, opinion, and religious beliefs

### 2.1. International standards

At *international level*, Universal Declaration of Human Rights, in art. 18, sets out the principle according to which, "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

Similar provisions are to be found in art. 9 (freedom of thought, conscience and religion) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) and art. 10 (freedom of thought, conscience and religion) of the Charter of Fundamental Rights of the European Union.

The authors of the European Convention understood to protect not only the private and family life of the individual, his correspondence and his domicile, but also his "inner forum", namely the thought, conscience and religion he chooses. In the process of thinking, the individual forms certain beliefs; as a social being, he needs to manifest his beliefs - often attached to the embrace of a certain religion - externally to other fellows or with them.[5]

In the context of international legal instruments, it should be underlined that the freedom of opinion, conscience and religion is also regulated at special level, namely for the persons deprived of their liberty. We take into account the provisions of rules 65 and 66 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), the first instrument developed under the auspices of U.N. which protects people deprived of their liberty.

Also, the European Prison Rules, in rule 29 set out the basic principles regarding the freedom of thought, conscience and religion, which shall be respected; as a consequence, inmates "may not be compelled to practice a religion or belief, to attend religious services or meetings, to take part in religious practices or to accept a visit from a representative of any religion or belief."

This entails two aspects: first, the right of prisoners to manifest their religion or belief and to receive religious or moral support, which is particularly important in the context of deprivation of liberty; and secondly, the right of prisoners not to be compelled to adopt any form of religion or belief.[6]

### 2.2. Relevant internal legislation

At *national level*, freedom of thought, opinion, and religious beliefs is regulated, as a basic principle, in art. 29 paras. (1) and (2) of the Romanian Constitution, according to which these liberties "shall not be restricted in any form whatsoever. No one shall be compelled to embrace an opinion or religion contrary to his own convictions. Freedom of conscience is guaranteed; it must be manifested in a spirit of tolerance and mutual respect."

From a legal point of view, freedom of conscience, as it is formulated in our Fundamental law, is a single right, a single freedom, which incorporates, as it can be observed, several aspects that need to be considered together.[7]

In detail, the legal framework is established by the provisions of Law no. 489/2006 on religious freedom and the general status of denominations[8]. Thus, according to art. 1 and 2, "the Romanian State observes and guarantees the fundamental right to freedom of thought, conscience and religion for any individual on the territory of Romania, under the Romanian Constitution and the international treaties Romania is a party to. No one shall be prevented from adopting a religious opinion or joining a religious faith, no one shall be coerced into adopting a religious opinion or joining a religious faith, contrary to his/her persuasion, and no one shall be subject to any discrimination, or be harassed or placed in an inferior position on account of their faith, membership or non-membership in a religious group, association or denomination, or for the exercise, within the law, of their freedom of religion.

Freedom of religion includes the right of every individual to have or embrace a religion, to manifest it individually or collectively, in public or in private, through practices and rituals specific to that denomination, including through religious education, as well as the freedom to preserve or change one's religion. The freedom to manifest one's religion cannot be subject to any restrictions other than those required under the law and which are necessary in a democratic society for the protection of the public, of public order, health or morality, or for the protection of fundamental human rights and liberties."

The special rules, which concern the persons deprived of their liberty, are provided by art. 58 of the Law no. 254/2013 on enforcement of custodial penalties and of measures ordered by the judicial bodies during the criminal proceedings[9] (Law no. 254/2013), art. 124 of the Regulation on implementing the

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[5] C. Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole. Volume I. Drepturi și libertăți [The European Convention on Human Rights. Comment on articles. Volume I. Rights and freedoms]* (Bucharest: All Beck, 2005), 697.

[6] D. van Zyl Smit, S. Snacken, *Principles of European prison law and policy. Penology and human rights* (Oxford: Oxford University Press, 2011), 207.

[7] M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român [European Human Rights Protection and the Romanian Criminal Procedure]* (C.H. Beck Publishing House, Bucharest, 2008), 231.

[8] Law no. 489/2006 on religious freedom and the general status of denominations, republished in the *Official Journal of Romania, Part I, no. 201 of March 21, 2014.*

[9] Law no. 254/2013 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings, published in the *Official Journal of Romania, Part I, no. 514 of August 14, 2013*.

provisions of the Law no. 254/2013[10] (Regulation) and the Order of the Minister of Justice no. 4000/C/2017 for the approval of the Regulation regarding the religious assistance of the persons deprived of their liberty in the prison system[11] (Order of the Minister of Justice no. 4000/C/2017).

**2.3. Specific aspects regarding the persons deprived of their liberty**

Historically, religion played a large part in shaping prison regimes, In Europe early historical connections between the evolution of the prison and the monasteries are well documented, while attempts to reform prison regimes at the end of the 18th century owed much to the Christian beliefs of moral entrepreneurs, such as John Howard and his successors. Religious groups have continued to focus on prisons and to attempt to influence the spiritual lives of prisoners.[12]

Prison authorities will be expected to recognize the religious needs of those deprived of their liberty by allowing inmates to take part in religious observances.[13]

The special primary legislation has only taken over the principles already enshrined in Romanian Constitution, so that art. 58 paras. (1) and (2) of Law no. 254/2013 states that "freedom of conscience and of opinions, as well as freedom of religious beliefs of the convicted persons cannot be restricted. The convicted persons shall have the right to freedom of religious beliefs, without prejudice to the freedom of religious beliefs of the other convicted persons".

Because of the specific nature of the organization of the penitentiaries, such a legal framework, regulated only in general termn and declarative norms, would have been insufficient, risking generating only formal regulation and not an effective exercise of freedom of conscience, with all its components, especially religious freedom.

As a consequence, it was necessary to create a system of legal provisions that would contain some technical, precise and complete provisions designed to ensure full respect for the freedoms of thought and their effective exercise by persons deprived of their liberty:

a) The exercise of the freedom of conscience and opinions, as well as of the freedom of religious beliefs in the case of persons convicted of deprivation of liberty. The right of the individual to manifest his beliefs presupposes that any person can manifest his/her own beliefs, individually or collectively, publicly or in a private setting, manifesting, first of all, through cult and rites - especially in prison -, as well as through "practices".[14]

Inmates may declare on their free consent the confession or religious affiliation at the entrance to the place of detention and subsequently during the execution of the punishment [art. 124 para. (3) of the Regulation on implementing the provisions of the Law no. 254/2013].

According to art. 58 para. (3) of the Law no. 254/2013, the convicted persons may attend, based on free will, to sermons or religious meetings organized in penitentiaries, may receive visits from the representatives of that denomination and may acquire and hold religious publications, as well as worship objects.

Without prejudice to free consent to the choice of confession or religious affiliation, secondary legislation has established an administrative procedure for the change of religion, as well as some rules on giving inmates the possibility of attending cults or beliefs, as a precondition for changing confession or religious affiliation.

Thus, the change of confession or religious affiliation during the period of detention is proved by a declaration on its own responsibility and by the act of affirmation of belonging to that cult. Where a change of religion is envisaged, inmates are allowed to participate in the meetings of that cult or faith, with the agreement of their representatives and taking into account the specific security measures, the daily schedule and the number of participating inmates. Prisoners are informed that changing religion is a major decision that can affect their relationship with family members, their dependents or others [art. 124 paras. (4) and (8) of the Regulation on implementing the provisions of the Law no. 254/2013].

In applying the constitutional principles on the freedom of religious beliefs, paras. (6) and (7) of art. 124 of the Regulation establish the right of inmates to exercise their religion or belief in a real and effectively manner, by granting them the possibility of requesting confidential discussions with representatives of religious denominations or religious associations recognized by law and, on the other hand, the protection of this category of people against possible constraints on the adherence, change or renunciation of their own religious beliefs in the sense that inmates cannot be compelled to practice any religion or adopt any beliefs, participate in religious meetings, accept the visit of a representative of a cult or religious faith.

[10] Government Decision no. 157/2016 on the approval of the Regulation on implementing the provisions of the Law no. 254/2013 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings, published in the *Official Journal of Romania, Part I, no. 271 of April 11, 2016*.

[11] Order of the Minister of Justice no. 4000/C/2017 for the approval of the Regulation regarding the religious assistance of the persons deprived of their liberty in the prison system, published in the *Official Journal of Romania, Part I, no. 965 of November 29, 2016.*

[12] D. van Zyl Smit, S. Snacken, *Principles of European prison law and policy. Penology and human rights*, 207.

[13] J. Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, Human Rights Handbooks, 2012), 54.

[14] F. Sudre, *Drept European și internațional al drepturilor omului [European and international human rights law]* **(Bucharest:** Polirom, 2006), 344.

b) *Organization of religious service in prisons.* The set of regulations on the freedom of religious beliefs and religious assistance is capable to provide a lasting and profound connection between man and God or any other divinity. Practically, without being constrained, persons deprived of liberty can adopt the theism, as a conception of life, which can only help and discipline the person deprived of freedom by contributing to the education in the spirit of respecting religious and social values, with the consequence of successful reintegration into society. The situation is the same with regard to the adoption of atheism.

Of all the components of freedom of conscience, the freedom of religious beliefs required a number of special legal provisions to ensure a full and concrete external manifestation, through the organization of religious service in prisons and the access of persons deprived of liberty to it. In applying the provisions of art. 29 para. (5) of the Romanian Constitution, according to which the religious cults are autonomous to the state and enjoy its support, including through the facilitation of religious assistance in prisons, art. 124 para. (1) of the Regulation establishes the duty of the National Administration of Penitentiaries (N.A.P.) through the subordinated units to grant access to religious organisations and representatives recognized by the law in the penitentiaries in order to respond to the needs of religious assistance of the inmates on the basis of the written approval of the director of the penitentiary.

According to the provisions of art. 2 para. (2) from the Order of the Minister of Justice no. 4000/C/2017, in order to respond to the needs of religious assistance of persons deprived of their liberty, "specific activities in places of detention can be permanently secured by the Chaplain priests employees of N.A.P. or by representatives appointed by religious cults or associations, in compliance with their own canonical statutes or codes and legal provisions."

In order to effectively exercise the freedom of religious beliefs, the units subordinated to N.A.P. provides for "spaces allowing the exercise of the freedom of belief of persons deprived of their liberty in custody, with the assistance of representatives of religious denominations or religious associations recognized by law, whose confession they share" (Article 3 from the Order of the Minister of Justice no. 4000/C/2017).

Such a provision is in line with the regional standards in the field, provided in rule 29.2 of the European Prison Rules: "The prison regime shall be organised so far as is practicable to allow prisoners to practise their religion and follow their beliefs, to attend services or meetings led by approved representatives of such religion or beliefs, to receive visits in private from such representatives of their religion or beliefs and to have in their possession books or literature relating to their religion or beliefs."; according to the Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, so far as is practicable, places of worship and assembly shall be provided at every prison for prisoners of all religious denominations and persuasions. Also, approved representatives of religions should be allowed to hold regular services and activities and to pay pastoral visits in private to prisoners of their religion. Access to an approved representative of a religion should not be refused to any prisoner.

Also, the national provisions are in line with the provisions of rule 65 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), according to which, "if the prison contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis. A qualified representative appointed or approved in the previous mentioned conditions shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his or her religion at proper times."

"Representatives of religious denominations or religious associations who have access to the penitentiary may distribute to inmates publications and religious objects that can be kept by the inmates in a reasonable number. The reasonableness is determined by the number and size of publications, books and religious objects in possession of a detainee, without affecting his/her living space or the living space of other inmates, when the accommodation is shared." [art. 124 para. (5) of the Regulation]. Such a provision is in line with the international standards in the field - rule 66 of the Nelson Mandela Rules, according to which, "So far as practicable, every prisoner shall be allowed to satisfy the needs of his or her religious life by attending the services provided in the prison and having in his or her possession the books of religious observance and instruction of his or her denomination."

It is forbidden for the prison administration to interfere with the content of religious programs [art. 6 para. (2) from the Order of the Minister of Justice no. 4000/C/2017].

In other words, inmates should be able to received visits from a religious representative, and such contact should be in private, at least out of hearing of the prison staff.[15]

Moreover, from the perspective of the European Convention, the guarantee of freedom of thought, conscience and religion presupposes, first of all, a negative obligation on the part of the State authorities not to take any action or to refute any omission leading to a restriction of the effective exercise of these freedoms; such restraints are allowed only within the

[15] Association for the Prevention of Torture (APT), *Monitoring places of detention. A practical guide* (Geneva: Association for the Prevention of Torture, April 2004), 182.

limits strictly determined by the provisions of art. 9 para. 2 of the Convention and only with regard to freedom of religion and conscience, and not to freedom of thought.[16]

Concluding, we consider that the legal provisions in force are able to ensure the protection of inmates against possible abuses by the prison administration or third parties, by ensuring freedom of conscience, opinions and, above all, the freedom of religious beliefs.

c) *Proportionality of the measures ordered by the penitentiary administration.* Regarding the compliance of the penitentiary regulations, it was pointed out in the North American law system that, if the court decides your belief is religious and sincerely held, it will then apply the *Turner test* to the prison regulation or practice that you are challenging by asking whether a prison regulation "is reasonably related to legitimate penological interests," and therefore does not violate your constitutional rights[17]. Specifically, under Turner, a court will consider the following four factors:

- Whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest used to justify it;
- Whether there are other ways of exercising the right despite the regulation;
- If, by allowing you to exercise your right, there will be a "ripple effect" on others such as prison personnel, other prisoners, and on the allocation of prison resources; and
- Whether there is a different way for the prison to meet the regulation's goal without limiting your right in this way.[18]

For example, one federal court of appeal used the *Turner test* to rule that prison officials could prohibit religious items like a bear tooth necklace and a medicine bag in cells to protect the safety of other prisoners, prison guards, and the prisoner[19].

Also in the North American law system (*Schreiber v. Ault* case), a free exercise of religion claim failed. A prisoner believed for religious reasons that after his blood was used for routine medical tests it should have been poured on the ground and covered with dust; decontamination and disposal of prisoners' blood after medical testing was reasonably related to public health and safety concerns.[20]

We consider that such a test could also be used by national courts or by the judge in charge of the supervision of deprivation of liberty on the occasion of the examination of the violation of the freedom of conscience, opinions and freedom of religious beliefs provided for in art. 58 of the Law no. 254/2013.

d) *The limits of exercising the freedom of conscience and opinions, as well as the freedom of religious beliefs.* The fundamental nature of the rights guaranteed in article 9 para. 1 (art. 9-1) is also reflected in the wording of the paragraph providing for limitations on them. Unlike the second paragraphs of articles 8, 10 and 11 (art. 8-2, art. 10-2, art, 11-2) which cover all the rights mentioned in the first paragraphs of those Articles (art. 8-1, art. 10-1, art. 11-1), that of article 9 (art. 9-1) refers only to "freedom to manifest one's religion or belief". In so doing, it recognizes that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected[21]. In fact, there is a generous margin of appreciation from State authorities in this field[22].

The closed environment and the constraints inherent in the execution of the custodial sentences imposed the regulation of some normal limits for the exercise of religious freedom, which would enable each prisoner (both individually and collectively, in the prison community), to exercise the effectiveness of this freedom. Thus, according to art. 58 paras. (2) and (3) of the Law no. 254/2013, convicted persons shall have the right to freedom of religious beliefs, without prejudice to the freedom of religious beliefs of the other convicted persons. The convicted persons may attend, based on free will, to sermons or religious meetings organized in penitentiaries, may receive visits from the representatives of that denomination and may acquire and hold religious publications, as well as worship objects.

However, the actual contact of the inmates with the representatives of the cult or religious confession

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[16] C. Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole. Volume I. Drepturi și libertăți [The European Convention on Human Rights. Comment on articles. Volume I. Rights and freedoms]*, 703.

[17] Turner v. Safley, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 79 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."), apud Columbia Human Rights Law Review, *A Jailhouse Lawyer's Manual, Chapter 27: Religious Freedom in Prison*, 819, accessed March 25, 2019, http://jlm.law.columbia.edu/files/2017/05/39.-Ch.-27.pdf.

[18] Turner v. Safley, 482 U.S. 78, 89-90, 107 S. Ct. 2254, 2261-62, 96 L. Ed. 2d 64, 79-80 (1987), apud Columbia Human Rights Law Review, *A Jailhouse Lawyer's Manual, Chapter 27: Religious Freedom in Prison*, 828-829.

[19] Hall v. Bellmon, 935 F.2d 1106, 1113 (10th Cir. 1991) (upholding a prison policy that prohibited a Native American from wearing a bear tooth necklace and medicine bag on the grounds of prison security); see also Spies v. Voinovich, 173 F.3d 398, 405 (6th Cir. 1999) (upholding a prison's prohibition of certain Buddhist religious materials from a prisoner's cell and the chapel on the grounds of prison security), apud Columbia Human Rights Law Review, *A Jailhouse Lawyer's Manual, Chapter 27: Religious Freedom in Prison*, 829.

[20] Schreiber v. Ault, 280 F.3d 891 (8th Cir. 2002), apud J. W. Palmer, Constitutional Rights of Prisoners, 9th Edition (New Providence, New Jersey: Lexis Nexis Anderson, 2010), 126.

[21] ECtHR, judgment from 25.05.1993, Kokkinakis v. Greece, no. 14307/88, § 33. Please note that all judgments of the European Court of Human Rights referred to in this study are accessible on the website of ECtHR, accessed March 25, 2019, http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/.

[22] J. Murdoch, *The treatment of prisoners. European standards*, (Strasbourg: Council of Europe Publishing, 2006, reprinted 2008), 248.

they belong to is not absolute, the limitations inherent in the penitentiary regime being accepted as long as they do not affect the very substance of the right or freedom in question. "Religious or moral-religious activities in the penitentiary environment are carried out in compliance with the internal regulations regarding the guarding, supervision and escorting of the persons performing custodial sentences in the places of detention in the penitentiary administration system". [art. 8 para. (1) from the Order of the Minister of Justice no. 4000/C/2017].

From this perspective, the provision in art. 124 par. (2) of the Regulation provides for the possibility of the warden to order the prohibition of the access of representatives of cults or religious associations recognized by law for a period of maximum 6 months, in certain strictly regulated cases (e.g.: discovery of weapons, ammunition, hallucinogenic substances, drugs or other objects forbidden to visitors, which they have not declared before the start of control; visitors that may have a negative influence on the behaviour of inmates; visitors that do not allow the specialized control before entering a prison). The imposition of such obligations on representatives of religious denominations and religious associations, as well as the regulation of the possibility of applying a ban on the access of representatives of religious denominations or religious associations who have breached the legal provisions for a maximum period of 6 months, is fully in line with the requirements of international legal instruments, as such restraints are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others [art. 9 para. (2) of the European Convention; art. 18 para. (3) of the International Covenant on Civil and Political Rights].

Mention should be made that the prohibition concerns only the religious representative, not the cult, so that the right to religious assistance is not affected by the application of such a prohibition on access by religious representatives or religious associations who have breached legal provisions.

e) The European Convention for the Protection of Human Rights and Fundamental Freedoms. The case law of the European Court of Human Rights. At the Council of Europe level, freedom of conscience, opinions and religious beliefs is regulated in art. 9 of the European Convention and read as follows: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Freedom of thought (conscience, beliefs and religious beliefs), as provided in art. 9 of the European Convention, has two dimensions - the internal, individual dimension (*'forum internum'*), which concerns the right to have opinions and beliefs, independent of its concretisation and expression in public, and an external dimension (*'external forum'*), which concerns the manifestation of these freedoms in public, in society.

The right to have a conscience, belief, in general, protects the inner forum, that is, the field of personal beliefs and religious beliefs, and is not susceptible to limitations, unlike the right to manifest beliefs, which may suffer some limitations, of course in accordance with legal requirements (provided for by law, have a legitimate aim and being necessary for public security, public order, health, public morals, rights and freedoms of others).

Article 9 para. 1 of the European Convention does not only address religious beliefs that can be manifested in certain forms or can be exchanged, but also other beliefs of the individual, expressing his conception of the world and life or of certain social phenomena.[23]

Freedom to have beliefs is absolute, the only restriction referred to in art. 9 of the European Convention excluding only the means of exercising that freedom. Affirming this freedom may seem useless, it is that obvious.[24]

The right to have a conscience presents a triple approach: it is primarily the freedom of every person to have or to adopt a belief or religion, at his free choice; then the right in question is the freedom to have no belief or religion and finally the right to have a belief is the freedom of individuals to change their belief or religion without suffering any constraint or prejudice.[25] And it also comprises the right not to be obliged to act in a way that entails the expression of acceptation of a church, a religion or belief that one does not share.[26]

Conventional regulation recognizes each person's freedom to manifest their religion or belief: through cult, education, practice, and ritual fulfilment.

It should be noted that neither the European Convention nor the case law of its bodies have given a definition of the notion of "religion" or "cult"; they also do not allow the identification of general criteria according to which certain spiritual representations can

[23] C. Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole. Volume I. Drepturi și libertăți [The European Convention on Human Rights. Comment on articles. Volume I. Rights and freedoms]*, 715.

[24] J.-F. Renucci, *Tratat de drept European al drepturilor omului [*Treaty on European Human Rights*]* (Bucharest: Hamangiu, 2009), 207.

[25] F. Sudre, *Drept European și internațional al drepturilor omului [European and international human rights law]* **(**Bucharest: Polirom, 2006), 344.

[26] P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak, *Theory and practice on the European Convention on Human Rights*, 758.

be qualified as having the meaning of a religion or cult.[27]

Obviously, a person's membership of major religions or traditional confessions does not raise any problem in exercising control over respect for freedom of religion. But religious beliefs are not limited to Christianity, Islam, Judaism, Hinduism, or Buddhism. The most delicate issues are about minority religions and new religious groups. Therefore, the issue of the sects is inevitable, especially as there is a general mistrust of the sects and their actions at European level.[28]

In any case, when the criteria of 'cogency, seriousness, cohesion and importance' are fulfilled, the existence of a religion or belief must be assumed. It is not up to the State to withhold protection because this religion or belief is regarded as incorrect, untrue or unacceptable.[29]

For proper assessment and application of national legal provisions on freedom of conscience, opinion and freedom of religious belief, an analysis of the Strasbourg Court's case law on art. 9 of the European Convention must be put in place.

We believe that the Court's principles in solving the applications can and should be applied at national level; this is the only way to ensure the uniformity of judicial practice, with a conventional application and interpretation of domestic legal provisions.

Occasional complaints have been made concerning interference with religious beliefs or matters of conscience by prison regimes. Few serious issues have yet been found to arise. Claims by Orthodox prisoners that prison food failed to respect dietary requirements was contested strongly by the UK Government and failed for non-exhaustion.[30] Also, the inability to obtain a particular item or lack of provision of a preferred item is insufficient. Short of compulsion to breach a strict religious dietary requirement or failure to provide sufficient food compatible with that diet, complaints are likely to fail[31] as an infringement of the European convention.

As the Court finds in an admissibility decision, prisoners have the right to manifest their religion or beliefs through worship, practice and the fulfilment of religious rites, within the meaning of art. 9 para. 1 of the European Convention[32].

Over time, the Strasbourg courts have ruled that art. 9 defends beliefs such as: pacifism, environmental protection, vegetarianism, conception of hunting, etc.[33]

In the case of *Vârtic v. Romania (no. 2)*[34], the Court found that the authorities failed to strike a fair balance between the interests of the prison authorities and those of the applicant, namely the right to manifest his religion through observance of the rules of the Buddhist religion (the applicant requested a meat-free diet, as prescribed by his religion). The Court concluded that there has been a violation of Article 9 of the Convention.

In this case, the Court noted that the applicant himself provided a coherent account of the manner in which he observed his Buddhist faith, and argued that he asked the prison authorities to provide the diet required by his faith only when, due to a change in legislation, he could no longer rely exclusively on the food provided by his family. It also appears that during the domestic proceedings the courts did not in any way question the genuineness of his faith.

The applicant requested a meat-free diet, as prescribed by his religion. Whilst the Court is prepared to accept that a decision to make special arrangements for one prisoner within the system can have financial implications for the custodial institution and thus indirectly on the quality of treatment of other inmates, it must consider whether the State can be said to have struck a fair balance between the interests of the institution, those of other prisoners and the particular interests of the applicant. The Court noted that the applicant's meals did not have to be prepared, cooked and served in any special way, nor did he required any special foods. The Court was not persuaded that the provision of a vegetarian diet to the applicant would have entailed any disruption to the management of the prison or any decline in the standards of meals served to other prisoners, all the more so as a similar diet free of animal products was already provided for inmates observing the Christian Orthodox fasting requirements.

Finally, the Court pointed out that the recommendation of the Committee of Ministers to the member States, namely Recommendation Rec (2006)2 on the European Prison Rules recommend that prisoners should be provided with food that takes into account their religion. In recent judgments the Court has drawn the authorities' attention to the importance of this recommendation, notwithstanding its non-binding nature.

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[27] C. Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole. Volume I. Drepturi și libertăți [The European Convention on Human Rights. Comment on articles. Volume I. Rights and freedoms]*, 709.

[28] M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român [European Human Rights Protection and the Romanian Criminal Procedure]*, 225.

[29] P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak, *Theory and practice on the European Convention on Human Rights*, 760.

[30] ECtHR, judgment from 07.03.1990, S. v. UK, no. 13669/88.

[31] K. Reid, *A practitioner's guide to the European Convention on Human Rights*, 3rd edition (London: Thomson Sweet & Maxwell, 2008), 478.

[32] ECtHR, judgment from 06.07.2000, Indelicato v. Italy, no. 31143/96, apud D. Bogdan, *Arestarea preventivă și detenția în jurisprudența CEDO [Preventive arrest and detention in the European Court of Human Rights case law]*, 2nd edition (Bucharest, 2011), 514.

[33] M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român [European Human Rights Protection and the Romanian Criminal Procedure]*, 223.

[34] ECtHR, judgment from 17.12.2013, Vârtic v. Romania, no. 14150/08, § 46-55.

In *Poltoratskiy* v. Ukraine[35], the Commission was unable to establish with sufficient clarity whether the applicant or his parents requested permission from the national authorities for the applicant to be visited by a priest before 22 December 1998. However, the Commission found it to be established by the oral evidence and documents produced to it that the applicant was not able to participate in the weekly religious service which was available to other prisoners and that he was not in fact visited by a priest until 26 December 1998.

In these circumstances, the Court found that the interference with the applicant's right to manifest his religion or belief was not "in accordance with the law" as required by article 9 § 2 of the Convention. It considered it unnecessary to examine whether the interference was "necessary in a democratic society" for one of the legitimate aims pursued within the meaning of article 9 § 2. Accordingly, there has been a violation of art. 9 of the Convention.

The fundamental question is whether a headscarf, bangle, crucifix, yarmulke, is an expression of faith or an essential tenet of faith. It appears that international human rights will only actively protect the essential tenets of faith, other overt manifestations of faith being regarded as a private matter and thus subject to State control.[36]

In *Leyla Şahin v. Turkey* case[37], the Court argued that while religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Article 9 lists the various forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. But, art. 9 does not protect every act motivated or inspired by a religion or belief. By reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course. Besides, having found that the regulations pursued a legitimate aim, it is not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institution's "internal rules" devoid of purpose. Article 9 does not always guarantee the right to behave in a manner governed by a religious belief and does not confer on people who do so the right to disregard rules that have proved to be justified. Consequently, the Court held that there has been no breach of art. 9 of the Convention.

Keeping order and safety in penitentiaries allows, in the opinion of the former Commission, a generous margin of appreciation for the authorities. For example, the need to be able to identify prisoners may thus warrant the refusal to allow a prisoner to grow a beard, while security considerations may justify denial of the supply of a prayer-chain.[38]

However, relatively recently, and by reference to the right to respect for private and family life, the Strasbourg Court (in the *Biržietis v. Lithuania* case)[39] noted that the applicant was serving a prison sentence, during which time he was prohibited from growing a beard by the internal rules of the correctional facility. Those rules placed an absolute prohibition on prisoners growing a beard, irrespective of its length, tidiness, or any other considerations, and did not explicitly provide for any exceptions to that prohibition. While the Court accepted that the Contracting States are in principle justified in setting certain requirements related to prisoners' personal appearance, it reiterated that any such restrictions must conform to the requirements of necessity and proportionality within the meaning of art. 8 § 2 of the Convention. In this case, the Court has expressed its reservations as to the existence of a legitimate aim pursued by the impugned restriction on the applicant's art. 8 rights. The Court further considered that the Government did not demonstrate that the absolute prohibition on growing a beard, irrespective of its hygienic, aesthetic or other characteristics, and not allowing for any exceptions, was proportionate. Lastly, it observed that in the applicant's case the prohibition on beards did not seem to affect other types of facial hair, such as moustaches or sideburns, thereby raising concerns of arbitrariness. Taking into account all the circumstances of the case, the Court considered that the applicant's decision on whether or not to grow a beard was related to the expression of his personality and individual identity, protected by art. 8 of the Convention, and that the Government has failed to demonstrate the existence of a pressing social need to justify an absolute prohibition on him growing a beard while he was in prison. There

[35] ECtHR, judgment from 29.04.2003, Poltoratskiy v. Ukraine, no. 38812/97, § 166-171. See, also, on the same topic, ECtHR, judgment from 29.04.2003, Kuznetsov v. Ukraine, no. 39042/97; ECtHR, judgment from 30.11.2006, Igors Dmitrijevs v. Latvia, no. 61638/00, § 79-81.

[36] R.K.M. Smith, *International Human Rights*, 208.

[37] ECtHR (Grand Chamber), judgment from 10.11.2005, Leyla Şahin v. Turkey, no. 44774/98, § 105, 121.

[38] Commission Decision in the case of X. v. Austria, 15th of February 1965, no. 1753/63 apud J. Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights*, 55.

[39] ECtHR, judgment from 14.06.2016, Biržietis v. Lithuania, no. 49304/09, § 45-58.

Similarly, The U.N. Human Rights Committee, in the case no. 721/1997, *Boodoo v. Trinidad and Tobago* (74th Session, 18 March-5 April 2002, Communication No. 721/1996, U.N. Doc. CCPR/C/74/D/721/1996, accessed March 25, 2019, http://www.ccprcentre.org/doc/2013/05/CCPR_C_74_D_721_1997.pdf), stated that as to the author's claim that he has been forbidden from wearing a beard and from worshipping at religious services, and that his prayer books were taken from him, the Committee reaffirmed that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various practices integral to such acts. In the absence of any explanation from the State party concerning the author's allegations, the Committee concluded that there has been a violation of article 18 of the Covenant on Civil and Political Rights.

has accordingly been a violation of art. 8 of the Convention.

From the point of view of public security, the protection of order, the rights and freedoms of others, we can hold the principles affirmed by the European Court in the case of *Phull v. France* as applicable, *mutatis mutandis*, to the penitentiary system as well. The applicant complained under art. 9 of the Convention of a violation of his right to freedom of religion by the airport authorities. He argued that there had been no need for the security staff to make him remove his turban (the applicant was a practising Sikh and was, thus, required by his religion to wear a turban), especially as he had not refused to go through the walk-through scanner or to be checked with a hand-held detector. Given the fact that the Sikh religion requires its male followers to wear a turban, the Court decided to work on the premise that the disputed measure constituted interference with the applicant's freedom to manifest his religion or beliefs. The Court ruled that security checks in airports are undoubtedly necessary in the interests of public safety within the meaning of that provision; also, the arrangements for implementing them in this case fell within the respondent State's margin of appreciation, particularly as the measure was only resorted to occasionally, as this was a necessary safety measure and that any resulting interference with the applicant's freedom of religion was justified.[40]

In *C.W v. UK* case[41], the applicant complained of the policy at H.M. Prison Blundeston whereby he was required to work in the prison print shop. He protested that he did not consider inside work suitable and that also his belief as a Vegan prohibited working with products that are unnecessarily tested on animals.

The Commission recalled that the applicant refused to work in the print shop because as a Vegan he wished to avoid contact with animal products or products which had been tested on animals. The Commission found that the Vegan convictions with regard to animal products fall within the scope of art. 9 para. (1) of the European Convention.

The Commission recalled that all prisoners were generally required to work in the print shop for a period of 13 weeks after which time other employment was available. It noted the factual conflict as to the nature and extent of the connection between the dyes and animals, the fact that it was only one of the applicant's reasons for refusing the work and also the relatively minor nature of the penalties imposed on the applicant for refusing to comply with the normal work regime. In these circumstances, the Commission found that the principle of proportionality has not been infringed and to the extent that there has been an interference, the interference is justified under art. 9 para. (2) of the European Convention.

The importance of religious freedom has been recognized by the Strasbourg Court as one of the factors that may lead to the non-existence of the violation of art. 3 of the European Convention in the case of a person subject to the measure of isolation in a penitentiary. Thus, in *Rhode v. Denmark*[42], the Court noted that a period of such a length (eleven months and fourteen days) may give rise to concern because of the risk of harmful effects upon mental health, as stated on several occasions by the CPT. However, when assessing whether the length was excessive under art. 3 the Court must also take into account the conditions of the detention including the extent of the social isolation. The applicant was detained in a cell which had an area of about eight square metres and in which there was a television. Also, he had access to newspapers. He was totally excluded from association with other inmates, but during the day he had regular contact with prison staff, e.g. when food was delivered; when he made use of the outdoor exercise option or the fitness room; when he borrowed books in the library or bought goods in the shop. In addition, every week he received lessons in English and French from the prison teacher and he visited the prison chaplain. Also, every week he received a visit from his counsel. Furthermore, during the segregation period in solitary confinement the applicant had contact twelve times with a welfare worker; and he was attended to thirty-two times by a physiotherapist, twenty-seven times by a doctor; and forty-three times by a nurse. Visits from the applicant's family and friends were allowed under supervision. In these circumstances, the Court found that the period of solitary confinement in itself, lasting less than a year, did not amount to treatment contrary to art. 3 of the European Convention.

In *Vincent v. France*[43], the applicant, who was unable to move, being immobilized in a wheelchair (he retained normal upper limb mobility, being autonomous in managing his own person), invoked the violation of art. 9 of the Convention, concerning his right to practice religion, since the penitentiaries in which he was accommodated did not have facilities that would allow him to easily access the worship places in these prisons without help. The Court pointed out that art. 9 guarantees to every person the right to freedom of religion, including the freedom to manifest their religion or belief individually or collectively, in public or in particular, through cult, education, practice and the fulfilment of rituals. However, although it was not disputed that the applicant could not reach the places of worship by his own forces, yet the prison administration offered him help to reach them, but the applicant refused. Moreover, he received visits to his room from the chaplain. Consequently, the Court rejected the claimant's claim, in the absence of violation of his religious freedom.

[40] ECtHR, judgment from 11.01.2005, Phull v. France, no. 35753/03.
[41] ECtHR, judgment from 10.02.1993, C.W v. UK, no. 18187/91.
[42] ECtHR, judgment from 12.07.2005, Rhode v. Denmark, no. 69332/01, § 97-98.
[43] ECtHR, judgment from 24.10.2006, Vincent v. France, no. 6253/03, § 8-9, 133, 136-138.

Also, in another case, the Commission declared the application inadmissible for the situation where the applicant (Sikhismist adherent) claimed that retaining a book on religion is contrary to his religious freedom. Although the Commission accepted that the applicant's freedom of religion was limited by the prison authorities, it noted that the refusal to receive the book was not based on philosophical or religious reasons, but because it contained an illustrated section on martial arts and self-defense, which could be dangerous if used against other persons. The passive use of the book (for practicing religion), as the applicant intended to do, was not, for that reason, the decisive factor in the decision of the prison management. The Commission concluded that the interference with the applicant's freedom under art. 9 of the European Convention was justified within the meaning of para. (2) of that article[44].

Finally, it is important to point out that not all allegations about the violation of freedom of conscience, opinions and freedom of religious beliefs lead to a favourable solution from the Strasbourg Court. In other words, the allegations of the persons held on the violation of religious freedom must be substantiated. From this perspective, ECtHR decided that the provisions of art. 9 of the European Convention because the applicant, complaining of a violation of his right to manifest his religion through religious rituals, has not even demonstrated that he has requested that those rituals be held in the chapel of Cala Reale (where the persons with forced residence were placed), or that he requested permission to go to church at Cala d'Oliva (the main settlement on the island of Asinara, near Sardinia)[45].

The claimant must provide evidence to substantiate the allegations made and have the capacity to prove, in the view of the court, the violation of the principle that freedom of conscience, opinion and freedom of religious beliefs is ensured, regulated by art. 9 of the European Convention.

Similarly, in the case of *Iorgoiu v. Romania*[46], the claim for the impairment of religious freedom was dismissed as manifestly groundless because the applicant did not bring any evidence to support the impediment of the free exercise of religion by the penitentiary administration.

The Court considers that the right to manifest one's religion or beliefs also has a negative aspect, namely the right of the person not to be forced to reveal his religion or beliefs and not to be obliged to act in a way that would allow determining whether or not the person share such beliefs. Therefore, the state authorities are not entitled to intervene in the sphere of the person's freedom of conscience and to try to find out his religious beliefs or to force him to declare his confession. In *Sinan Işik v. Turkey*[47] the Court held the violation of art. 9 of the European Convention, although the violation in question did not occur by refusing to indicate the applicant's belief on his identity card, but by indicating, whether mandatory or optional, religion on the identity card. This reasoning is supposed to cover all types of documents or registers that serve to identify state-run individuals, including those managed at the level of penitentiary units.

Finally, it should be stressed out that the refusal to allow a prisoner convicted of terrorist offences to travel to her father's funeral was recently analysed by the Strasboug Court (*Guimon v. France*[48]) in relation with article 8 (right to respect for private and family life) of the European Convention, rather than in relation with a art. 9 (freedom of conscience, opinions and religious beliefs) of the European Convention. The case concerned the refusal to allow the applicant, who was imprisoned in Rennes for terrorist offences, to travel to a funeral parlour in Bayonne to pay her last respects to her deceased father.

The Court held that there had been no violation of art. 8 of the European Convention, noting that the authorities had rejected the request on the grounds, firstly, of the applicant's criminal profile – she was serving several prison sentences for terrorist offences and continued to assert her membership of ETA – and, secondly, because it was impossible to organise a reinforced security escort within the time available. The Court found that the respondent State had not exceeded the margin of appreciation afforded to it in this area and that the refusal to grant the applicant's request had not been disproportionate and had pursued legitimate aims.

f) *National case law.* Regulating freedom of conscience and opinions as well as freedom of religious beliefs in the legislation regarding the execution of criminal penalties would be illusory if it were not accompanied by effective mechanisms to protect the exercise of freedom of thought against possible abuses of the prison administration.

Thus, by decision no. 1153/2011[49], the delegate judge from Iași Penitentiary admitted the complaint of an inmate complaining about the violation of the freedom of religious beliefs. The petitioner stated that he was Adventist on Day 7 (although in the penitentiary he was registered as an Orthodox Christian) and requested to the warden of the prison to approve his participation in the meetings organized by this cult and to receive the appropriate diet. His request was rejected on the grounds that he was not yet convicted by a final court decision, based on the provisions of art. 40 para.

[44] Commission Decision, X. v. UK, 18.05.1976, no. 6886/75.
[45] ECtHR, judgment from 06.11.1980, Guzzardi v. Italy, no. 7367/76, § 110.
[46] ECtHR, judgment from 17.07.2012, Iorgoiu v. Romania, no. 1831/02, § 95-101. See, also, on the same topic, ECtHR, judgment from 15.04.2014, Florin Andrei v. Romania, no. 33228/05, § 50-55; ECtHR, judgment from 15.10.2013, Ali (no. 2) v. Romania, no. 30595/09, § 48.
[47] ECtHR, judgment from 02.02.2010, Sinan Işik v. Turkey, no. 21924/05, § 41, 51-53.
[48] ECtHR, judgment from 11.04.2019, Guimon v. France, no. 48798/14.
[49] The delegated judge, Iași Penitentiary, decision no. 1153/2011, unpublished.

(2) from Law no. 275/2006 [currently, art. 58 para. (3) from Law no. 254/2013], according to which ”convicted persons may participate, on the basis of free consent, in religious services or gatherings organized in penitentiaries and can obtain and hold publications of religious character as well as objects of worship”. The prison administration argued that the applicant was in preventive detention and not convicted by a final court decision, thus he could only participate in individual activities, counselling or evaluation. Regarding the demand for a diet specific for the Adventist cult, the administration of the penitentiary took into account that the applicant was registered as an Orthodox Christian, and that in order for the application to be admitted it was necessary for him to prove his belonging to the Adventist cult.

The delegated judge solution of admitting the detainee's complaint we consider to be correct because, according to art. 82 para. (5) of the Law no. 275/2006, the provisions of the law contained in Title IV, Chapter. III-VII (including those on religious assistance) apply to both convicted and preventively arrested persons. Thus, it is clear that persons deprived of their liberty may participate, on the basis of free consent, to religious services or assemblies organized in penitentiaries, because only in this way can they acquire the status of member of a certain cult. In other words, when a change of religion is targeted, inmates will be allowed to participate in the meetings of that cult, with the agreement of their representatives, and taking into account the specific security measures of their possession. Therefore, participation in religious services and activities organized by representatives of religious organizations, associations and cults can only be restricted for reasons of security of ownership, the daily schedule and the number of participating inmates.

In fact, as the Strasbourg Court has consistently held, the prison administration's obligation consists in an attitude of neutrality and impartiality, as defined in the ECtHR case-law, which is incompatible with any interference to assess the legitimacy of religious beliefs.[50]

By criminal decision no. 1938/2015, the 5th District Court of Bucharest[51] admitted partly the complaints of the petitioners K.C., M.Y.S. and E.N. against the decision of the judge in charge of the supervision of deprivation of liberty and ordered the prison administration to allow the petitioners to receive *Koser food* daily (on their own expense) in quantities necessary to meet their personal needs (including food requiring heating, baking, boiling or other heat treatments in order to be eaten), ensuring that the food is served under the same conditions as to other inmates, and, also, with the obligation for the prison to provide conditions for storing the food for the days when it cannot be delivered to the three inmates.

In order to decide this, the court held the following: the right to religious freedom is a constitutional right, guaranteed by the provisions of art. 29 of the Romanian Constitution, as well as a right regulated by art. 9 of the European Convention. In the court's view, the only concrete way in which the applicants could benefit from food according to religious beliefs was to require the prison administration to allow the petitioners to receive *Koser food* daily (bearing the cost thereof), given the fact that if the court were to rule on a general solution such as ”obliges the prison administration to provide kosher-type food for the inmates” ", would not solve the complaint, but rather will acknowledge a theoretical and illusory right to receive proper food, according to their religious beliefs, as such a solution would only open the bureaucratic channels for the prison administration in order to allocate budgetary resources and then conducting a public procurement procedure. Under these circumstances, it is clear that the petitioners would be deprived of the right to obtain food according to religious beliefs for a good period of time.

According to the court, the provisions of art. 56 para. (6) letter a) of Law no. 254/2013 allow the court to determine the legal measures required to comply with the law and to oblige the prison administration to respect them. An interpretation according to which the prison administration is the one that establishes the concrete measures for respecting the law would only allow it to replace the power of the courts.

By decision no. 211/2014, the judge in charge of the supervision of deprivation of liberty from București-Rahova Penitentiary[52] admitted the complaint about the violation of the right to freedom of religious beliefs and ordered the penitentiary to provide complainants with a meat-free diet (for all three meals of the day), as prescribed by their religion, observing the Christian Orthodox fasting requirements. Thus, two Orthodox Christian inmates (recorded as such in the prison administration's records) showed that they had requested in writing to the penitentiary to provide a meat-free diet, during the Christian Orthodox fasting before Easter, but either it was not granted or it was provided only for lunch, not for the other two meals of the day.

While the prison response was general and elusive, without clear references to the situation of the complainants, although the place of detention recognized the right of inmates to receive a meat-free diet, as prescribed by their religion, the judge considered the position of the prison as an implicit acknowledgment of the petitioners' claims and ruled on

[50] See, for example, ECtHR, judgment from 07.12.2010, Jakóbski v. Poland, no. 18429/06, § 48-55, in which case the Court has held that if the religion or belief requires a particular diet, it should be respected by the authorities, provided that it is not unreasonable or burdensome, or the refusal to make available to a person deprived of liberty of Buddhist religion, a diet lacking meat, as his belief requires, was considered to be a violation of the provisions of art. 9.

[51] 5th District Court, Bucharest, criminal decision no. 1938/2015, unpublished.

[52] The judge in charge of the supervision of deprivation of liberty, București-Rahova Penitentiary, decision no. 211/2014, unpublished.

the violation of art. 58 of the Law no. 254/2013, because according to these legal provisions, freedom of religion must be observed in case of inmates, a component of this freedom being obviously also respecting a specific diet required by the religion.

Conversely, the delegate judge at Codlea Penalty[53] has reasonably rejected the complaint of M.I. with regard to the violation of the right to participate in religious activities, with the following reasoning: the petitioner pointed out that he was enrolled in religious activities in August 2008, but the penitentiary employees unjustifiably refused to allow his to participate at the religious activities. Regarding the violation of the freeform of religious beliefs, the delegated judge noted that from the internal documents of the prison regarding the religious activity of the inmates, it can be concluded that the petitioner was included to participate at religious activities both on 10 August 2008 and on 16 August 2008, and on 10 August 2008 it was recorded that he participated in the religious activity, so that the petitioner's assertions are not confirmed, thus the complaint was rejected as ill founded.

## 3. Conclusions

Religious (or other) beliefs underpin the conduct of the life of an individual. Moreover, religious/moral precepts designate legal from illegal, right from wrong, in society. Courts, in adjudicating disputes before them, apply the stated beliefs of the society in which they operate.[54]

The fundamental character of the freedoms of thought is fully reflected in the national legislation, the normative provisions specifying precisely the limits within which they can be exercised, mentioning the limitations being of strict interpretation and proportionate to the intended purpose.

We envisage, for example, regulating the possibility of the warden to order the prohibition of the access of representatives of religions or religious associations recognized by law for a period of maximum 6 months, in cases where their behaviour is affecting the safety and stability of the penitentiary.

Obviously, the prison authorities have the obligation to recognize and respect the needs of (external) manifestation of freedom of conscience, opinions and especially of religious freedom, an important aspect being their access to specially designed worship places and the visits of the representatives of recognized religions or religions.

Concluding, one can affirm that the decisions rendered by the European Court can and should also be applied at national level, in order to ensure the uniformity of judicial practice.

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# ISSUES OF CONTROVERSIAL PRACTICE REFERRING TO THE CRIME OF FALSE TESTIMONY

**Mirela GORUNESCU***

**Abstract**

*The crime of false testimony is one of the crimes which are traditionally found in our criminal legislation, the judicial practice recording also specific situations which required the application of the incrimination text which defined this crime. It can be considered that we are dealing with a crime which can no longer present any difficulties in relation to the interpretation and application of the incrimination norm with regard to the particular deeds committed. However, many elements are still encountered with respect to the interpretation of the incrimination norm, which generate different solutions of application, a fact which –in accordance with the rigors of the criminal law- is not to be desired. This study approaches two of these issues, namely the juridical significance of the refusal of the person heard as a witness to give any statements in such capacity and, on the other hand, the possibility of the realization of a formal concurrence of crimes when the person summoned as a witness, through his/her false or incomplete statement intends to create a situation more favorable to a person regarded by the factual situation.*

**Keywords:** *false testimony; crimes against the service of justice; witness' refusal to give a statement; the privilege against self-incrimination; favoring through a false testimony*

## 1. General Issues

The crime of false testimony is provided under Art. 273 of the Criminal Code in a standard version and in an aggravated version. According to Art. 273 para. (1) of the Criminal Code, standard false testimony is represented by *the deed perpetrated by a witness who, within a criminal case, civil case, or any other procedure wherein witnesses are heard, makes deceitful statements or fails to tell everything s/he knows in relation to the facts or essential circumstances s/he is questioned about.*

The aggravated version constitutes, according to para. (2), *the false testimony given: a) by a witness with protected identity or found in the Witness' Protection Program; b) by an undercover investigator; c) by a person who prepares an expert appraisal report or by an interpreter; d) in connection with a deed for which the law provides the penalty by imprisonment or imprisonment for 10 years or longer.*

In accordance with doctrinarian opinions, the crime of false testimony has as its special juridical object the social relations regarding the proper service of justice. The crime can also have a secondary juridical object, consisting in the social relations regarding certain essential attributes of the person (dignity, liberty) or in the social relations with a patrimonial character, because such relations can also be breached through the perpetration of the deed[1].

In accordance with the provisions of the legislation in force, a witness is the person who, being informed of certain facts, data or circumstances which constitute evidence within a judicial lawsuit, is called to be heard. Also, the jurisprudence stated that the persons who are parties in a lawsuit[2], as well as the main subjects of the lawsuit cannot have the capacity of witness and, therefore, they cannot be active subjects of the deed of false testimony [Art. 115 para. (1) of the Criminal Procedure Code]. It is considered that the lawmaker instituted the incompatibility between the capacity of a party or of a main lawsuit subject within a lawsuit and the witness capacity, considering that, since the parties or main lawsuit subjects can be heard in such capacity, and their statements constitute evidentiary means, the accumulation of the capacity of party or main lawsuit subject and of the witness capacity cannot be justified[3]. If a person loses the capacity of party or main lawsuit subject within the lawsuit, such person may be heard as a witness.

According to Art. 117 of the Criminal Procedure Code, the following persons shall have the right to refuse to be heard as a witness: the spouse, direct ascendants and descendants, as well as the siblings of the suspect or of the defendant, and the persons who were the spouses of the suspect or of the defendant. Instead, if the abovementioned persons agree to make statements, the provisions regarding the witnesses' rights and obligations shall be applicable to such persons.

According to Art. 116 para. (3) of the Criminal Procedure Code, those facts or circumstances whose secret or confidential nature may stand good under the law in relation to the judicial bodies cannot form the

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[1] V. Dobrinoiu, I. Pascu, M.A. Hotca, C. Păun, I. Chiș, M. Gorunescu, N. Neagu, M. Dobrinoiu, M. Sinescu, Noul Cod penal comentat, Partea specială, Universul Juridic Publishing House, Bucharest, 2014, p. 249.

[2] Brașov Court of Appeal, Criminal Section, Dec. No. 198/A/2000, on *www.ctce.ro*.

[3] Gr. Theodoru, *Tratat de drept procesual*, Publishing House Hamangiu, Bucharest, 2007, p. 371.

object of the witness' statement. These are the facts or circumstances which came to the knowledge of the witness within the exercise of his/her profession. By exception, such facts or circumstances may form the object of the witness\ statement when the competent authority or the entitled person expresses its consent in this respect or when there is another legal cause for removing the obligation to keep the secret or maintain the confidential nature (for instance, the obligation to incriminate).

False testimony is punished in a more severe manner if it is perpetrated by a witness with protected identity or found in the Witness Protection Program, by an undercover investigator, by a person who prepares an expert appraisal report or by an interpreter. The reason for aggravation in relation to the capacity of the active subject refers to the special position of such a person in the criminal lawsuit, based on relations of trust (in case of the undercover investigator, expert or interpreter, who are specialists in certain fields and must assist the court of law in the process of finding the truth and serving justice). In the case of protected witnesses, the additional effort of the judicial bodies to ensure their protection in exchange for their testimony justifies the aggravation of the punishment in case the trust in their *bona fide* is breached.

The witness with a protected identity is the threatened witness, according to Art. 125 of the Criminal Procedure Code, in relation to whom any of the protection measures provided under Art. 126 para. (1) letters c) and d) of the Criminal Procedure Code was taken. Thus, if there is any reasonable suspicion that the life, bodily integrity, freedom, assets or professional activity of the witness or of a member of the witness' family might be endangered as a result of the data provided by such witness to the judicial bodies or as a result of his/her statements, in relation to the respective person shall be ordered the measure of the protection of the data regarding his/her identity, by giving to such person a pseudonym under which such witness shall sign his/her statement, or by hearing the respective person in his/her absence, by means of audio-video communication devices, with distorted voice and image, when the other measures are not sufficient.

The witness found in the Witness Protection Program is subject to the regulations of the Witness Protection Law[4]. The Witness' Protection Program represents the specific activities conducted by the National Office for Witness Protection, with the support of the central and local public administration authorities, for the purpose of protecting the life, bodily integrity and health of the persons who obtained the capacity of protected witnesses, under the conditions provided by the law. The protected witness is the witness, the members of the witness' family and the persons close to the witness, who are included in the Witness' Protection Program, according to the provisions of the law.

According to Art. 148 of the Criminal Procedure Code, undercover investigators are operative agents of the judicial police. In the case of investigating crimes against national security and crimes of terrorism, the operative agents of the State bodies which conduct, under the law, information activities in view of ensuring national security can also be used as undercover investigators. The authorization to use undercover investigators may be issued by the prosecutor under the conditions of Art. 148 para. (1) of the Criminal Procedure Code. Undercover investigators can be heard as witnesses within the criminal lawsuit under the same conditions as threatened witnesses.

The objective side of the crime of false testimony is realized in terms of the material element by means of two alternative methods: either deceitful statements are made, or not everything that is known about the essential circumstances in a case in which witnesses are heard is told, and we are dealing with a manifestation liable to mislead judicial bodies.

So, in the first case, we are dealing with an action, in which case the witness, expert or interpreter makes deceitful statements, while, in the second case, we are dealing with the situation when not everything that is known about the essential circumstances for the judicial case is told[5].

The normative method which is of interest for this study is „[*the witness*] *is not telling everything that she knows"*, which means manifesting reticence as far as what s/he stated is concerned, keeping quiet, concealing all or part of what the witness knows. Keeping quiet must refer to something that was known to the witness, and not what the witness might have known[6].

A criminal significance shall be attached only to that omission liable to mislead the judicial body. A person's refusal to testify is not the equivalent of the omission in terms of attitude, which can be the manifestation of the material element of a false testimony.[7]

The statements or omissions of a witness must refer to essential circumstances.

*Essential circumstances* must represent those situations and circumstances which refer to the main fact of the case, and not to any adjacent issues which are not related thereto[8]. Therefore, the following can, for instance, be considered circumstances essential to the case: the constitutive elements and the mitigating or aggravating circumstances within a criminal lawsuit; the *de facto* grounds in case of a divorce lawsuit in the

[4] Law No. 682/2002 on the witness protection, published in The Official Gazette No. 964 of December 28, 2002, as subsequently amended and supplemented.

[5] V. Dobrinoiu, I. Pascu, M.A. Hotca, C. Păun, I. Chiș, M. Gorunescu, N. Neagu, M. Dobrinoiu, M. Sinescu, *op.cit*., p. 249

[6] V. Dongoroz and others, *op. cit*., vol. IV, pp. 182-183., p. 183.

[7] V. Dobrinoiu, I. Pascu, M.A. Hotca, C. Păun, I. Chiș, M. Gorunescu, N. Neagu, M. Dobrinoiu, M. Sinescu, *op.cit.,* p. 249

[8] Idem.

civil field; as well as the other evidentiary facts which may serve to the solving of a case and to the finding of the truth.

The essential character must be determined in accordance with the object of the evidence, in the sense that it is conclusive in relation to the charge brought against the defendant or in relation to any other issue liable to influence the defendant's criminal liability.

The realization of the material element of the crime requires that the witness should have been asked by the authorized body (prosecutor's office, court of law, etc.) or by the lawsuit parties or by the main lawsuit subjects with regard to the essential circumstances. Thus, in the judicial practice it was decided that the fact that the defendant declared that she was in another locality for a certain period of time together with her husband, charged with the perpetration of a crime during the same period of time, does not represent a crime of false testimony, since she was not expressly asked whether the defendant was in the same locality as she was at the time when the crime was perpetrated and neither did she state that the defendant would not have left the locality in the mentioned period of time[9].

If, through his/her deceitful statements, the witness tries to avoid that his/her criminal liability be entailed, such fact no longer constitutes a crime (according to Art. 118 of the Criminal Procedure Code, the witness has the right to not accuse oneself). A contrary solution is considered to lead to the conclusion that the obligation of self-incrimination is incumbent on those persons who committed a crime, which conclusion cannot be accepted as long as the obligation to inform on crimes perpetrated by other persons exists only in the cases in which the law expressly provides so[10].

## 2. Issues Specific to the Crime of False Testimony

Constantly, in the doctrine and in the judicial practice, the issue is raised to establish whether the crime of false testimony may be perpetrated from an objective point of view is the refusal to make statements [*sic!*], namely the maintenance of passivity, given that the crime of false testimony is a crime which implies perpetration in all the cases[11].

With respect to this issue, the specialty doctrine traditionally differentiates between the normative assumption "[*the witness*] does not declare all that s/he knows" and the factual assumption to refuse to make any statements.

Thus, a doctrinarian opinion indicates that: „*A criminal significance shall be attached only to that omission liable to mislead the judicial body. A person's refusal to testify is not the equivalent of the omission in terms of attitude, which can be the manifestation of the material element of a false testimony. In the juridical literature, the following opinion to which we adhere was expressed, that the explicit refusal of a person who accepted to testify to answer certain questions has no criminal significance either, in the sense of the provisions of Art. 273 of the Criminal Code*[12]*. Such an explicit refusal, clearly expressed, is not, as it was stated, liable to mislead the judicial body, but it draws attention to the necessity of producing new evidence in order to find out the truth*."

The specialty doctrine often indicates that: "*the witness enjoys the right to keep quiet and to not contribute in his/her self-incrimination, to the extent to which, through his/her statement, s/he might incriminate himself/herself [for instance, in the cases in which, as a result of successive severances, a suspect or a defendant in the initial file (the basic file) becomes a witness in a file severed from the basic file; in such capacity, s/he enjoys the right to silence and to not incriminate himself/herself with regard to certain issues which, once reported, might incriminate him/her in the file in which s/he is being charged]*." [13]

Under these conditions, my refusal to make a statement does not have in any case the purpose of encumbering the service of justice, but only the purpose that the witness ***should protect his/her lawsuit situation, representing a bona fide exercise of the right to not incriminate oneself.***

In the same respect, the specialty literature[14] indicates that: "*The privilege against self-incrimination and the defendant's right to keep quiet, implicit guarantees of the right to a fair trial, have been examined, after 1993, in several cases on the dockets of the E.C.H.R. (J.B versus Switzerland, 2001, IJL GMR and AKP versus United Kingdom, 2000, Kansal versus United Kingdom, 2004, Jalloh versus Germany, 2006, Weh versus Austria, 2004, Allan versus United Kingdom, 2002, Muray versus United Kingdom, 1996, Serves versus France, 1997), being constantly revealed the necessity to prohibit the use of any coercion means in order to obtain evidence, against the defendant's will, as well as the fact that, in relation to the autonomous character of the notion of "criminal charge*", consideration should be given to the fact that

[9] HCCJ, Criminal Section, Decision No. 5430/2004, in RDP No. 4/2005, p. 147.

[10] V. Dobrinoiu, I. Pascu, M.A. Hotca, C. Păun, I. Chiș, M. Gorunescu, N. Neagu, M. Dobrinoiu, M. Sinescu, op.cit., p. 249

[11] V. Dongoroz and a collective of authors, Explicaţii teoretice ale Codului penal român, The Publishing House of the Romanian Academy and C.H. Beck Publishing House, Bucharest, 2003, p. 159.

[12] A. Filipaş, *Infracţiuni contra înfăptuirii justiţiei*, The Publishing House of the Romanian Academy, Bucharest, 1985, p. 56.

[13] M. Udroiu, Drept penal, partea specială, C. H. Beck Publishing House, Bucharest, 2016, p. 256.

[14] C. Rotaru, A. Trandafir, V. Cioclei, Drept penal, Partea specială II, C.H. Beck Publishing House, Bucharest, 2016, p. 102. The author quotes from the considerations of Decision No. 213/2015 issued by the High Court of Cassation and Justice, consulted at *http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=124329*)

the witness also enjoys this right to the extent to which his/her statement might lead to self-incrimination.

*In summary, the privilege against self-incrimination is a principle according to which the State cannot compel a suspect to cooperate with his/her prosecutors by providing evidence which might incriminate him/her.*

*Or, under the conditions of hearing a person having the witness capacity, subject to taking an oath and, especially, subject to the criminal punishment of perpetrating the crime of false testimony, with respect to facts or circumstances which might incriminate him/her, E.C.H.R. - in its jurisprudence – has elaborated the so-called "theory of the three difficult choices with which the person is faced", according to which it is not natural that the alleged perpetrator should be asked to choose between being punished for his/her refusal to cooperate, providing incriminating information to the authorities or lying and risking conviction for this reason (case Weh versus Austria, 2004)".*

In the recent judicial practice, however, it was deemed that the witness either *makes deceitful statements* which entails *de plano* the fact that the witness accepts to testify but distorts the truth with respect to the essential circumstances of the case in which s/he is heard, case which is not –however- applicable in this cause – or *does not tell everything that s/he knows in connection with the facts or with the essential circumstances s/he is asked about*. Not telling everything that s/he knows means manifesting a reticence as far as his statements are concerned, keeping quiet, concealing all or part of what the author knows"[15].

Also, the court considered that, by looking at the factual method of the refusal to testify, two distinct situations can be again identified. The first is that of the "refusal to have the witness capacity – in which case the respective person refuses to take the oath and to have the witness capacity", a hypothesis in which the court deemed that we cannot be in the presence of the crime of false testimony, but eventually in the situation of committing a judicial default or of any other crime, as applicable.

The second situation concerns: "the case in which, although the oath was taken, the witness refuses to tell anything about certain essential circumstances about which s/he is asked". Against this theoretical background, the court considered that: "the total refusal to testify, given that the witness capacity is a capacity won for the case because the person took the oath, is the equivalent of: *not telling everything s/he knows* in connection with essential elements on which s/he is heard"[16].

Moreover, the court considered that: "it matters not for the existence of the crime whether the refusal is an explicit refusal – when the witness expressly declares that s/he refuses to testify – or an implicit refusal – when the witness, without making any express reference, chooses to keep quiet on certain matters related to the essential circumstances of the case in which s/he is being heard." The argument invoked by the court of law to support this statement is an argument which adds to the law, in the sense that: "it cannot be considered that the crime of false testimony, in this version, would exist only under the conditions of a partial and tacit refusal, but also under the conditions of a total and explicit refusal, because it would be a non-sense that the one who is committing less should perpetrate a crime, while the one who is committing more should not be considered as a deceitful witness."[17]

These arguments, which obviously represent an analogical supplement of interpretation *in malam parte* of a criminal juridical norm, reveal, in the opinion of the merits court that the witness' refusal to make a statement represents the crime of false testimony.

When analyzing the constitutive elements of the crime of false testimony, they should start from the reason for which the lawmaker would have incriminated such a behavior. Obviously, such a legal text was included in the group of crimes against the service of justice, because it allows the punishment of anti-social behaviors whereby a circumstance perceived directly by a person heard as a witness in a judicial case is presented in a distorted manner. Under these conditions, for a crime of false testimony to exist, there must exist in fact an effort to mislead the body which is conducting the hearing.

Moreover, the existence of the crime of false testimony requires that the person conducting the hearing of the person having the witness capacity, ***should have asked specific questions about the circumstances that s/he considers being essential.***

The argument made by the court according to which "it cannot be considered that the crime of false testimony, in this version, would exist only under the conditions of a partial and tacit refusal, but also under the conditions of a total and explicit refusal, because it would be a non-sense that the one who is committing less should perpetrate a crime, while the one who is committing more should not be considered as a deceitful witness" is, in fact, erroneous. This because the one who is apparently committing less causes more disturbance in the process of serving justice. Through the effort of making a statement which is purposefully elliptical, the person heard as a witness distorts the real facts and makes the judicial body have an erroneous representation of the factual situation, considering that such representation is correct. The behavior of refusing to make another statement is not specifically covered by the incrimination norm under Art. 273 of the Criminal Code.

Moreover, the court highlighted that the crime of false testimony constitutes a special version of favoring

[15] HCCJ, Criminal Division, Sentence No. 363/2017, final through Criminal Decision No. 13/2018, not published.
[16] HCCJ, Criminal Division, Sentence No. 363/2017, final through Criminal Decision No. 13/2018, not published.
[17] Idem.

a perpetrator since, in the criminal cases; the false testimony can also lead implicitly to the favoring of the perpetrator. Under these conditions, the court of law indicates: "regardless of the fact that, through the false testimony made, the defendant is acting with a direct intention – pursuing to favor a perpetrator – or with an indirect intention – *i.e.* not expressly pursuing to favor the perpetrator but accepting the possibility that such result could also occur – the same deed cannot meet the material elements of two distinct crimes, while only the special crime, that is the false testimony, shall be maintained."

Also in the judicial practice the issue is raised whether the crime of favoring the perpetrator may be committed under the conditions of a formal concurrence of crimes with the false testimony.

In our opinion, such a juridical classification of the deed cannot be accepted, since it is in disagreement with the specific nature of the incrimination of the deed of favoring the perpetrator. Thus, the specialty doctrine indicates that: "The character of general and, therefore, subsidiary norm of the crime of favoring the perpetrator entails that, if the assistance given takes the form of a false testimony, only this latter crime shall be maintained.[18]"

In the same manner, in the judicial practice it is indicated that: "the crime of favoring the perpetrator has a subsidiary nature, and it cannot be maintained if there are other special incriminations of the favoring (such as the false testimony or the facilitation of escape). It is noted that, in the case, there is a special incrimination (Art. 260 of the Criminal Code – the false testimony), so that the crime of favoring the perpetrator and the crime of false testimony cannot be maintained concomitantly, but only the crime of false testimony can be maintained … "[19]

It was correctly considered that the relationship between the two crimes (namely the favoring of the perpetrator and the false testimony) is a relationship of the type genre – species, the testimony being nothing other than a special form of favoring. Under these conditions, maintaining a formal concurrence of crimes between the crime of favoring the perpetrator and the false testimony is in complete disagreement with the specific nature of the incrimination norms included in the Title referring to the crimes against the service of justice from the Criminal Code and does nothing other than breaching the *ne bis in idem* principle.

Thus, the more recent specialty doctrine indicates that: "The character of general and, therefore, subsidiary norm of the crime of favoring the perpetrator entails that, if the assistance given takes the form of a false testimony, only this latter crime shall be maintained[20]". In the same manner, the judicial practice indicates that: "the crime of favoring the perpetrator has a subsidiary nature and it cannot be maintained if there are other special incriminations of the favoring (such as the false testimony or the facilitation of escape).

## Conclusion

Although the crime of false testimony is one of the incriminations which have continuity in the field of our criminal legislation, the matters related to such crime are far from being clarified. On the contrary, in our opinion, this crime gained new interpretation and application difficulties, especially by reference to the European standard regarding the witness protection, which witness is also recognized the privilege against self-incrimination. Under these conditions, it is obvious that the refusal to make a statement in witness capacity, especially in case the judicial body hears in this capacity the very person against whom a criminal complaint is submitted, for instance, should not have any criminal valences.

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[18] C.Rotaru, A. Trandafir, V. Cioclei, Drept penal partea specială, C.H. Beck Publishing House, Bucharest, 2016, p. 69.

[19] Timişoara Court of Appeal, Criminal Division, Decision No. 1174/2013 commented in C.Rotaru, A. Trandafir, V. Cioclei, Drept penal partea specială, C.H. Beck Publishing House, Bucharest, 2016, p. 69.

[20] C.Rotaru, A. Trandafir, V. Cioclei, Drept penal partea specială, C.H. Beck Publishing House, Bucharest, 2016, p. 69.

# SPECIAL FEATURES OF THE CRIMINAL OFFENCES LAID DOWN IN THE COMPANY LAW NO.31/1990

**Mihai Adrian HOTCA***

**Abstract**

*The Law No.31/1990 is a non-criminal law with criminal provisions, as it is mainly aimed at regulating the operation of companies, but it also includes incrimination rules. Thus, Art. 271-279, Art. 280[1] and Art. 280[3] incriminate several acts through which the legal rules on companies are violated.*

*The incrimination rules included in the Law No.31/1990 are special incrimination rules (derogatory), as compared to the ones existing in the Criminal Code [Art.297 (abuse of office), Art.295 (embezzlement) etc.], because they are applied with priority, except when the penalty provided for in the Criminal Code is more severe (see Art.281 of the Law No.31/1990).*

*The incrimination rules existing in the Law No. 31/1990 apply exclusively to the companies regulated by this law, and not to other types of companies, with or without legal personality.*

**Keywords:** *companies; incrimination rules; non-criminal law with criminal provisions; Criminal Code; active subject; passive subject; legal subject-matter.*

## 1. General

The most important legislative act, regulating the formation, the organisation and the dissolution of companies is the Law No. 31/1990[1].

This law is a technical and legal support intended for the entrepreneurs who want to start businesses but do now own enough resources to put in practice their ideas, and for those who want to carry out economic activities in cooperation with other persons, although they own the necessary capital or resources. If the first category concerns persons who do not own enough resources, the second category concerns persons who want to share the economic risks with others or who want to limit them.

The companies provided for in the Law No. 31/1990 are **legal lucrative vehicles, configured in forms of organisation aimed at satisfying both the private economic interests and the general ones, made available to business man and to the persons who wish to invest and to make profit.**

According to Art.1 para. (1) of the Law No.31/1990, in order to perform lucrative activities, the natural persons and the legal entities may associate together and set up companies with **legal personality**, in compliance with the provisions of this law.

And Art.1 para. (2) of the same law provides that the companies specified in para. (1) established in Romania are **Romanian legal entities**.

According to Art.2 of the Law No.31/1990, the companies shall be set up in one of the following forms:

- general partnership;
- limited partnership;
- joint stock company;
- limited partnership with a share capital;
- limited liability company.

Art.3 para. (1) of the Law No.31/1990 enshrines the principle (rule) of limitation of the legal liability of the members. The rule in the field of companies is that the **social obligations** (belonging to one of the companies regulated by the Law No. 31/1990) **are secured by the assets of the company**.

By way of exception to this principle, the partners in a partnership and the general partners in a limited partnership or in a limited partnership with a share capital **are jointly and severally liable for the social obligations**. In these derogatory situations, the creditors of the company shall pursue first the company and, only if the company does not pay them within not more than 15 days of the date of the formal notice, they will be able to pursue the partners, who are jointly and severally liable [Art. 3 para. (2)].

The shareholders, the limited partners and the members of the limited liability company are liable only up to the amount of the subscribed share capital [Art. 3 para (3)]. We note that in the business field the overwhelming majority of companies are limited liability companies. The companies limited by shares hold the next place, but at a great distance, while other forms of companies are almost non existent.

It is necessary to note here that the persons who committed acts provided for in the Law No.85/2014 or in the tax legislation shall be liable for the debts of the company regardless of the legal form of the latter, if the company is insolvent or in a state of insolvency.

According to the provisions of Art.4 of the Law No. 31/1990, the company with legal personality shall have at least 2 members, unless otherwise provided for

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[1] For commentaries on the Law No. 31/1990, see St.D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, The Company Law, Comments on articles, 5th edition, C.H. Beck Publishing House, Bucharest, 2014; S. Bodu, The Company Law, commented and annotated, Rosetti Publishing House, Bucharest, 2017. Please note that this material has been published in a similar form, in the Romanian language, in RRDPA No. 1/2019.

by the law. *The law provides for otherwise*, for example, in the case of the limited liability company, that may be formed by one member.

The violation of legal rules regulating the formation, the organisation, the change or the cessation of the activity of companies can take different forms and can give rise to criminal, civil, disciplinary, tax liability, as the case may be, etc.

Given the reality that the companies have a special importance in the business field, the Romanian legislator incriminates certain violations of the rules laid down in the Law No.31/1990[2].

## 2. Special and common features of the criminal offences laid down in the Law No. 31/1990

### 2.1. Special features of the criminal offences laid down in the Law No.31/1990

I. From the standpoint of categories of criminal laws, the Law No.31/1990 is a **non-criminal law with criminal provisions**, as it is mainly aimed at regulating the operation of companies. Thus, Art. 271-280, Art. $280^1$ and Art. $280^3$ incriminate more acts through which the legal rules on companies are violated.

II. According to the criterion of the scope, the incrimination rules included in the Law No.31/1990 are **special (derogatory) incrimination rules**, as compared to the ones included in the Criminal Code [Art. 297 (abuse of office), Art. 295 (embezzlement) etc.]. These incrimination rules are special because whenever the same act meets both the incrimination requirements laid down in one of the criminal provisions of the Law No.31/1990, and the ones laid down in the Criminal Code or in other laws, the incrimination rules from the Law No.31/1990 are applied with priority, except when the penalty provided for in the Criminal Code is more severe (Art.281 of the Law No.31/1990)[3].

III. The incrimination rules existing in the Law No.31/1990 apply **exclusively to the companies regulated by this law** and not to other types of companies, with or without legal personality (unincorporated voluntary associations, joint ventures, cooperatives, agricultural companies). Also, the application of these incrimination rules may not be extended to other collective entities with legal personality, although there are similarities between them. Thus, the incrimination rules laid down in the Law No.31/1990 are not applicable to autonomous public service undertakings or to associations. *A fortiori*, the incrimination rules included in the Law No.31/1990 do not apply to the natural persons authorised to carry out economic activities, and nor to the individual or family enterprises set up according to the Government Emergency Ordinance No.44/2008.

IV. According to Art.281 of the Law No.31/1990, although the incrimination rules laid down in the Law No.31/1990 are special, **they are also subsidiary.** But the subsidiarity is limited to the cases in which other legislative acts provide for more severe penalties for the same acts, which means that the rule of subsidiarity is correlated with and supplemented by the **principle of specialty**, feature applicable in the case of special rules. If the rule of specialty applied in all cases - regardless of the serious nature of the criminal offence - then it could be said that the rules of the Law No.31/1990 are general rules, and not special ones. Therefore, these are **conditional derogatory rules**.

V. Another specific feature of the criminal offences regulated by the Law No. 31/1990 is that the legislator uses **the technique of reference rules** in respect of most of them. This specific feature - the legislative technique of reference rules - was criticised in the academic literature that claimed that this *is not typical for the criminal legislator*, and that the rules in question lack *predictability and clarity, thus breaching the principle of legality. Moreover*, by successive amendments, *the hypothesis of many criminal rules was so deformed that it can no longer be used to incriminate* [4].

Indeed, the addressee of the incrimination rules has to make many correlations both between the incrimination rules and between them and other rules of the Law No.31/1990, as there many (multiple) references from one rule to another[5].

From a different standpoint, in respect of some of the incrimination rules included in the Law No.31/1990, the legislator should reconsider the need of criminal liability, as long as there are other legal instruments than can achieve the aim contemplated by the legislator. For example, *de lege ferenda*, the failure

[2] For a review of the criminal offences relating to companies, see: A.M. Truichici, *The criminal protection of company's assets*, Universul Juridic Publishing House, Bucharest, 2007. See also the bibliography indicated by this author, including the works: R.Bodea, *Criminal offences laid down in special laws*, Hamangiu Publishing House, Bucharest, 2011, M.A. Hotca, M. Gorunescu, N. Neagu, M. Dobrinoiu, R. Geamănu, *Criminal offences laid down in special laws*, 4th edition, C.H.Beck Publishing House, Bucharest, 2017; S.Bodu, The Company Law, commented and annotated, Rosetti, Bucharest, 2017; N.Cârlescu, Criminal business law. Criminal offences laid down in the Criminal Code and the Company Law No. 31/1990, Bucharest, C.H. Beck Publishing House, 2018.

[3] Art.281 of the Law No.31/1990 provides that the sanctioning of criminal offences laid down in the Law No. 31/1990 is subject to the rule of subsidiarity according to which if, under the Criminal Code or certain special laws, these acts form the subject-matter of more severe criminal offences, they shall be punishable under the conditions and by the penalties provided for there.

[4] See S. Bodu, op.cit, p.1343.

[5] See A.M. Truichici, *op. cit.*, p. 61.

to call the general meeting by the auditor (Art.276) could be excluded from the scope of criminal law.

In conclusion, after reviewing the incrimination rules provided for in the Law No.31/1990, one can note that the texts describing the criminal acts are not properly drafted, whereas they favour the possible non-unitary application of the law and the emergence of controversies[6], therefore a re-assessment of the criminal rules included in the Law No.31/1990 is required. However, this operation must be carried out in a systematic and global manner, namely both in respect of the correlation between the special incriminatory provisions, and in respect of the correlation of the incrimination rules with the rules to which the first ones make reference to. Also, in the framework of the re-assessment of the incrimination rules, we think that the legislator should review each such rule by reference to the principle of proportionality of the criminal protection.

**2.2. Common features of the criminal offences laid down in the Law No.31/1990**

I. **The generic legal subject-matter** of the criminal offences provided for in the Law No.31/1990 is represented by the social relationships arisen in connection with the formation, the organisation, the change and the cessation of the activity of limited liability companies, joint stock companies, limited partnerships, limited partnerships with a share capital and partnerships. In other words, **the Romanian legislator protects the legal institution of companies**, institution that is fundamental for any rule of law based on a market economy. The protection of companies is provided both for their benefit and for taking care of *the fabric of social relations* generated by the existence of these collective entities equipped with legal personality. On a different note, the criminal protection of companies covers various virtues or social values, essential for a democratic and social state, namely **the honesty** of the management bodies, **the truth** of the content of the documents issued by these entities, **the observance of the fundamental rights** of third parties, shareholders, employees, etc[7].

II. As regards the **material subject-matter**, the latter usually is absent in the case of criminal offences regulated by the Law No.31/1990.

III. From the standpoint of the consequences on the social values, most of the criminal offences provided for in the Law No 31/1990 **have immediate effects consisting of states of danger for the protected social values**.

IV. As regards the forms of the criminal offence (possible only in the case of intentional criminal offences), by reference to the performance of the criminal activity, we note that **the attempt or the preparatory acts are not incriminated** in the case of any of the criminal offences examined, **whereas the legislator deemed them irrelevant from a criminal standpoint.**

V. Another feature resulting from the analysis of the incrimination rules provided for in the Law No.31/1990 is that **all these criminal offences are committed with intent**. Although it is not necessary, but in order to emphasize the specificity of the subjective side, the legislator uses often, relatively redundantly (mainly in order to warn the addressees of the rules), the wording ”in bad faith” (which means here intent in any of its forms) or other terms that show that the guilt of the perpetrator must take the form of intent, and in some cases even the form of direct intent (for example, when it uses the wording *in order to*).

VI. Another specific feature of the criminal offences regulated by the Law No.31/1990 is that **the criminal offences concerning companies have**, directly or indirectly, a **qualified active subject**, because the persons covered by the incrimination rules must be founders, directors, managers, shareholders, internal auditors etc. The criminal offence provided for in Art. 280[3] (knowingly using the documents of a struck off company for the purpose of creating legal consequences).

The criminal offences provided for in the Law No.31/1990 may be committed, as author or co-author, by: the founder[8], the director, the general manager, the manager, the member of the Supervisory Board or of the Management Board or by the legal representative of the company[9]. No special conditions are required for the instigator or the accomplice, therefore any persons meeting the general conditions of criminal liability can be held criminally liable for this criminal offence.

According to Art.6 para (1) of the Law No.31/1990, **the founders** are the signatories of the memorandum of association and the persons with a decisive role in the formation of the company.

*The persons who have (had) an important role in the formation of a company* are those persons who, although are not the signatories of the memorandum of association (of course, the signatory founders usually play an important role), had an essential contribution to

[6] Ibidem.

[7] M.A. Hotca, M. Gorunescu, N. Neagu, M. Dobrinoiu, R. Geamănu, *Criminal offences provided for in special laws…, op. cit.*, p. 348.

[8] The status of founder is required, alongside the other statutes (director, manager, etc.) only in the case of the criminal offences provided for in Art.271-272[1] and Art. 277 para (3)].

[9] According to Art.278 of the Law No.31/1990:” The provisions of Art.271-277 shall also apply to the liquidator to the extent to which they refer to obligations pertaining to his specific duties.” We note that the criminal offence provided for in Art.279 of the Law No.31/1990 may be committed, as author or co-author, only by a shareholder or a bondholder. And according to Art.280[1] of the same law, the incrimination rule implicitly concerns the shareholder and the member of a limited liability company.

the formation of the company in relation to which the act is committed. It concerns the *so-called de facto founders*[10], who *inter alia* had the idea of the business forming the objects, who attracted the investors etc. In any case, the status of **person playing an important role in the formation of a company must follow from the acts legally prepared by the entitled persons**. For example, from the memorandum of association.

Indeed, the founders of the companies may be *signatories or non-signatories of the memorandum of association*. The latter may benefit from certain advantages (public or non-public), according to the agreements between the founders, granted in consideration of their status of persons who played *a decisive role* in the formation of the company. The category of *de facto founders* does not have to include all persons who had a certain *role*, but *less important* in the formation of the company. The persons who were involved in the formation of the company, but without playing *a decisive role*, may not be integrated in the category of founders. For example, there are deemed such persons those who, regardless of the title (for free or for consideration) have contributed in a non-essential manner to the formation of a company (lawyers, consultants, etc)[11].

In the case of **two-tier** companies, two specific structures are regulated: **the Management Board** and **the Supervisory Board**. According to Art. $153^1$ of the Law No. 31/1990, the members of the Management Board are the persons who direct the activity of the joint stock company and fulfil the acts necessary and useful for achieving the objects of the company, except for those reserved by the law to the Supervisory Board and to the General Meeting of Shareholders. The Management Board perform its duties under the control of the Supervisory Board.

The Supervisory Board appoints the members of the Management Board and also assigns to one of them the title of Chairman of the Management Board [Art. $153^2$ para. (1)].

According to Art. $153^6$, the members of the Supervisory Board are appointed by the general meeting of shareholders, except for the first members, who are appointed by the memorandum of association. According to Art.$153^8$ of the Law No. 31/1990, the members of the Supervisory Board may not simultaneously be members of the Management Board. Also, they may not be members of the Supervisory Board and employees of the company at the same time.

The Supervisory Board has the following main duties:

a) exercises continuous control over the leadership of the company by the Management Board;
b) appoints and revokes the members of the Management Board;
c) verifies that the operations of managing the company comply with the law, with the memorandum of association and with the resolutions of the general meeting;
d) reports at least once a month to the general meeting of shareholders on the supervision carried out.

In exceptional cases, when the interest of the company requires it, the Supervisory Board may call the general meeting of shareholders.

Under Art.31 of the Law No.31/1990, the founders and the first members of the Board of Directors, of the Management Board and of the Supervisory Board respectively, are jointly liable from the time of formation of the company to the company and the third parties for:

- the full subscription of the share capital and the making of the payments established by the law or the memorandum of association;
- the existence of contributions in kind;
- the veracity of the publications made in order to set-up the company;
- the validity of the operations completed on behalf of the company before the formation and assumed by the latter.

Art.18 para. (1) of the Law No.31/1990 provides that, if the joint stock company is formed by public subscription, the founders shall prepare a prospectus that shall include the data laid down in Art.8, except for those concerning the directors and the managers, the members of the Management Board and of the Supervisory Board respectively, and the internal auditors or, where appropriate, the financial auditor, and that shall specify the date of closure of the subscription.

Also, Art.108 of the Law No.31/1990 provides that the shareholders who offer for sale their shares through public offer shall proceed according to the laws on the capital market.

The **director** status is acquired according to the provisions of the Law No.31/1990, and the latter has certain obligations provided for by the law or the memorandums of association. The obligations and the rights of the director have a different configuration depending on the legal form of the company (joint stock company, limited liability company etc.) and its type of organisation (one-tier or two-tier system). Art.71 of the Law No.31/1990 provides that the directors holding the right to represent the company may only transfer it if they were expressly authorised in this respect.

The academic literature considers that the de facto directors may be active subjects of this criminal offence[12]. As far as we are concerned, we consider that the person who is not mentioned as director in the deeds of the company, even if he *de facto* behaves as a director, may not be author or co-author of the criminal offences laid down in the Law No.31/1990. Such person may be held criminally liable as instigator or accomplice, where appropriate, if the other legal requirements are met.

[10] See S. Bodu, op. cit., p. 53.
[11] For more explanations, see S. Bodu, op.cit., p.54.
[12] See N. Cârlescu, op. cit., p. 389.

The **manager** is the person to whom the Board of Directors delegates the management of the company. According to Art.143 of the Law No.31/1990, the Board of Directors may delegate the management of the company to one or more managers, appointing one of them as general manager. The managers may be appointed from the directors or outside the Board of Directors. If the memorandum of association or the resolution of the general meeting of shareholders provides for in this respect, the Chairman of the Board of Directors of the company may be appointed General Manager. The delegation of the management of the company is mandatory in the case of joint stock companies whose annual financial statements are subject to a legal obligation of financial auditing.

The (general or ordinary) manager of the **joint stock company** is only the person to whom powers to manage the company were delegated. Any other person, regardless of the technical name of the position held within the company, is excluded from the application of the legal rules concerning the managers of the joint stock company.

Now, examining as a whole the provisions of the Law No.31/1990, it follows that the executive managers are included in the category of managers. If, besides the legal requirements, other duties than the specific ones are established for other persons, named *executive managers*, these persons may not be legally included in the category of managers.

**The legal representative** of a company is a person, other than the director, the manager or the general manager, who is authorised, according to the law, to perform certain activities in the name of and on behalf of the company. For example, the person designated as legal representative, in the framework of proceedings for holding liable the legal entities, according to the provisions of Art.491 para. (3) Criminal Procedure Code[13].

We note that the **legal representative of the company** may be a qualified author or co-author only in the case of criminal offences provided for in Art.271-274 of the Law No.31/1990.

**The internal auditors** are among the persons who may be authors or co-authors of the criminal offences laid down in Art.276 and Art.277 para. (1) and (2) of the Law No.31/1990. Also, **the experts** may be authors or co-authors in the case of the criminal offence laid down in Art.277 para. (1) and (2) of the same law.

In the case of co-authorship, all perpetrators must hold the special capacity provided for by the law, but all persons who meet the legal requirements for criminal liability may be accomplices and instigators. In other words, the secondary participants may come from the ones nominated or non-nominated by the law.

VII. **The passive subjects (the injured parties) are not expressly qualified**, which, at the first sight, means that the sphere of injured parties coincides with the sphere of legal subjects. However, this is indirectly limited to the category of legal entities covered by the law (of the companies in question) and to certain persons who may be harmed by the acts forming offences, to the shareholders, the members and the creditors of the companies in question respectively (the bondholders may also be included here). In other words, **the companies harmed by the acts committed** may mainly be injured parties and, alternatively, if they prove a harm, the creditors of the company, the members or the shareholders may be passive subjects. Of course, the injured parties may be civil parties in the criminal proceedings. The application of incrimination rules of the Law No.31/1990 is limited to the natural persons or legal entities who commit the acts described in relation to the **companies regulated by this law.** Consequently, no other collective entities are concerned, regardless of whether they have legal personality or not. For example, these incrimination rules do not apply to the persons activating within organisations similar to the companies regulated by the Law No.31/1990, such as the cooperatives, the agricultural companies, the unincorporated voluntary associations etc [14].

VIII. According to Art. 6 para. (2) of the Law No. 31/1990: ”The persons who, according to the law, are incapacitated or have been sentenced for criminal offences against the assets by breach of trust, corruption offences, embezzlement, offences of forgery of documents, tax evasion, criminal offences laid down in the Law No.656/2002 on preventing and sanctioning money laundering, and on establishing measures for preventing and fighting the financing of acts of terrorism, republished, or **for the criminal offences provided for by this law** (our emphasis added) cannot assume the position of founders”.

According to Art. $73^1$ of the same law:” *The persons who, according to Art.6 para (2), may not be founders may also not be directors, managers, members of the Supervisory Board and of the Management Board, internal auditors or financial*

[13] According to Art.491 Criminal procedure code:” (1) During the various proceedings and procedures the legal entity shall be represented by its legal representative.

(2) If criminal action has started against the legal entity’s legal representative for the same offense or related offenses, said representative shall appoint a proxy to stand in for them.

(3) In the case stipulated at par. (2), if the legal entity has not appointed a proxy, such person shall be appointed, as the case may be, by the prosecutor who performs or supervises the criminal investigation, by the Preliminary Chamber Judge or by the court, selected from the ranks of insolvency practitioners who are certified under the law. Insolvency practitioners thus appointed shall operate, accordingly, under the stipulations of Art. 273 par. (1), (2), (4) and (5).”

[14] For this point of view and for references to the academic literature, see S. Bodu, op.cit., p.1344.

*auditors, and if they were elected, they shall be revoked*".

As a matter of principle, the prohibition (the forfeiture) of the right to be a founder and of the exercise of other rights (to be director, manager, member of the Supervisory Board and of the Management Board, internal auditor or financial auditor) lasts until the *de jure* rehabilitation occurs or the judgment granting the judicial rehabilitation becomes final. I said *in principle* whereas there might be other cases in which the interdictions, the incapacities or the forfeitures deriving from a conviction judgment cease. For example, if the rule laying down the forfeiture is repealed or if a law decriminalising the act in relation to which the conviction giving rise to the forfeiture of certain rights was ordered entries into force.

## 3. Conclusions

The Law No.31/1990 represents the legal and technical support intended for the business man and other investors through which they can put into practice their ideas.

As it is the most important law on companies, the legislator has also wanted to insert certain criminal incrimination rules in it, aimed at protecting the companies.

According to the criterion of the scope, the incrimination rules included in the Law No.31/1990 are special (derogatory) incrimination rules, as compared to those existing in the Criminal Code [Art. 297 (abuse in office), Art. 295 (embezzlement) etc.]. These incrimination rules are special, because whenever the same act meets both the incrimination requirements laid down in one of the criminal provisions of the Law No.31/1990 and those from the Criminal Code or from other laws, the incrimination rules of the Law No.31/1990 are applied with priority, except when the penalty included in the Criminal Code is more severe (Art.281 of the Law No.31/1990).

The incrimination rules of the Law No.31/1990 apply exclusively to the companies regulated by this law, and not to other types of companies, with or without legal personality (unincorporated voluntary associations, joint ventures, cooperatives, agricultural companies), and all the more they may not be applied to the businesses carried out by natural persons.

The incrimination rules provided for in the Law No.31/1990 are special and also subsidiary. However, this is limited to the cases in which other regulatory acts lay down offences more serious for the same acts, which means that the rule of subsidiarity is correlated with and supplemented by the principle of specialty, feature applicable in the case of special rules. If the rule of subsidiarity applied in all hypothesis - regardless of the severity of the penalty - then it could have been said that the rules of the Law No.31/1990 are general rules, and not special ones. It can be considered that they are conditional derogatory rules.

Another specific feature of the criminal offences regulated by the Law No.31/1990 is that the legislator uses the technique of reference rules in respect of most of them. This legislative technique of reference rules is questionable.

In conclusion, we note that the texts describing the criminal acts favour the possible non-unitary application of the law and the appearance of controversies, therefore a re-assessment of the criminal rules included in the Law No.31/1990 is required, including by reference to the principle of proportionality of the criminal protection.

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# PARTICULARITIES OF CIVIL ACTION IN THE CASE OF FRAUD BY BANK CREDIT CONTRACTS

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**Abstract**

*The crime of fraud is one of the most important threats facing the contemporary Romanian society. One of the most common ways of fraud is fraud through credit agreements. Of course, as in any criminal proceedings, in this case the question arises as to the way of repairing the damage caused by the offense. The particularity of solving the civil action in this case is the fact that, according to Romanian law, the credit contract is an executory title, so the bank would have no reason to wait for the criminal trial because it can immediately proceed to the forced execution of the person who obtained the credit in fraudulently.*

*However, there is also the view that the criminal court will have to cancel the credit agreement, which has been hit by absolute nullity at the end of the criminal trial, and to oblige the defendant to pay damages. Throughout this study, we will try to analyze the consequences of both solutions and try to identify the legal and sound solution.*

**Keywords**: *fraud, civil action, credit contract, executory title, penalty.*

## 1. Introductory considerations.

It is possible that the commission of an offense will produce, in addition to the socially dangerous consequences, material and moral damages to the detriment of a natural or legal person, in which case the offense is also the source of civil proceedings.

The legal means by which the person materially or morally damaged seeks compensation for the damage caused in a criminal trial is the civil action.

As a judicial action, civil action is essentially an institution of civil law, becoming an institution of criminal procedural law insofar as it is exercised in a criminal proceeding.[1]

In this respect, Article 19 (1) C.pr.pen. states that "the civil action brought in the criminal proceeding has as its object the tortuous civil liability of the persons responsible under civil law for the damage caused by committing the deed which is the object of the criminal action".

Civil action arising from the commission of a criminal offense can also be exercised separately in civil proceedings; in some legal systems, such as the Anglo-Saxon, a civil action can not be brought before the criminal court, so that the person injured by the offense must go to the civil court to obtain compensation for the damage suffered. In most legislation, the two actions - both criminal and civil - have as a common source that the same offense can be exercised concurrently in the same criminal process; in this sense, the romanian specialists in the field of criminal procedural law were pronounced. The Romanian criminal procedure has been known this system since 1864.[2]

## 2. Fraud by credit bank contracts.

The crime of fraud is one of the most important threats facing the contemporary Romanian society. A particular feature of this form of criminal behavior is fraud by credit bank contracts

The economic crisis that the Romanian society has traveled since 2009 proved a particularly cruel reality: a large part of the loans granted by the banking units were fraudulently granted and the accompanying guarantees had no real effective coverage . The desire for enrichment of bank employees (who were rewarded by the amount of the credits granted, without counting that they later did not have any chance of recovering the amounts of money granted), the lending policy (the granting of loans was not decided by an independent structure in the bank's structure that has no contact with the client, but also by the officials of the agencies and branches to be rewarded for the respective credits), the formal verification of the sources of income for those applying for loans (the information in the income certificates, which most of the time they were forged, were not for example checked at the Territorial Labor Inspectorates) were the main elements that favored fraud. Practice has shown that there have been numerous criminal networks specializing in fraudulently obtaining credits, networks formed of managers of commercial companies (who issued employee certificates although their companies did not carry out any concrete economic activity, the only purpose of the existence of these companies being strictly deception banking units), bank officials, persons with the ability to falsify identity documents or other documents, etc. Against the backdrop of the desperate financial situation of many people, these

[1] Ion Neagu, Drept Procesual Penal.Partea Generala, Bucuresti,Ed. Global Lex, 2007, p.73

[2] G. Theodoru, *Tratat de Drept Procesual Penal,* Bucureşti, Ed. Hamangiu, 2008, p. 113-114

groups have found numerous clients who have agreed to contract bank loans in their own name, with most of the loans coming back to the members of the criminal group.

Although the period we refer to seems far away, judicial practice proves that there are many cases currently pending court trials dealing with such bank frauds. Although such crimes are not as common at present, they are a constant reality.

## 3. Solving the civil action.

In this article, we aim to deal with the issue of solving civil action in the case of a fraud committed through credit agreements. Is such a civil action exercised by the banking unit in criminal proceedings admissible? And if so, under what conditions? The solutions were contradictory in the case-law.

In a first opinion, it was considered that the exercise of civil action in this case is inadmissible. The credit agreement between the bank unit and the person who took the credit is an enforceable title according to O.U.G. no. 99/2006. Thus, according to art. 120 of O.U.G. no. 99/2006, credit agreements, including real or personal guarantee contracts, concluded by a credit institution shall be enforceable titles.

The civil party already has an enforceable title, represented by the credit agreement, so that the admission of the civil action would lead to two titles for the same claim. In other words, the civil party already has an enforceable title in respect of that amount, the enforceable title which is precisely the contract of credit concluded. As a result, the enforcement of these titles would be of greater interest to the civil party, even through a forced execution conducted with the bailiff.

The situation is similar to the one in which the civil action is taken in the case of the offense of family abandonment, although for the maintenance pension there is an enforceable title represented by the court order by which the parent was obliged to pay it. In this respect, it has been stated in the case-law that "as regards the civil aspect of the present case, the court found that there was a ground for inadmissibility of the civil action, deriving from the fact that no longer a decision can be made to order the defendant to pay of the amounts targeted in the criminal proceedings, as long as the defendant has already been obliged, in a civil proceeding, to pay exactly the same amounts and the same title. In other words, the civil party already has a writ of execution on the respective pension, an enforcement order which is precisely the final and irrevocable civil sentence by which the defendant was obliged to pay a monthly maintenance pension."[3]

In another opinion it is considered that in such cases, the court is obliged to order the cancellation of credit agreements as a result of the restoration of the previous situation, and these have been hit by absolute nullity as a result of the unlawful cause. Under the conditions of the abolition of credit agreements, the possibility for the bank to make claims in the criminal proceeding opens through the exercise of civil action. In other words, the bank will not have two enforceable titles, because when the court order by which the defendant was ordered to pay the sums due defines definitively, the credit agreement is abolished and therefore can not constitute a basis for enforced execution the one found guilty.

## 4. Possible solutions

In our opinion the first opinion is the correct one. In this sense, it is also the majority practice. For example, in a recent ruling, the Bucharest Court of Appeal stated that "the Court, in line with the view of the court of first instance, notes that the claims relating to the credit agreement concluded with the defendant B in the amount of RON 30 485.90 are inadmissible since the contract in question is an enforceable title, so that the admission of a civil action under this contract would lead to two titles for the same claim."[4] In another case, another panel of judges from the same court stated that "in such situations, there is no question of an unlawful cause of the contracts concluded, but of a vitiation of consent (inferiority), which only attracts the relative nullity of credit agreements . At the same time, as long as the civil party already had an enforceable title against the defendants, it is questionable to what extent he could claim the same claims in a criminal trial."[5]

Besides, we can not help notice that the second opinion would only cause many practical difficulties. For example, almost always bank units do not wait for the criminal process to be finalized but address the bailiff to execute the credit agreement. If the credit agreement were to be canceled as a result of restoring the previous situation, virtually all execution acts under the credit agreement would have to be effectively abolished as a result of the principle of accessorium sequitur principalae. Such an interpretation would only jeopardize the principle of legal certainty and would be capable of generating new litigation (for example, the debtor's assets have been executed and leased to a third party in good faith). Even more obvious is the erroneous nature of that view if the credit agreement was associated with a mortgage contract on the assets of a third party.[6] In this situation, cancellation of the credit agreement would lead to the termination of the mortgage contract as a result of the latter's accessory character. Practically, as a result of this interpretation, the bank would obviously be disadvantaged because it would lack a real estate collateral that it consented to

[3] Jud. . Brașov, s. pen., sent. pen. nr. 2075/11.10.2016, J. Timișoara, s. pen. sent. pen. nr. 3073/7.10.2016, in I. Neagu, M. Damaschin, A.V. Iugan., Codul de Procedură Penală Adnotat, București, Ed. Universul Juridic, 2018, p. 91-92.

[4] C. Apel București, s. I pen., dec. nr. 1463/1.11.2018, unpublished

[5] C. Apel București, s. a II-a pen., dec. nr. 308/23.02.2016, unpublished.

[6] See also, T. București, sent. pen. nr. 221/13.02.2019, unpublished.

granting credit. In particular, the bank would have diminished its chances of obtaining compensation for the damage caused.

That is why we consider that in such cases the banking units are not in a position to demand compensation for the damage in the criminal proceedings, but will execute the credit contract.

However, two exceptions are to be recognized from this rule: the situation in which the bank carries out the civil action against other participants in the offense than the one with which it actually concluded the credit agreement and the hypothesis in which the credit agreement was obtained under a different name, using fake identity documents.

In the first case, obviously civil action is admissible in respect of the damage created, the civil party having no enforceable title against the defendant in respect of these amounts, if he is complicit or instigator of the acts by which the bank was deceived.

In the same sense, in a solution of judicial practice, it was shown that "regarding the rest of the claimed claims, in the context in which the defendant had the procedural quality of accomplice and instigator of the material acts by which the bank was injured, the civil party does not have a enforceable title against the defendant, but only against the suspects for whom the case was closed in the course of the criminal prosecution - as the act does not present the degree of social danger of a crime - and on whose behalf the contracts in question were concluded. Under these circumstances, amounts of money corresponding to credit agreements made by suspects AC, IM, RN and ZM with the civil party through the support and at the request of the defendant may be the object of the civil action in question.

In a fair and thorough manner the court of first instance analyzed the conditions of civil liability in question, 998-999 C.civ. previously valid on the date when the offense was committed, holding that the offending offense is the action of the defendant to issue false certificates, which allowed AC, IM, RN and SM to obtain credits, although not they had this right. Indeed, the condition of the existence of damage is also met, since the actions of the accused have caused material damage, amounting to the amounts with which the civil party has been harmed by the non-repayment (or delayed repayment) of the loans. At the same time it was rightly pointed out that the damage caused is the consequence of the illicit deed committed by the defendant, the act being committed by the guilty defendant, having the possible consequences of his actions on the civil party, consequences that, even if he did not follow, he accepted.

The Court observes that the first instance found that there are fulfilled the conditions for the detention of the defendant's civil liability and legally forced the defendant to pay the amount requested by the civil party. The Court also takes into consideration the provisions of Art. 1382 of the Civil Code, according to which those responsible for a damaging act are held jointly and severally liable for the damage and, in the case of joint and several liability, the creditor is entitled to require any person to execute the full benefit of the obligation which is the subject of the obligation.

The defendant had in the criminal case in question, complicity in the material acts imputed to suspects AC, IM, RN and ZM. Therefore, in this situation, the civil party could claim payment of the entire debt from any of those charged with the civil liability."[7]

Also, in the second case the civil action is admissible. The credit contract is concluded by the defendant under another name, it is obvious that the bank does not have a writ of execution against him and can not carry out his forced execution. Under these circumstances, it is necessary to terminate the concluded credit agreement, which is being punished with absolute nullity for the unlawful cause and the substantive settlement of the civil action.

If the court will effectively resolve the civil action, the question arises as to how the amount of the damage will be determined, namely whether the defendant will be required (of course, in addition to the amount borrowed) to pay all the penalties and commissions provided in the credit agreement or just to pay legal interest.

The problem arises from the art. 19 par. (1) C.pr.pen. in which it is stated that the civil action in the criminal proceedings has as object the tortuous civil liability of the persons responsible under civil law for the damage caused by committing the deed which is the object of the criminal action. As regards tort liability and not contractual liability, the question arises as to the extent to which the provisions of a contract for determining the amount of the damage can be taken into account. Moreover, the fact that the credit agreement in question is abolished must also be taken into account. Could such a contract be the basis for calculating the damage?

In the case-law, the views on how to calculate the damage in the case of frauds in the conventions, in the event that the parties have introduced a criminal case, are controversial.

For example, in a case involving a crime of fraud, consisting in the fact that the defendants as promise-sellers deceived 8 (eight) persons by signing of the sale-purchase pre-contracts with the notary of apartments to be built in Sibiu, for which the injured parties paid between 5.000-64.000 euros (penalties were set in each contract if the promissory-sellers did not sell the apartments), and later they found that those the apartments were either sold to others or were not finalized and entered in the Land Book, the defendants refusing under certain pretexts to repay sums of money collected in advance, the court, by settling the civil action, ordered the defendants not only to pay the sums

[7] C. Apel București, s. I pen., dec. nr. 1463/1.11.2018, unpublished.

received but also to pay penalties according to the concluded contracts.[8]

In another case, the defendant was convicted of deception, noting that he had requested from B.C.R. SA a credit of 43.500,00 Euro, granted on February 27. The credit was guaranteed with the apartment located in Vaslui, ŞMM, bl. 337, et. 3, sc. C, ap. 7, on which a first-rank mortgage was signed in favor of the bank, authenticated by the conclusion no. 735 dated 29 February 2008 by the Bureau of Notary Public Associates B.M. and CRD defendant stating that the flat is good for themselves and "is free of charges or prosecutions of any kind on it there is litigation pending, being the acquisition date and so far legally and continuously" in its property despite the fact that that apartment was a common good of the defendant and his wife with whom he was in the process of divorce. The court, admitting the civil action brought by the bank unit, ordered the defendant to pay the outstanding debit and penalties under the credit agreement.[9]

Conversely, in a case where the defendant was convicted of fraud, it was noted that the defendant misled the injured person C.D. after 14 October 2011 when the parties authenticated B.N.P. A.A.A. the addendum to the authenticated Sale / Purchase Agreement dated September 29, 2011 (ending the authentication of October 14, 2011) invoking various unrealistic reasons not to end on January 25, 2012, the purchase contract for the studio for which an antecontract was previously concluded selling sale for the price of 26,000 euros, the goal pursued by defendant BH being to get a better price from another buyer for the same studio (32,000 euros) and thus causing damage to the injured party C.D. by the fact that he could not become the owner of the respective studio and can not oblige the defendant B.H. to conclude an authentic act of sale, provided that the respective studio was sold at auction under a forced execution procedure and subsequently sold to another person.

In the case, at the time of the conclusion of the sale / purchase agreement, the injured C.D. paid the accused B.H. the amount of 22,000 euros by bank transfer from C.M. - Buyer's father opened at Banca R.D. in the account of the defendant B.H. opened at the same bank. The price difference of 4,000 euros was to be paid by the injured C.D. in 2 installments, namely 2,000 euros until September 30, 2012, and 2,000 euros by September 30, 2013. The authentic purchase purchase agreement for the studio would be completed on September 30, 2013, otherwise defendant BH had to pay the injured party double the amount of the advance received or the injured party may apply to the civil court to obtain a court order to place a sale-purchase contract for that studio.

Solving the civil action, the appellate court held that it is not possible to order the defendant to pay double the advance received from the injured party, namely the sum of 44,000 euros, as this sum has its source in the clauses of the bilateral sale-purchase promise. However, the defendant's liability is engaged in the criminal offense on a non-contractual basis. In this respect, the appellate court considered that there was no causal link between the defendant's act of misleading the injured party and the amount of the damage consisting in the payment of an additional amount equal to the advance paid by the injured party resulting from the failure to execute the pre- for sale – purchase.[10]

In our opinion, in such cases, the defendant may be required to pay all the interest and penalties stipulated in the credit agreement, and not just to pay the legal interest. As long as both parties to the contract have agreed on the claims that the creditor may claim in the event of the debtor's non-performance, there is no reason that this clause will not produce its effects for the future until the payment effective flow.

It is necessary that the contractual provisions relating to the calculation of interest and commissions due by the defendant should continue to exist only for the proper compensation of the civil party, who is entitled both to recover the actual loss and the unrealized gain. If the defendant were not obliged to pay the interest and commissions set, it would be the paradoxical situation in which debtors of bad faith, who obtained fraudulent credits through the use of falsified documents, owe the bank in case of default of the credit compensation lower than a bona fide debtor who has legally obtained a credit and can no longer pay for it due to objective circumstances.

One last issue we want to address is the possibility of the criminal court invested with the resolution of civil action in these cases to censure the penalties and interest set out in the credit agreement and to find that these are abusive clauses.

In our opinion, not only can the court, but it is even obliged (including ex officio) to consider whether the bank contract, which is the basis for establishing the amount of the damage in the criminal proceedings, contains abusive clauses or not.

As regards the possibility for the court to raise of its own motion this issue, the Court of Justice of the European Union in Murciano Quintero judgment C-240/98 decided that the protection afforded to consumers by Directive No. 93/13 on unfair terms in consumer contracts requires the national court to be able to examine of its own motion whether a contract clause inferred from the judgment is abusive.

Applying this rule in practice, a court held in a case that the clause in Article 6 (2) of each credit agreement, which provides for penalties of 1% per day

[8] I.C.C.J, s.pen., dec. pen. Nr. 2978/13.11.2014, according www.scj.ro

[9] C. Apel Iași, s.pen., sent. pen. nr. 82/18.12.2014, according www.scj.ro; n the appeal made by the banking unit, the court ordered the pending settlement of the civil action following the death of the defendant - I.C.C.J, s.pen., dec. pen. nr. 197/29.05.2015, according www.scj.ro

[10] I.C.C.J, s.pen., dec. pen. nr. 219/12.06.2015, according www.scj.ro

of delay, must be interpreted in the light of the provisions of Law No 193/2000 , with amendments to the abusive clauses in contracts between traders and consumers, in force at the time of the conclusion of the agreement between the parties to the dispute. Under Article 1 paragraph 3, traders are forbidden to stipulate abusive clauses in cartels with consumers.

Any contract provision that has not been negotiated directly, which does not allow the consumer to influence its nature and which creates a significant imbalance between the rights and obligations of the parties to the detriment of the consumer and violates the principle of good, is regarded as an abusive clause under Article 4 of the same act, Faith.

Thus, this provision protects the interests of the consumer, in the sense of allowing the possibility of negotiating the contractual terms from equality, while being an expression of the actual (real) manifestation of the will of freedom.

According to the court, the clause inserted in Article 6 (6) (2) of the General Conditions, which does not limit the amount of penalties in time or in amount, thus allowing the creditor to remain passive until the limitation period is fulfilled, does not entirely satisfy the requirements of a clause complying with legal provisions and the principle of good faith. That is because, on the one hand, the debtor could not have influenced its content, since that convention is a standard contract, which contains pre-established clauses unilaterally. On the other hand, the provision in question produces a serious imbalance between the situations of the parties, to the detriment of the debtor, because it establishes a unilateral liability by forcing the debtor to pay penalties in the event of default or late enforcement but not the creditor .

Under these conditions, seeing also the provisions of letter i) of Annex no. 1 to Law no. 193/2000, which lists exemplary types of abusive clauses, including the obligation to pay disproportionately high amounts in case of non-fulfillment contractual obligations by the trader in comparison with the damage suffered by the trader, the court instance considered that the obligation of the debtor to pay penalties in an unlimited amount, reaching a value exceeding two or three times the value of the debit for example, in the case of RN the outstanding capital is 13,273.68 lei and the delay penalties are 45,062.34 and in the case of ZM the remaining capital is 6,894.75 lei and the penalties are 22,096.82 lei - is justified by the actual loss suffered by the creditor, since in the period between the date of declaring the maturity of the loan up to which the penalties have been calculated - not serious monetary instability) is an abusive clause that damages the interests of the consumer-debtor.

Failure to observe the imperative, public order provisions of Article 4 of Law no. 193/2000 brings the total absolute nullity of the aforementioned abusive clauses. The sanction of invalidity has a virtual character, but it certainly results from the way in which the legal provision is drafted, as well as from its rationale and purpose.

Considering that the law was adopted to transpose the European Community Directive No.93 / 13 on unfair terms in consumer contracts and Romania has assumed the obligation to transpose and effectively apply Community legislation in inter-individual relations, only an interpretation that ensures the effective effectiveness of the prohibition of imposing unfair terms in contracts between traders and consumers can ensure the attainment of the aim pursued by the legislature, namely to discourage the laying down of unfavorable clauses for consumers under the general conditions imposed on them.

From the wording of the contract, which in fact is an adhesion contract, the party having no active role in negotiating the clauses, it has not obviously been that the debtor has had an effective opportunity to influence the nature of the inserted clauses, including those relating to and the amount of penalties in case of late payment of invoices and the collection of a pre-term termination fee.

On the effects of ineffectiveness, the Court held that in the judgment in Case C-618/10 Banco Español de Credito SA, the Court of Justice of the European Union stated that the national courts had only the obligation to exclude the application of an unfair contractual clause so that it produces binding effects on the consumer, but without being able to alter its content. That contract must, in principle, continue to exist without any change other than that resulting from the abolition of unfair terms inasmuch as, in accordance with the rules of national law, such maintenance of the contract is legally possible .

Under these circumstances, the court deduced from the amount of the damage claimed by the civil party the amount of penalties calculated according to the contract.[11]

## 5. Conclusions

As we have seen, the practical problems faced by courts in dealing with civil action in the case of credit fraud were quite numerous. Under these circumstances, the case-law solutions were also very varied.

Unitary jurisprudence is an indispensable element for increasing citizens confidence in the justice system. We hope that the present study, through the solutions proposed and the case-law presented, will be a first step in the unification of judicial practice and a useful tool for every person involved in the execution of the act of justice, and why not for any person interested in the issues presented.

[11] Jud. Sect. 5 București, sent. pen. nr. 1316/2.05.2018, unpublished.

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# ACTUAL PROBLEMS OF REALIZATION OF THE RIGHT OF PERSONAL PROTECTION OF THE ACCUSED IN THE CONTEXT OF THE REQUIREMENT FOR A TERM FOR PRE-TRIAL INVESTIGATION ACCORDING TO THE BULGARIAN CRIMINAL PROCEDURE CODE.

**Lyuboslav LYUBENOV***

**Abstract**

*The present scientific publication represents an attempt for clarification the question, how affects the principle of objective truth and the right of personal protection of the accused person to carry out the pre-trial investigation in an explicity regulated by law period of time? For this purpose, is made an obserbance of Art.234, par.7 of the Criminal Procedure Code of the Republic of Bulgaria and the legal consequences. Based on the understanding that the defendant's right to personal protection is in its broadest sense, a recognized and guaranteed opportunity for personal, active participation in criminal proceedings we have mainly dealt with the issue of excluding important evidence of justification only because they were collected beyond the period of investigation and over the forms of limiting the personal activity of the accused person in the preliminary stage of trial through the investigation period itself. In the context of the problems described, a case- law of the European Court of Human rights has also been discussed. In the final part of the report are made theoretical conclusions on the basis of which were formulated proposals for improvement of the Bulgarian Code of Criminal Procedure.*

**Keywords:** *right of personal protection, criminal procedure law, European court of Human right, case-law.*

## 1. Introduction

The ground for this paper is the latest amendments made 2017 in Art. 234 of the Criminal Procedure Code of Republic of Bulgaria. With these amendments, the legislator finally strengthened his understanding of conducting the pre-trial investigation in absolute term. In my opinion, this normative innovation inadvertently contradicts the disclosure of objective truth and the right to personal protection, which is linked to the requirement for the duration of the study in several different directions: personal protection is exercised at all stages of the process (Art. 122 par. 1 from the Constitution of Republic of Bulgaria; Article 15 of Criminal Procedure Code of Republic of Bulgaria); the accused as a rule presents and is involved in the pre-trial investigation (Art. 206 of the Criminal Procedure Code); the accused has the opportunity to make evidential requests and to lay evidence in the course of the investigation (Art.55, 107 and 230 of the Criminal Procedure Code); the accused has the right to a sufficient time to prepare for his defense (Art. 6 (3) (b) ECHR). The present exposition describes this problem and offers a solution.

## 2. Content

According to the amended Art. 234, par. 1 of the Criminal Procedure Code "The investigation shall be performed and the case forwarded to the prosecutor within two months from the date of its institution."

In par. 2 of the same article is expressly prescribed the possibility of shortening the basic term for investigation by the prosecutor by defining shorter than the two-month period, and in par. 3 - possibility of extending the term under par. 1 in the factual and legal complexity of the case by up to four months, in cases where it can be assumed that the extended term is also insufficient, the administrative head of the respective prosecutor's office or a prosecutor authorized by him may extend the extended term at the request of supervising prosecutor, and the period of any extension may not be longer than two months. In paragraph 4 of Art. 234 of the Criminal Procedure Code, it is stated in particular that " The reasoned request for prolongation of the period shall be sent before expiration of the terms under Par. 1 and 2. Consequently, the timely completion of the pre-trial phase of the process is legally secured, above all with the introduction of a preliminary pre-trial investigation.

The investigating authorities must, as a general rule, clarify the facts and circumstances of the criminal proceedings within the prescribed time limit, and only exceptionally, for a shorter or longer term but always in a clearly specified time, unlike the court which Art. 22, par. 1 of the Criminal Procedure Code empowers the general obligation to consider and resolve the cases within a reasonable time. This dual mode of development and completion of criminal proceedings inevitably leads to a number of both theoretical and practical problems.

It is not clear from the law itself why the court at the stage of a judicial investigation should not be stimulated and accordingly limited in its actions by a deliberate time limit, and the pre-trial authorities must.

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Although in substance, the investigation activity is identical and with the same procedural importance for the entire criminal process - a concrete act of revealing the objective truth by getting to know the issues relevant to the proper resolution of the case. The described ambiguity is exacerbated when the possibilities for disclosure of the objective truth of the court are compared with those of the investigating police authorities and the investigators who ex lege are obliged in the pre-trial phase of the trial to conduct a full, objective and comprehensive study within the two-month period because the extension and the shortening of the investigation period is not a mandatory one, but only a discretionary option, and secondly an opportunity addressed to the prosecutor, i.e. lies beyond their own discretion and authority - argument Art. 234, par. 2-3 Criminal Procedure Code. In other words, there is no answer to the question why the same criminal case at the pre-trial stage is considered according to the legislator's preliminary assessment of a sufficient time for its solution, and in the court - according to the court's decision, for a reasonable time?! It can be summarized that the pre-trial investigation "ipso iure" should take place and the case should be handed over to the prosecutor within two months of its formation in accordance with Art. 234, par. 1 of Criminal Procedure Code, as "de lege lata" conducting the preliminary investigation within the terms of par. 2-3 of the same article, constitutes an optional deviation from the general text (Article 234, paragraph 1 of the Criminal Procedure Code), i.e. an exception to the general rule and not the basic rule itself. The latest amendments from 2017 in Criminal Procedure Code do not contradict this conclusion. Although, in Art. 234, par. 3 of the Code states that the investigation period may be extended, i.e repeatedly and not once, it can not be assumed that the extensions themselves can be carried out indefinitely, because, according to Art. 203 par. 2 of the Criminal Procedure Code: " The investigative body shall be obligated within the shortest possible period to collect the necessary evidence required for the discovery of the objective truth, being guided by the law, his/her inner conviction and the instructions of the prosecutor."

From the aboved, it can be safely concluded that the existence of an obligation to carry out the preliminary investigation as soon as possible necessarily implies an obligation to temporarily reveal the objective truth in the pre-trial phase of the trial. This is because the objective truth "de jure" is revealed only through a lawful investigation, that is, in the order and with the means stated in the code – argument- Article 106 of the Criminal Procedure Code. The normative introduction of a deadline for revealing the objective truth is in disharmony with Art. 121, par. 2 of the Constitution of Republic of Bulgaria, according to which: "The proceedings in the cases ensure the establishment of the truth". The constitutional legislator is categorical that all procedure, i.e pre-trial proceedings, is organized and structured in such a way as to ensure that the knowledgeable subjects can reach the objective truth in full and not as far as possible within a certain procedural timeframe. This understanding could be reached in another formally-logical way, namely, it is not possible to fulfill the tasks referred to in Art. 1 of the Criminal Procedure Code without "... establishing the facts and circumstances of the criminal process as they have been in the objective reality"[1]. For example, disclosing the offense and disclosure to the guilty is always a function of clearly illustrating the criminal event and the involvement of the accused in it. The timely discovery of objective truth violates the very principle of objective truth (Article 13 of the Criminal Procedure Code) and leads to conclusions, most of which are absolutely unacceptable:

First of all, it is clear from the obligation that the objective truth be strictly established within the pre-trial investigation period that it must be disclosed on a provisional basis - to the extent that the term has not expired, and not unconditionally, as stated in Art. 13 of the Criminal Procedure Code - with all necessary measures for the purpose.

Second, since the objective truth must be disclosed only within the period of investigation and not according to the need to examine all the circumstances relevant to the outcome of the case, it is permissible and sufficient that it be sought in part rather than in full, exhaustively.

Third, as the objective truth is revealed exclusively within the time limit and not according to the factual nature and legal complexity of the case, it is permissible to derive it entirely according to the diligence, the approach and the subjective possibilities of the investigative bodies to orientate quickly and correctly in time.

Fourth, the requirement for objective truth to be "delivered", that is brought quickly into the process, finally stimulates the investigating authorities to ignore the details of their work, which increases the risk of procedural errors and significantly reduces the quality of their work.

Fifth, the disclosure of objective truth with the judicious speed, but without the necessary quality, excludes the possibility of a proper settlement of the case.

Sixth, according to the practice - the wrongful resolution of the case always comes at the expense of citizens' rights and their trust in the justice system, etc.

From the above, it can be inferred that the disclosure of objective truth within the explicitly defined time frame for pre-trial investigation is a factual and formal-legal disagreement with the lawful and proper resolution of the case. This disagreement ultimately reduces considerably the security of state interests and hence of personal interests, because ... "in

[1] С. Павлов, Наказателен процес на Република България – обща част, С. „Сиби", 1996 г., с. 108.

our criminal proceedings, the interests of the state are harmoniously combined with the interests of the person"[2] Therefore, the timely disclosure of objective truth adversely affects the full exercise of the defendant's right of defense. Personal protection, conceived as a specific subjective right, means the possibility of self-defense of certain rights and legitimate interests in the criminal process - active participation aimed at highlighting those circumstances of the subject of proof that exclude or mitigate the penal liability of the accused i.e. disclosure of objective truth about them from the accused himself. From this point of view, personal protection always helps to properly solve the case. The introduction of a time-limit for disclosure of the objective truth in the pre-trial phase infringes the right to personal protection, so that, through its exercise, the accused reveals the truth of the factual situations in which he is using the case.

The necessity for the objective truth to be revealed exclusively within the term for pre-trial investigation is imposed in Art. 234, par. 7 of Criminal Procedure Code, with the following wording: "... Investigative actions taken outside the time limits under Paragraphs 1 - 3 shall not generate legal effect and the evidence collected may not be used before court for the issuance of a sentence." Consequently, the disclosure of the objective truth by will and by the means described in the code by both the state and the accused outside the term a pre-litigation investigation is inadmissible in nature and the person subject to it should be subject to a procedural penalty consisting in disqualification of the evidence gathered outside the due date. Although the procedural inadmissibility of evidence and evidence attracted outside the term of investigation is not a classical legal sanction, since it neither adversely affects the person of the offender by imposing certain sanctionary consequences on him (burdens, deprivation) nor his property. It is a typical procedural penalty aimed at restoring the situation existing before the offense.

By argument of legal theory, the term is relevant for a certain period of time in which legal rights are exercised and legal obligations are being fulfilled. From the point of view of its realization, it is an event, as the physical exhaustion of time occurs regardless of the presence of human will for that[3]. As an event in certain cases, the term is raised by the legislator as a particular legal fact from the category of legal events, the preliminary manifestation of which is confined to the appearance of certain legal consequences. Considered as a legal fact, the term is part of the composition of the legal phenomenon - a necessary component of it and a separate, independent precondition for the creation, modification or extinction of rights and obligations[4]. In the indicated sense the legislator in Art. 234, par. 7 of the Criminal Procedure Code treats the term of investigation. A careful analysis of the provision shows that the expiration of the investigation period is a legal fact, the manifestation of which exits the pre-emptive environment for a pre-trial investigation. In other words, the expiration of the terms under par. 1-3 of Art. 234 of Criminal Procedure Code entails the obligation to suspend the investigation, the non-fulfillment of which leads to procedural sanction - the procedural inadmissibility of the collected material and the impossibility of being used by and before the court in the issuing of the sentence. But in order to be an imperative, the law is "... above all-evaluation norm"[5]. This is because "... whoever wants to motivate someone, he must know beforehand towards what he wants to motivate; he must have assessed that thing in a certain positive sense, i.e. to have found it valuable."[6] In this logical sequence, the norm of Art. 234, par. 7 of Criminal Procedure Code should also state what is the state of public law that is behind its imperative, i.e what is publicly worthwhile and what is not to occur or not to be subject to sanction. Obviously, the legislator has considered it to be publicly harmful to use evidence gathered beyond the time-limit for pre-trial investigation, i.e, it is publicly valuable to close the criminal proceedings quickly. This legislative decision can only be justified if the exclusion of evidence formally collected outside the time-limit for pre-trial investigation is in favor and not at the expense of the rights and legitimate interests of the participants in the criminal proceedings and, in particular, the accused as a subject in the pre-trial phase and in the judiciary. Simple verification of the claim that the rapid completion of criminal proceedings corresponds to the effective and efficient protection of the legal good of the accused leads to important results, some of which are considered as significant below.

First, from the literal interpretation of Art. 234, par. 7 of the Criminal Procedure Code, it is remarkable that there is no obstacle to certain justifiable evidence, that they are inappropriate and consequently used in the process, even though the request for their collection was made at the end of the term or shortly after its expiration, only on the pretext that their collection outside the same would not produce the intended legal consequences and would therefore be meaningless. This, in turn, is nothing other than depriving the defendant of free evidence valuable evidence, especially considering the fact that the taking of evidence and the collection of the materials mentioned therein takes place outside his or her personality. It is addressed to the competent state authorities as a procedural obligation (Article 107 of the Criminal Procedure Code), which can not be implemented in a timely manner, even consciously, in general. The omission of the term for unreasonable reasons is irreparable - Art. 186, par. 1 of the Criminal Procedure Code and the disciplinary

[2] Пак там, с. 90.

[3] Р. Ташев, Обща теория на правото, С., „Сиби", 2010 г., с.235-236.

[4] Виж подробно относно строежа на равното явление, В. Ганев, Курс по обща теория на правото – увод и методология на правото, С., „Академично издателство Проф. Марин Дринов", 1995 г., с. 15-20.

[5] Н. Долапчиев, Наказателно право – обща част, С., „ Издателство на Българската академия на науките", 1944 г., с.202.

[6] Пак там.

sanctioning of state bodies for deliberate procedural passivity will in no way remedy the unfavorable consequences of expiry of the term for the accused.

Second, the provision mentioned above precludes the acceptance of any documentary evidence deposited personally by the accused, even when the expiration date is only one day, which is absurd and in violation of his or her effective personal protection. It goes without saying that there is no obstacle to the accused by an active subject of the investigation to be reduced to a passive object of the same by means of purely formal legal arguments.

Third, Art. 234, par. 7 of the Criminal Procedure Code makes it possible to exclude without justification the exculpatory evidence that is included outside the general investigation period by carrying out procedural investigative actions (prequisition, search, seizure, etc.).[7]

Fourth, the continuation of the term in the criminal proceedings, according to Art. 185, par. 1 of Criminal Procedure Code is only possible if it is determined by the court or pre-trial bodies in the presence of valid reasons and the filing of an application before the expiration of the term. Probably, because the time for investigation is determined by law, not by a body of pre-trial proceedings or by the court, the legislator in par. 3 of Art. 234 talks about the extension of the investigation period. It is obviously a particular case of extension of the time-limit, since there is no significant difference between the extension and the extension of the time-limit, in both cases an additional period of time is added to one expiration date. But, and the "special" extension of the term within the meaning of Art. 234, par. 3 of the Criminal Procedure Code shall be implemented by decision of the prosecutor or of the administrative head of the respective prosecutor's office. Then, what is the guarantee that the extensions of the pre-trial time will not be carried out systematically for the prosecution's needs and too little, or at least for those of the defense?

Fifth, the availability of time-limits for pre-trial investigation encourages public authorities to transfer the evidence-based process primarily to the judicial phase, where the judicial investigation is conducted within a reasonable, not exactly specified, time. This inevitably leads to the occurrence of a probative incompleteness, which is in some cases absolutely insurmountable to the accused, even due to the nature of the evidence itself, which can be erased, destroyed or damaged by the beginning of the judicial investigation. On the other hand, probative deficiency is a basic prerequisite for raising and introducing unjustified and unlawful charges. It fills the environment for making erroneous conclusions about the existence of the necessary and sufficient grounds for drafting and filing the indictments in court (Article 246 of the Criminal Procedure Code), as the prosecutor is deprived of "... all the evidence that could be objectively gathered and investigate in the pre-trial investigation."[8]

Sixth, according to Art. 234, par. 7 of Criminal Procedure Code, the materials gathered outside the term for pre-trial investigation can not be used, but only when the sentence is handed down. Therefore, per argumentum a contrario, they could be used in the enforcement of other judicial acts. For example, when deciding to approve a settlement agreement - Art. 382 of the Criminal Procedure Code, or in the adoption of a decision to convict the accused, by releasing him from criminal responsibility by imposing an administrative penalty - Art. 378 Criminal Procedure Code. The conclusion is that the same evidence may be admissible or inadmissible depending on the requirements of the case, or in other words there is no obstacle to surrendering the probative value of the evidence in the case - something incompatible with the philosophy underlying in the Constitution of Republic of Bulgaria and the Bulgarian Criminal Procedure Code.[9]

Seventh, literal interpretation and application of Art. 234 par. 7 of the Criminal Procedure Code raises serious gaps in the practice, for example, is it unclear, should it be disqualified from the evidence in the case of certain protocols with justification for the accused only because the compulsory means of obtaining them (certification, perquisition, search etc.) were carried out within the time limit for pre-trial investigation, but the approval of the records by the court occurred later, after its expiration? In the Criminal Procedure Code, there is no specific answer to the question what happens when the pre-trial proceedings are initiated against an unknown perpetrator (Article 215 of the Criminal Procedure Code) and no action has been taken within the prescribed timeframe to investigate the crime, but after the expiry of the time a person accused of being charged with the minutes of the first investigative action against him.

Eighth, the short deadlines for the pre-trial phase of the trial encourage pre-trial authorities to "look for" at the cost of all the confessions of the accused, in order to guarantee their accusation. The extraction and use of the confessions of the accused de lege lata is facilitated by the legislator with the institute of the interrogation of the accused before a judge - Art. 222 of the Criminal Procedure Code. The adoption of this procedural figure has the following meaning: "... after confession has been reached, the accused is interrogated before a judge, and the relevant protocol is drawn up. If in the course of the judicial investigation he gives a substantially contradictory explanation, only the record of the interrogation before a judge /to which he or she is given a prior power/ ... from what has been said so far ... the interrogation before a judge in the pre-trial proceedings is an institute of investigation /inquisitorial/. It introduces a preliminary force of evidence and reabilitates the accused's confession as

[7] В този см., вж., М. Чинова, Досъдебното производство по НПК – теория и практика, С., „Сиела", 2013 г., с.388.
[8] Н. Манев, Развитие на реформата на наказателния процес, С., „Сиела", 2018 г., с. 103.
[9] Вж в този см., пак там., с. 102.

the queen of evidence."[10] In summary, the short deadlines for investigation, especially of a complicated criminal activity, the preliminary proceedings motivate their position by compensating the insufficient time with methods from the inquisitorial process.

Ninth, the provision of an explicit deadline for pre-trial investigation is also contrary to european standards of protection. Under Article 6 (1) of the ECHR, every person is entitled to request that his case be dealt with within a reasonable time. The requirement of reasonableness of the term in European theory and practice aims not to accelerate the criminal proceedings but to prevent uncertainty in the situation of the accused for too long[11]. In criminal cases "... the guarantee for reasonable time is valid from the moment when the person is accused wich means from the moment it is significantly affected.[12]" Therefore the guarantee time applies as early as in the pre-trial proceedings. Under the ECHR, criminal cases are not dealt with in absolute terms[13]. The reasonableness of the time-limit depends always on specific circumstances such as the complexity of the case (number of accusations against one person, number of accused persons, amount of evidence, legal complexity of the concerned issues, etc.), the applicant's behavior and the behavior of the competent administrative and judicial authorities[14]. Thus, the European legislator appealed for a criminal trial that takes into account the needs of the defendant to fully counter the indictment according to the nature and peculiarities of each individual case and not to the expense of them in pursuing a speedy resolution of criminal cases because of the very speed as a value.

Tenth, the existence of a special term for pre-trial investigation also contradicts the right to sufficient time for the preparation of the protection provided in Art. 6, item 3, letter "b" of the ECHR. Ensuring sufficient time to prepare the defense is designed to protect the accused from a quick trial[15]. By analyzing the case law of the Court of Human Rights, there would be no violation of Art. 6 (3) of the Convention if, within the time-limit for pre-trial investigation, the accused has sufficient time to take full account of the facts of the case, provided that his competence, his need for further training, authorization of a defense counsel, for a longer discussion meeting with a lawyer[16].

## 4. Conclusions

In our view, the written above is sufficient to justify the understanding that the introduction of an absolute time-limit for pre-trial investigation runs counter to both the principle of disclosure of the objective truth and the right to personal protection. Therefore, "de lege lata" in Art. 234 form Criminal Procedure Code terms is necessary to be understanded and treated as instructive and disciplining, and in no way fatal. In agreement with this conclusion, we propose 'de lege ferenda' to amend the text in line with the broader (European) requirement for a reasonable period or to build a new, more flexible, procedure for extending the time-limits for investigation in the preliminary phase. It is in the interest of the participants in the criminal proceedings that the legislator should strive for the complete elimination of the pre-trial investigation periods rather than for their extension or even less to their reduction.

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[12] Пак там.
[13] Пак там., с. 524
[14] Pedersen and Baadsgaard v. Denmark [GC], No. 49017/99, judgment of 17 December 2004, Reports 2004-XI
[15] *Müller and Others v. Switzerland*, 24 May 1988, § 35, Series A no. 133
[16] Харис, О' Бойл, Уробрик, Бейтс, Бъкли, Право на европейската конвенция…, цит съч, с., 561-562: X vs Austria, Le compte vs Belgium, Samer vs Germany, Kremzow vs Austria и др.

# ISSUES REGARDING THE JURISDICTION IN CASE OF JOINING THE CRIMINAL CASES

**Dan LUPAȘCU**[*]
**Mihai MAREȘ**[**]

**Abstract**

*The joinder of criminal cases determines a prorogation of material or territorial jurisdiction of the court or, as the case may be, of the prosecuting authority ensuring a proper performance of the legal activities.*

*The current Code of Criminal Procedure regulates both the compulsory joinder and the optional joinder of the criminal cases, according to a summary proceedings, stipulated in article 45 (during the trial), and, respectively, article 63 paragraph (1) related to article 45 (during the criminal investigation).*

*The concurrence between the civil and military nature of the judicial body is settled in favour of the civil nature of the judicial body, observing the equivalence of its degree. After joining the cases, the enactment of certain decisions by the judicial body determines either maintaining the legal empowerment (in case of the court) or, as the case may be, declining the jurisdiction (in case of the prosecuting authority).*

**Keywords:** *jurisdiction; joinder of cases; court; prosecution body; joinder procedure.*

## 1. Introduction

**The joinder of criminal cases is an institution of major importance in the criminal procedural law with direct repercussions on the procedural trajectory of a criminal case. Although the joining of the cases is of such major importance, it does not benefit from a thorough and exhaustive analysis in the specialized legal doctrine.**

Also, the judicial bodies in their practice do not approach this institution with much interest, in general the prosecutors and the courts of law deal with it in an expeditious way, by a simple order of joinder and with no further argumentation as to why the joinder is applicable, nor why the legal conditions of joining the cases are actually met in the respective cases.

This paper deals with a full theoretical, but still pragmatic, analysis of both the old and the new procedural regulations in the matter of joinder of the cases in criminal matters. By examining current legislation as compared to the old regulation, some principles can be drawn up to provide answers to several aspects signaled in the practice of prosecutor's offices or courts of law. The analysis of each case of bringing together criminal cases has an important role for the clarification of the problems caused by what we contend to be a limited regulation of this procedural institution.

It shall be noted from our analysis that the regulation on the joinder of cases in criminal matters is not very vast and it does not address all the issues that may appear in the judicial practice.

This paper therefore aims to bring to light some controversy over the current regulations in the matters related to the joinder of the cases in criminal matters, problems that give rise to a proper doctrinal analysis in order to provide the necessary answers. It is our contention that this paper will definitely serve as guideline for the legal authors and for the legal professionals as well.

## 2. General issues. Institution of joining the cases in criminal matters

**Regulatory act in the current Code of Criminal Procedure**

The current Code of Criminal Procedure[1] (hereinafter referred to as the Code of Criminal Procedure) regulates the joinder of the criminal cases as independent and special procedural institution, specific to courts, in **articles 43-45**, within Title III (*Participants in criminal proceedings*), Chapter II (*Jurisdiction of judicial bodies*), Section 3, a section marginally and suggestively called "*Special stipulations regarding the jurisdiction of courts*".

The simple positioning of the institution for joining the cases within this section determines ab initio its qualification as an **institution waiving** the common rules on the jurisdiction of the courts.

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[1] Effective from 1 February 2014.

The joinder of cases by the prosecution bodies[2] does not benefit from a freestanding regulation in the Code of Criminal Procedure, different from the one related to the jurisdiction of courts. Under the provisions of article 63 paragraphs (1) and (2) of the Code of Criminal Procedure, contained in Section 5 (*Prosecuting authorities and their jurisdiction*) of the same Title and the same Chapter of the Code of Criminal Procedure, the provisions of article 43-45 also properly apply during the criminal investigation, with one exception, but to which we shall refer below.

As we shall mention, the current regulation is not much different from previous regulation in the Previous Code of Criminal Procedure (hereafter referred to as the Code of Criminal Procedure 1968), the regulatory differences being rather formal than related to content.

**Notion. Rationale for regulating the joinder of cases in criminal matters**

As it results from the very topography of the initial criminal procedural provisions, the joinder of cases is a **special procedural incident** with implications on the **jurisdiction** in criminal matters - both of the courts and of the prosecuting authorities. The joinder of cases is, in a more plastic but eloquent expression, "gathering together" several criminal cases - among which there are certain links - either during the criminal investigation or during the trial, even if the judicial body (the court or prosecuting authority) would not normally be competent to settle all these cases.

From a technical and legal point of view, the specialized doctrine has correctly acknowledged that the joinder is the **operation** in which two or more causes are brought together in one file to be solved by one court order[3]. The joinder or criminal procedural junction occurs when substantive links exist between criminal cases, so that finding the truth can only be achieved by examining these cases within the same proceedings[4].

As a matter of course, the Code of Criminal Procedure does not define as such the notion of joinder of criminal cases or their effects on judicial proceedings, but its meaning and implications are easily deduced from all the provisions governing it.

The legislator has thus provided the institution for joining the cases **for the good administration of justice** and for avoiding a separate trial by the same court and passing a contradictory court order in cases between which there are substantial connections necessary to find the truth in the same criminal proceedings[5]. The same purpose of a good administration of justice is also pursued by the legislator in case of joinder of cases during the criminal investigation, since, in addition to the advantages of time and resources of the prosecution carried out in one case and concurrently regarding the same offences and persons, the eventual prosecution of all these offences and persons subsequently ensures a unitary and consistent trial by a single court.

As a matter of fact, one of the objectives pursued by the Code of Criminal Procedure by regulating the jurisdiction of the judicial bodies and all other issues related to the participants in the criminal proceedings has been to create a legislative framework "*in which the criminal proceedings become faster and more efficient, and significantly less expensive*"[6]. The reason for joining the cases is undoubtedly limited to the aim pursued by the legislator in the current criminal procedural regulation. The simultaneous investigation and trial of the cases between which there are certain connections as a result of the implementation of the joining mechanism, guarantee a good performance of the criminal proceedings, since, in this way, the **efficiency** of the judicial activities is ensured, avoiding possible contradictory or unfounded decisions in the respective cases.

The mechanism for joinder of criminal cases therefore tends to ensure a **unitary justice** and, in the broad sense, it is a benefit to the good course of justice. The joinder of criminal cases leads to a better settlement thereof, since it gives the judicial bodies the opportunity to have an overview of all the circumstances in which the offences have been committed[7]. The aim of joinder of cases is to ensure that the truth is attained by conducting all investigations by the same investigation bodies at the same time for a fair and consistent production of evidence, thereby clarifying the contradictions between the statements of the heard witnesses, through confrontations and the production of other necessary evidence[8].

**Effects of joinder of cases from the jurisdiction perspective. Prorogation of jurisdiction**

The joinder of cases in criminal matters may have the effect, as legal doctrine and practice call, of **legal prorogation of jurisdiction**. This prorogation of jurisdiction functions both with regard to the prosecuting authorities and the courts.

The **jurisdiction** of judicial bodies, courts or prosecuting authorities is the scope of the duties that each category of judicial bodies has to fulfil, according

[2] Mentioning that the only prosecuting authority competent to order the joinder of criminal cases during the criminal investigation, is the prosecutor.

[3] A. Zarafiu, *Procedură penală. Partea generală. Partea specială. Conform Noului Cod de procedură penală*, Editura C.H. Beck, 2015 – p. 130.

[4] C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 133.

[5] High Court of Cassation and Justice, Criminal Division, decision no. 2379 of 14 June 2011, available on www.scj.ro

[6] Explanatory statement of the Code of Criminal Procedure, effective from 1 February 2014, p. 4.

[7] I. Neagu, M. Damaschin, *Tratat de procedură penală, Partea generală*, Editura Universul Juridic, București, 2014, p. 365.

[8] Constitutional Court of Romania, Decision no. 719/2016 - the exception of the unconstitutionality of the provisions of article 43 paragraph (1) of the Code of Criminal Procedure, published in the Official Gazette no. 125 of 15 February 2017, paragraph 16.

to the law, in the criminal proceedings[9]. In principle, this jurisdiction can be determined by an offence (material jurisdiction - *ratione materiae*) or, exceptionally, by the quality of the perpetrator of an offence (personal jurisdiction). Also, without going into details that go beyond the scope of this paper, we recall that another form of jurisdiction of the judicial bodies is also the territorial form (*ratione loci*), established in accordance with the dispositions of article 41 of the Code of Criminal Procedure, according to certain criteria expressly provided by the legislator.

Thus, the joinder of criminal cases would, at first glance, be a prolongation or extension of the limits of jurisdiction of a judicial body and of offences or persons not assigned to it according to the customary rules[10]. The prorogation of jurisdiction is essentially an **exception** to the ordinary rules of jurisdiction which allows the judicial body to carry out judicial activities in respect of certain offences or persons in respect of whom it has not been initially competent without the acts performed under those conditions to become null and void[11].

The joinder of cases is governed by special provisions on jurisdiction, which derogate from the ordinary rules of jurisdiction, so that all joinder cases listed in article 43 of the Code of Criminal Procedure will be restrictively interpreted and cannot be extended by analogy to other situations not provided by law.

As we shall see below, **not all cases of joinder of cases cause a genuine prorogation of jurisdiction**, some of which do not attract a genuine effect of extending the jurisdiction of the judicial body to these causes, but rather a formal one.

The old doctrine defines the prorogation of jurisdiction as "*the prolongation or extension of jurisdiction, regarding the offence, to another offence or another offender of different jurisdiction*"[12]. Other perpetrators, examining the prorogation of jurisdiction under the Code of Procedure 1968, have argued that there is a prorogation of jurisdiction due to some errors in the classification of the offence or the failure to recognise circumstances leading to a change of classification[13].

Also, under the aegis of the former regulation, the Supreme Court has ruled in a decision similar to this case that "*the prorogation of jurisdiction means the extension of the normal jurisdiction of the judicial bodies to cases which, naturally, belong to other judicial bodies, according to the law "ratione materiae" or "ratione loci*"[14]. At the same time, the specialized doctrine has rightly considered in that the prorogation of jurisdiction is always legal in criminal matters and can only take place in favour of a judicial body of the same rank or of a higher rank, never in favour of a lower judicial body[15].

## 3. Regulation of the institution for joining the cases in the current Code of Criminal Procedure and in the Code of Criminal Procedure 1968

As can be seen from the simple comparison of the two criminal procedural regulations, the changes in the joinder of cases *during the trial* have occurred more formally, in principle the cases of joining the cases being renamed and restructured by the current Code of Criminal Procedure (A). Regarding the regulation of the joinder of cases *during the criminal investigation*, no changes in the content have been made either in the current Code of Criminal Procedure, as stated below (B).

**(A)** Regarding the joinder of cases during the trial, the criminal procedural provisions of the two codes may technically be presented as follows:

**Current Code of Criminal Procedure**

*TITLE III: Participants in criminal proceedings*

*CHAPTER II: Jurisdiction of judicial bodies*

*SECTION 3: Special stipulations regarding the jurisdiction of courts*

*Article 43:*

*Joinder of cases*

*(1) The court shall order the joinder of cases in case of continued offences, of formal multiple offences, or in any other cases when two or more material acts compose a single offence.*

*(2) The court may order the joinder of cases, provided that this does not delay the trial, in the following situations:*

*a) when two or more offences were committed by the same person;*

*b) when two or more persons participated in the commission of an offence;*

*c) when there is a connection between two or more offences and joinder of cases is required for a proper administration of justice.*

*(3) The provisions of paragraphs (1) and (2) are also applicable when several cases, having the same subject matter, are pending with the same court.*

*Article 44:*

*Jurisdiction in case of joinder of cases*

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[9] Quoted in C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 116.

[10] A. Zarafiu, *Procedură penală. Partea generală. Partea specială. Conform Noului Cod de procedură penală*, Editura C.H. Beck, 2015 – p. 130.

[11] *Idem*.

[12] Tr. Pop, *Drept Procesual Penal, vol. II, Partea Generală,*, Tipografia Naţională S.A. Cluj, 1946, p. 189.

[13] V. Dongoroz (coord.) *Explicaţii teoretice ale Codului de procedură penală roman, Partea general, vol. I,* Editura Academiei Republicii Socialiste România, Bucureşti, 1975, p. 102.

[14] High Court of Cassation and Justice, Criminal Division, decision no. 1495 of 10 May 2012, available on www.scj.ro.

[15] C. Voicu, în N. Volonciu (coord.), Codul de procedură penală comentat, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 133.

*(1) In case of joinder of cases, if in relation to various perpetrators or various acts, the jurisdiction belongs, under the law, to several courts of an equal level, the jurisdiction to rule on all facts and on all perpetrators shall rest upon the court which has been firstly notified, and if, depending on the nature of facts or on the capacity of persons, the jurisdiction belongs to courts of different levels, the jurisdiction to rule on all joined cases rests with the court of the higher level.*

*(2) The jurisdiction to rule on joined cases remains adjudicated even if for the act of the perpetrator who determined the jurisdiction of a specific court, splitting or termination of criminal proceedings was ordered or an acquittal was ordered.*

*(3) Concealing and favouring the offender and failure to report any offences fall under the jurisdiction of the court deciding upon the offence to which these are related, and if the jurisdiction based on the capacity of persons belongs to courts of different level, the jurisdiction to rule on all joined cases rests with the court of the higher level.*

*(4) If one of the courts is a civil court and the other is a military court, the jurisdiction rests with the civil court.*

*(5) If the military court is of a higher level, the jurisdiction rests with the civil court having an equivalent level and has jurisdiction under articles 41 and 42.*

*Article 45:*

*Case joinder procedure*

*(1) The joinder of cases may be ordered at the request of the prosecutor, the parties, the victim and ex officio by the competent court.*

*(2) The cases may be joined if they are judged by a first instance court, even after the cancellation or annulment of the court order, or by the Court of Appeal.*

*(3) The court shall decide through a court session report, which may be appealed only together with the merits of the case.*

**Code of Criminal Procedure 1968**

*TITLE II: Jurisdiction*

*CHAPTER I: Types of jurisdiction*

*SECTION III: Jurisdiction in case of indivisibility and connection*

*Article 32:*

*Joinder of cases*

*(1) In case of indivisibility or connection, the trial at first instance is judged by the same court if it takes place at the same time for all offences and all perpetrators.*

*Article 33:*

*Cases of indivisibility*

*(1) The following cases are considered indivisibility:*

*a) when more persons were involved in the commission of an offence;*

*b) when two or more offences were committed through the same act;*

*c) in case of continued offence or in any other cases in which two or more material acts make up one offence.*

*Article 34:*

*Cases of connection*

*The following cases are considered connection:*

*a) when two or more offences are committed through different acts, by one or more persons together, at the same time and in the same place;*

*b) when two or more offences are committed at different times and in different places, as a result of a prior understanding between the perpetrators;*

*c) when an offence is committed in order to prepare, facilitate or hide the perpetration of another offence, or in order to facilitate or ensure avoidance of criminal responsibility by the perpetrator of another offence;*

*d) when there is a connection between two or more offences and the cases must be joined for a better administration of justice.*

*Article 35:*

*Jurisdiction in case of indivisibility and connection*

*(1) In case of indivisibility or connection, if the jurisdiction regarding the different perpetrators or the different deeds rests, under the law, with various courts of an equal level, the jurisdiction to judge all the deeds and all the perpetrators rests with the court which has been firstly notified, and if the jurisdiction according to the nature of the deeds or to the quality of the persons rests with the courts of different level, the jurisdiction to judge all the joined cases rests with the court of the higher level.*

*(2) If one of the courts is a civil court and the other is a military court, the jurisdiction rests with the civil court.*

*(3) If the military court is of a higher level, the jurisdiction rests with the civil court having an equivalent level as the military court.*

*(4) The jurisdiction to judge the joined cases is kept by the court it was granted to, even if the splitting or termination of the criminal proceedings or the acquittal were ordered for the offence or the perpetrator who determined the jurisdiction of this court.*

*(5) Concealing and favouring the offender and failure to report any offences fall under the jurisdiction of the court deciding upon the offence to which these are related, and if the jurisdiction based on the capacity of persons belongs to courts of different level, the jurisdiction to rule on all joined cases rests with the court of the higher level.*

*Article 36:*

*Court competent to decide upon the joinder of cases*

*(1) Whether the cases are joined or not is decided by the court which is competent to judge, according to the provisions of article 35.*

*(2) In the case stipulated in article 35 paragraph 3, the joinder of cases is decided by the military court which forwards the file to the competent civil court.*

*Article 37:*

*Special cases*

*(1) In the indivisibility cases stipulated in article 33 letters a) and b), as well as in the connection cases, the cases are joined even if they are judged by the first instance court, even after the cancellation of the decision forwarded by the court of appeal or after the annulment forwarded by the court of last appeal.*

*(2) The cases are also joined by the courts of appeal, as well as by the courts of last appeal of the same level, if they are at the same stage of the trial.*

*(3) In the indivisibility case stipulated in article 33 letter c), the cases must always be joined.*

Starting from the reference provisions of the two normative acts mentioned above, some clarifications are required:

### 3.1. Joinder cases

Reading the provisions on joinder of criminal cases according to the Previous Code of Criminal Procedure and comparing them with those of the current regulation, the institution for joining the criminal cases seems to be fully reformed. In fact, the legislator has made a reform only in terms of the configuration of the institution in the structure of the Code of Criminal Procedure.

The doctrine has argued that in the previous regulation the joinder of cases has been a *"procedure deriving from the express and distinct provision of certain cases of connection or indivisibility*"[16]. The previous criminal procedural law has expressly provided the indivisibility and connection as causes for joinder of cases. It has been argued that they are the most common cases of prorogation of jurisdiction[17]. The specialized doctrine has defined the indivisibility as the legal situation of a criminal case, which, comprising multiple offences or persons, forms a unity that requires the judgment of the "*complex assembly*" of offences and persons by the same court[18]. The notion of *connection* has also been defined as the legal situation of a criminal case in respect of two or more offences which, because of the link between them, require them to be judged jointly by the same court[19].

As a first remark, it is noted that the current Code of Criminal Procedure has not taken over the express provision in article 32 of the Code of Criminal Procedure 1968, which has tried to define the conditions of joinder of cases, namely the "*first instance*" trial by the "*same court*" if this trial "*takes place at the same time for all the offences and for all the perpetrators*". Practically, article 32 of the Code of Criminal Procedure 1968 has explicitly referred to the procedural context in which the cases could be joined, in which case the joinder could only take place when the cases have been at the same procedural stage and phase.

Having regard to the purpose of the institution, the joinder cases and the case joinder procedure regulated almost identically in the Code of Criminal Procedure 1968, such a reference was superfluous, since it was entirely understandable that the joinder could only be ordered if those cases were *pending* and aimed at the same procedural stage and phase, in the sense that none was definitively settled at the time of the joinder. Moreover, the rationale for joinder of cases and the good administration of justice could only concern the pending cases which were not finally settled at the time of the joinder.

Regarding the actual cases (grounds) of the joinder of criminal cases, the configuration of the current Code of Criminal Procedure places these cases in one article (article 43), unlike the Code of Criminal Procedure 1968, which lists joinder cases in two distinct articles (article 33 and article 34). Also, the earlier names of the joinder cases, namely "*cases of indivisibility*" and "*cases of connection*", were no longer kept as terminology by the current Code of Criminal Procedure, trying to approach more pragmatically the institution for joining the criminal cases.

However, it is easy to see that the current article 43 of the Code of Criminal Procedure includes in its contents the cases of indivisibility and connectivity stipulated in the Code of Criminal Procedure 1968. Article 43 of the Code of Criminal Procedure shows that the joinder of cases can occur in two hypotheses: *compulsory joinder* (in the cases stipulated in paragraph 1 of article 43) and *optional joinder* (in the cases stipulated in paragraph 2 of article 43).

In essence, the cases of **compulsory joinder** in the current Code are the indivisibility cases stipulated in **article 33 letter b**) (*when two or more offences were committed through the same act*) and **article 33 letter c)** (*in case of the continued offence or in any other cases in which two or more material acts make up one offence*) of the Code of Criminal Procedure 1968.

Accordingly, the cases of **optional joinder** in the current Code include both the indivisibility case stipulated in article 33 letter a) (*when two or more persons participated in the commission of an offence*), and all cases of connection stipulated in article 34 of the Code of Criminal Procedure 1968 (*where two or more offences are committed by different acts by one or more persons together, at the same time and in the same place; where two or more offences are committed in time or in a different place, after a prior agreement between the offenders or when an offence is committed to prepare, facilitate or hide the commission of another offence, or is committed to facilitate or ensure the*

[16] I. Neagu, M. Damaschin, *Tratat de procedură penală, Partea generală,* Editura Universul Juridic, Bucureşti, 2014, p. 365.

[17] G. Theodoru, *Tratat de Drept procesual penal*, Ed. Hamangiu, 2007, p. 311.

[18] *Idem.*

[19] *Ibidem.*

*avoidance of the criminal liability of the perpetrator of another offence*).

The delineation of compulsory joinder cases and optional joider cases also results from the provisions of the Code of Criminal Procedure 1968, although they were slightly inconsistent, and this distinction in its provisions was not very clearly outlined. Thus, the circumstance that certain cases attracted the compulsory joinder and others did not resulted from the provisions of article 37 paragraph (3), according to which the indivisibility cases stipulated in article 33 letter c) *had to be always joined*. *Per a contrario*, the other cases of connection and indivisibility were deemed as cases of optional joinder which were thus left to the discretion of the competent court.

However, regarding the regulation of the Code of Criminal Procedure 1968, an element of novelty is the provisions of article 43 paragraph (3) of the Code of Criminal Procedure, which expressly regulates the situation in which the cases, which are capable of compulsory or optional joinder, are, as the case may be, judged by *the same court*, and therefore not different courts, of equal or different level.

### 3.2. Jurisdiction of the joined cases

In point of the court competent to judge all joined cases, it can be found that there has been no change in the rules for determining that jurisdiction, both Codes of Procedure containing the same provisions in that regard.

Thus, according to both regulations, if, in relation to the different perpetrators or different offences, the jurisdiction belongs, according to the law, to several equal level courts, the jurisdiction to judge all the offences and all the perpetrators rests with **the court which was firstly notified** (*chronological priority*) and if, according to the nature of the offences or the quality of the persons, the jurisdiction belongs to different level courts, the jurisdiction to judge all the joined cases rests with the court of a higher level (*hierarchical priority*). Similarly, when there is also a military judicial body between the competent bodies, the jurisdiction rests with the civil judicial body (*functional priority*). If the military judicial body is of a higher level, the jurisdiction belongs to the civil judicial body of an equal level (*hierarchical and functional jurisdiction*)[20].

On another occasion[21], we have showed that the normative solution of judging the joined cases by the civil court instead of the military court has not been embraced by the Romanian legislator from the beginning. We emphasize that it was different from the normative solution contained in article 35 paragraphs (2) and (3) of the Code of Criminal Procedure 1968, prior to the amendment introduced by Law no. 356/2006, which provided for the jurisdiction of the military court in the joinder of cases pending in the civil and military courts, respectively. Subsequently, article I, paragraph 17 of Law no. 356/2006 amended the above mentioned provisions, reaching the normative solution preserved by the *de lege lata*, which means that the civil court is competent to judge the joined cases, not the military court.

Also, the provision that **the concealment, the favoring of the offender and the failure to report any offences** lie within the jurisdiction of the court that judges the offence to which they refer, and the provision that, if the jurisdiction by the quality of the persons belongs to different level courts, the jurisdiction to judge all the joined cases rests with the higher court, are also identical in the current regulation.

At the same time, both codes of procedure provide that, if the offence or the perpetrator that determined the jurisdiction of a certain court were ordered to split, terminate the criminal proceedings or acquittal, the jurisdiction of the joined cases **is still acquired.**

### 3.3. Case joinder procedure

In that regard, it is also noted that the two regulations contain **similar provisions** as to the court having jurisdiction to order the joinder, as well as the procedural stage and phase in which it may be ordered.

It is necessary, however, to emphasize, with particular reference to th**e concurrence between a civil and a military court**, that, although the trial of the joined cases rested with the civil court, after the above-mentioned distinctions, however, if we are in the presence of a higher level military court, according to the former provisions of article 35 paragraph (3) of the Code of Criminal Procedure 1968, the joinder of cases was decided by the military court, which then sent the file to the civil court competent to judge the joined cases. De lege lata, this provision no longer exists, as the jurisdiction to decide the joinder, as naturally, rests with the same court having jurisdiction to judge the joined cases, according to article 45, paragraph (1) of the Code of Criminal Procedure the final sentence, respectively the civil court of an equal level as the military court or the civil court of an equivalent level as the military court of a higher level.

We consider that the new legislator's option to renounce the provision that, in the above-mentioned situation, the joinder of cases is decided by the military court, is normal and corresponds to the recognized principle of *legal symmetry*. Given that the civil court is the one which, in fact, has the legal jurisdiction to judge the joined cases, it is the only one which can decide on the procedural incident of the joinder of cases, whether we are talking about a compulsory or optional joinder. At the same time, we believe that the provision on joinder of cases issued by a court other than the court with jurisdiction to resolve the joined cases would constitute an unlawful interference with the judicial activity of the latter court.

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[20] Note in N. Volonciu, *Comentariu la articolul 44 din Noul Cod de Procedura Penală*, 2014, www.sintact.ro.

[21] See in this respect, Dan Lupascu. Mihai Mareș. *Considerații privind competența organelor judiciare civile și a celor militare*, published on 5 June 2017 on www.juridice.ro and in "Revista Pandectele Române" number 3 of 30 June 2017.

Regarding **the procedural stage and phase** in which the joinder can be ordered, given the procedural reconfiguration of the appeal, namely the fact that the appeal has become *de lege lata* an extraordinary appeal (review), it is no longer possible to join the cases in the appeal according to the current Code of Criminal Procedure, the cases being already settled by final judgments[22]. Therefore, the current Code of Criminal Procedure has kept from the previous regulation only the possibility to join the cases (i) **in the first instance court**, even after the judgment was cancelled or annulled in the appeals and (ii) **in the court of appeal** respectively.

(**B**) Regarding the joinder of cases *during the criminal prosecution*, the criminal procedural provisions of the two codes may technically be presented as follows:

**Current Code of Criminal Procedure**

*TITLE III: Participants in criminal proceedings*

*CHAPTER II: Jurisdiction of judicial bodies*

*SECTION 5: Prosecuting authorities and their jurisdiction*

*Article 63:*

*Common provisions*

*(1) The provisions stipulated in articles 41-46 and 48 shall also apply accordingly during the criminal investigation.*

*(2) The provisions of article 44 paragraph (2) shall not apply during the criminal investigation.*

*[…]*

**Code of Criminal Procedure 1968**

*TITLE II: Jurisdiction*

*CHAPTER I: Types of jurisdiction*

*SECTION IV: Common provisions*

*Article 45:*

*Provisions applicable to criminal investigation*

*(1) The provisions of articles 30-36, 38, 40, 42 and 44 shall also apply during the criminal investigation accordingly.*

*($1^1$) The provisions of article 35 paragraph 4 shall not apply during the criminal investigation.*

*[…]*

*($4^1$) In the case of indivisibility or connection between offences for which the jurisdiction rests with the National Anticorruption Directorate and the Directorate for Investigating Organized Crime and Terrorism, the jurisdiction to carry out the criminal investigation in the joined case belongs to the specialized prosecuting authority which has been firstly notified. The provision is not applicable if the splitting has been ordered regarding the offence leading to the jurisdiction of the other structure.*

The comparison of the two regulations shows that the Romanian legislator's view has remained the same in the current Code of Criminal Procedure. The provisions on the joinder of cases during the trial are also applicable during the criminal investigation, except for the normative situation regarding the keeping of jurisdiction by the criminal court when the splitting, termination of the criminal proceedings or acquittal are ordered for the offence or the perpetrator who has determined its jurisdiction according to the rules in the joinder.

Thus, the closing of the case or splitting regarding the offence or the perpetrator, which has generated the jurisdiction to conduct the criminal investigation of the judicial body is ordered during the criminal investigation or upon the termination thereof, the jurisdiction to conduct the criminal investigations for the remaining offences or the perpetrators or the offence or the perpetrator about whom the splitting was ordered, **is not won by the prosecuting authority**. In this case, the case shall be referred to the competent body, a reference which, in our opinion, is achieved through the **declination of jurisdiction**.

As a differentiation element, the Code of Criminal Procedure has not preserved the previous provision on establishing the jurisdiction in cases where the cases of indivisibility or connection simultaneously led to the jurisdiction of both specialized structures within the Prosecutor's Office attached to the High Court of Cassation and Justice - National Anticorruption Directorate and the Directorate for Investigating Organized Crime and Terrorism. This provision was, however, superfluous, since the jurisdiction to conduct the criminal investigations could be established by properly applying the same criteria laid down for the trial.

It is noticed that the prorogation of jurisdiction during the criminal investigation, generated by the case joinder mechanism, does not have a final effect in this case.

## 4. Cases of joinder of cases in criminal matters

As mentioned above, the joinder of criminal cases is **mandatory** in case of the application of one of the cases stipulated in article 43 paragraph (1) of the Code of Criminal Procedure, but it represents a **faculty** of the body in the judiciary in the case of the application of any case stipulated in article 43 paragraph (2) of the same code. The cases of compulsory and optional joinder are generally applicable both during the judgement and the criminal investigation.

a) Compulsory joinder of cases

The compulsory joinder, as it results from the content of article 43 paragraph (1) of the Code of Criminal Procedure, occurs in the case of **the continued offence, the combination of offences**[23], as

[22] C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 137.

[23] Pursuant to article 38 paragraph (2) of the Criminal Code, there is a *combination of offences* when an action or inaction committed by a person, due to the circumstances in which it has occurred or the consequences which it has incurred, accomplishes the content of several

well as **in any other cases where two or more material acts constitute a single offence** - it is about other forms of the offence stipulated in the substantial criminal law, respectively **the successive continuous offence**[24] or the **complex offence**[25].

It is noted that the regulation of mandatory joinder of criminal cases has a purely objective basis, namely the existence of a single offence in its materiality, which may include one or more material acts. In essence, however, because the **same offence** has been committed by a person, it is necessary both to investigate it and to judge it, once, by the same judicial bodies.

There has been criticism about the constitutionality of article 43 paragraph (1) of the Code of Criminal Procedure, in terms of clarity, precision and predictability of the rule, due to the use of a allegedly ambiguous terminology on cases in which, in the practice of the judicial bodies, it could be the basis for compulsory joinder. On this occasion, the Constitutional Court has analyzed the cases stipulated in article 43 paragraph (1) of compulsory joinder of cases and has found fairly that the first two cases are expressly defined in the Criminal Code, and the third legal hypothesis mentioned in the criticized text implies that the court, following the analysis, classifies the material acts which are committed by the defendant and which are not a continued offence or a combination of offences, in the constituent content of the same offence.

The Court has stated in this respect that "*this activity of the judicial bodies of establishing the legal classification of the investigated offences is not, however, lacking of clarity, precision and predictability the criminal and criminal procedural norms, being the direct consequence of the duty of the law enforcement judicial bodies, duty which is a direct application in the criminal procedural laws of the constitutional provisions of article 124 on the administration of justice*"[26]. The Court has rejected the exception of unconstitutionality, arguing "*that, by the criticized text, the violation of the constitutional provisions of article 1 paragraph (5) regarding the quality of the law or the provisions of article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which regulates the principle of legality of incrimination, cannot be supported since the necessity for the legal classification of the committed offences by the courts in order to establish the existence of one of the legal assumptions stipulated in article 43 paragraph (1) of the Criminal Code, does not deprive the addressees of the criticized text of the possibility to adapt their conduct according to its requirements*"[27].

With particular regard to the **continued offence**, according to article 35 paragraph (1) of the Criminal Code, an offence is continued when a person commits, at different time spans, but for the same purpose and against the same victim, actions or inactions that each have the content of the same offence.

As it has been pointed out in the doctrine, the conditions for the continued offence to exist, according to the new criminal procedural regulation are: the unit of perpetrator, the plurality of actions or inactions committed at different time spans, the unit of criminal intent, the legal homogeneity of the acts of execution to which the unit of victim was added, a condition that does not exist under the previous regulation[28].

Regarding the condition of the unit of victim is, however, relevant the Decision of the Constitutional **Court of Romania no. 368/2017** on the exception of unconstitutionality of the provisions of article 35 paragraph (1) and article 39 paragraph (1) letter b) of the Criminal Code, which stated that the phrase "*and against the same victim*" in the provisions of article 35 paragraph (1) of the Criminal Code is unconstitutional because it creates discrimination within the same category of persons who commit at different time spans, but for the same purpose, actions or inactions that each have the content of the same offence, leading to the violation of the provisions of article 16 paragraph (1) of the Constitution regarding the equality of citizens before the law[29].

We consider that this reconfiguration of the conditions for the continued offence to exist, as a result of Decision of the Constitutional Court of Romania no.

offences. In this situation, the perpetrator undertakes a single action, which, by its pursuit, affects at least two social values protected by different offences by the legislator.

[24] The offence is *continuous* when its material element (action or inaction incriminated by the criminal law) is naturally extended. In fact, we are talking about a single material act extended over time, therefore, of one offence in its materiality. For this analysis, we consider that only the *successive continuous offence* is likely to be the subject of a compulsory joinder of cases, because, by itself, it assumes the natural interruption and the resumption of the material act, without generating multiple offences - as is the case, for example, of the offence of driving a vehicle without having a driving license.

For a similar definition of the successive continuous offence, see C. Mitrache, C. Mitrache, *Drept penal român, Partea generală,* Universul Juridic, Bucureşti, 2014, p. 301.

[25] The *complex offence* is expressly regulated by article 35 paragraph (2) of the Criminal Code providing that the offence is complex when its content includes an action or an inaction which constitutes an offence stipulated in the criminal law, as a constituent element or aggravating circumstance element. *The compulsory joinder of cases seems natural if the committed offence is a complex one, i.e. it includes at least two actions or inactions which are incriminated as freestanding offences under the law.*

[26] Constitutional Court of Romania, Decision no. 719/2016 - the exception of unconstitutionality of the provisions of article 43 paragraph (1) of the Code of Criminal Procedure, published in the Official Gazette no. 125 of 15 February 2017, paragraph 21.

[27] *Idem,* paragraph 22.

[28] Tr. Dima în I. Pascu, V. Dobrinoiu (coord.), *Noul Cod penal comentat*, Partea generală, ed. a II-a, Editura Universul Juridic, Bucureşti, 2014, p. 262.

[29] Constitutional Court of Romania, Decision no. 368 of 30 May 2017 on the exception of unconstitutionality of the provisions of article 35 paragraph (1) and article 39 paragraph (1) letter b) of the Criminal Code, published in the Official Gazette of Romania, part I, no. 566 of 17 July 2017.

368/2017, also has consequences on the criminal procedural realm, including from the perspective of joinder of criminal cases. Although article 35 paragraph (1) of the Criminal Code has not yet been in line with the Court's decision, its effects are in the order of the substantive criminal law, so that, *de lege lata*, the recurrent offence shall also be considered when the material acts are committed against different victims - individuals or legal entities.

In particular, where, for various reasons, until the entry into force of the said Decision of the Constitutional Court of Romania, two or more cases having as their object legally homogeneous offences committed by the same perpetrator on the basis of the same criminal intent, but against different victims, have been prosecuted or judged separately, **it shall be necessary to join** these cases complying with the rules on the jurisdiction to judge the joined cases.

Regarding **the effect of the prorogation of jurisdiction of compulsory joinder**, the doctrine has rightly considered that it could in most cases generate only a prorogation of territorial jurisdictional, but it could theoretically be accepted as the hypothesis of the prorogation of material jurisdiction in the case of combination of offences[30]. In this regard, an example is when the perpetrator shoots a gun at a person holding a publicly appointed office, thereby endangering the national security, but, by the same action, he/she also hurts a civilian, he/she commits both the attempt under article 401 of the Criminal Code, as well as an attempted murder, the prorogation of jurisdiction determining the trial of the case by the court of appeal according to article 38 paragraph (1) letter (a) of the Code of Criminal Procedure, although the murder is judged in the first instance by the district court.

Of course, there cannot always be a prorogation of jurisdiction as a result of joinder of cases under article 43 paragraph (1) of the Code of Criminal Procedure. For example, there shall not be a genuine prorogation of jurisdiction if the same prosecuting unit has been notified and opened separate criminal files dealing with different material acts of one continued offence committed within the same territorial jurisdiction. In this case, the joinder of criminal files does not give rise to any prorogation of jurisdiction, not even territorial, the prosecuting unit being also territorially competent to carry out investigations regarding those material acts.

b) Optional joinder of cases

The optional joinder of cases is regulated by article 43 paragraph (2) of the Code of Criminal Procedure and is, in essence, an incorporation, in a slightly different form, of the case of indivisibility stipulated in the Code of Criminal Procedure 1968 in article 33 letter a) and the cases of connectivity stipulated in the same code in article 34.

In the **optional joinder** of cases, the court having jurisdiction over the joinder of cases **shall appraise** whether there is **a connection** between those cases, on the one hand, and, on the other hand, whether the trial **is not delayed** by the joint trial of cases, respectively whether the joint trial of the cases would not affect the speed of the criminal trial and its resolution within a reasonable time. Of course, the same principles apply accordingly when the prosecutor appraises the joinder of cases during the criminal investigation.

In particular, the joinder of cases is optional in case of **the multiple offences**[31], of the **participation in the offence**[32], and in any other cases **where there is a connection between two or more offences and the joinder of cases is necessary for the proper administration of justice**.

In the latter case, for example, even the situation expressly indicated by the legislator in article 44 paragraph (3) of the Code of Criminal Procedure with respect to the jurisdiction to judge the offences of concealment, favouring the offender or failure to report offences together with the offence/offences to which they refer. A similar legal solution should also be recognized, for example, with regard to *the offence of perjury* committed during the criminal investigation, which, insofar as it would not lead to an unjustified delay in the settlement of the criminal case concerning offences related to false testimony, should be investigated within the same file.

The connection, a concept used in the previous Code of Criminal Procedure, but which is relinquished *de lege lata*, is a term specific to the civil procedural law, which was also dealt with in the interwar criminal procedural doctrine. It was then argued that *"two or more offences are connected when there is an objective extrinsic connection between them, that is, there is no subjective approximation between the perpetrators of these offences as in the participation and by their material nature, the offences did not engage in a common purpose as with the correlative offences, but owing to extrinsic circumstances, e.g. place, time, persons, object, etc., a connection was established between the offences, a connection that makes them connected"*[33]. Concerning the notion of connection, it was rightly stated in the legal literature that it is based on a criterion of *procedural opportunity* for the good administration of justice[34].

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[30] C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 134.

[31] According to article 38 paragraph (1) of the Criminal Code, there are multiple offences when two or more offences were committed by the same person through separate actions or inactions, before being finally convicted for any of them. Also, there are multiple offences when one of the offences has been committed for the commission or concealment of another offence.

[32] *The participation in the offence* refers to the legal situation in which several persons participate as co-perpetrators, instigators or accomplices in the commission of an offence under the criminal law act.

[33] I. Tanoviceanu, *Tratat de drept şi procedură penală, vol.II,* Tip. „Curierul Judiciar", Bucureşti, 1925, p.439.

[34] Tr. Pop, *op. cit.*, p. 190.

Obviously, in the cases of optional joinder, there shall be no prorogation of jurisdiction where the court or, as the case may be, the prosecuting authority is competent materially or by the quality of the person and territorially in relation to all the cases involved in the joinder. However, since the optional joinder cases refer to offences and/or different persons, the likelihood of joinder producing an effect of prorogation of jurisdiction is much higher than in the case of compulsory joinder of cases.

c) Joinder of cases with the same object before the same court

In line with the above, the current Code of Criminal Procedure has also regulated as a matter of novelty the situation of compulsory or optional joinder of cases where **there are several cases judged by the same court having the same object** - article 43 paragraph 3 of the Code of Criminal Procedure).

We consider that, although from the wording of article 43 paragraph (3) of the Code of Criminal Procedure would appear to be in the presence of a special case, distinct from joinder, in fact the above mentioned provisions do not regulate a real case of joinder of cases, but rather **an apparent case or, at the most, a case assimilated by the legislator in the actual cases of joinder**. Since the text of law refers to the phrase *"the same object"* of the cases judged *"by the same court"*, we consider that these causes are characterized by *identity of person and offence*[35]. Under these circumstances, the reason for joinder referred to in article 43 paragraph (3) is different from the reasoning of the institution for joining the cases, that is to bring together, in the same file, cases relating to distinct factual aspects.

Therefore, under article 43 paragraph (3), the joinder of cases, being about the same object of the cases, **cannot lead to a prorogation of jurisdiction**. However, the only procedural remedy to avoid cases in which the cases with the same subject are settled by the same judicial body at the same time, can only be that of joinder of cases.

The text provides that both the provisions of paragraph (1), which regulates the compulsory joinder, as well as those in paragraph (2) of article 43, which regulates optional joinder are applicable. In this respect, the text is deficient, and it is not clear whether, if there are two cases with an identical object, their joinder would be compulsory or optional. On this point, we consider that, when identifying an identical object in relation to two or more criminal cases judged by the same court, **their joinder must be mandatory** and cannot be left to the appreciation of the panel which has been firstly vested. Otherwise, there is a risk of contradictory decisions in the same criminal case on the same matter of fact or law.

## 5. Jurisdiction in case of joinder of criminal cases. Sanctions

As we have stated in Section II dedicated to analyzing the regulation of the institution for joining the cases in the current Code of Criminal Procedure and in the previous Code of Criminal Procedure, jurisdiction in joinder of cases in criminal matters essentially involves **two elements**: the judicial body competent to issue the *procedural act of the joinder*, therefore, to decide whether or not the cases are joined, but also the judicial body competent *to subsequently judge the joined cases* (the *unique* case resulting from the joinder).

Both during the trial and the criminal investigation, the judicial body competent to order the joinder is the same body that subsequently judges or investigates the joined cases. This jurisdiction to resolve the joined cases becomes, through extension (prorogation), a material or personal jurisdiction or, as the case may be, territorial jurisdiction.

Synthetically, the **jurisdiction** to judge/prosecute all the offences and all the perpetrators belongs to the court which was firstly notified/prosecutor's office which was firstly notified in the case of judicial bodies of an equal level, or, as the case may be, the court of a higher level/the Prosecutor's Office of a higher level in the case of judicial bodies of different levels. Also, as we have stated, the concurrence between the civil and military nature of the judicial body is in favour of the civil nature of the judicial body, complying with its level equivalence.

At the same time, unlike the rules applicable during the trial, if following the joinder of cases, the prosecuting authority orders the closing or splitting as regards the offence or the perpetrators, who determined the jurisdiction of a certain body, the jurisdiction to carry out the prosecution is lost as regards the other offences.

According to the provisions of article 281 paragraph (1) letter b) of the Code of Criminal Procedure, in the configuration given by the Decision of the Constitutional Court of Romania no. 302/2017[36], disregarding the rules on the material and personal jurisdiction of the courts and the prosecuting authorities, when the trial or the prosecution has been conducted by a judicial body of a lower level than the competent judicial body, shall be sanctioned with **absolute nullity**. On the other hand, the rules on territorial jurisdiction are provided under the sanction

[35] Strictly related to the trial by the first instance court, both article 317 of the Code of Criminal Procedure 1968, and article 371 of the Code of Criminal Procedure stipulate that the trial is limited to the *offences and persons* indicated in the document instituting the proceedings.

[36] The Decision of the Constitutional Court of Romania no. 302/2017 passed on 4 May 2017, found that the legislative solution, included in the provisions of article 281 paragraph (1) letter b) of the Code of Criminal Procedure, which does not regulate in the category of absolute nullity the violation of the provisions on the material jurisdiction and by the quality of the person of the prosecuting authority, is unconstitutional.

of **relative nullity**, being necessary to prove the injury inflicted by the person invoking it, according to the provisions of article 282 paragraph (1) of the Code of Criminal Procedure.

It has been pointed out in the specialized doctrine that, when the prorogation is determined by the application of different rules of material jurisdiction or by the quality of the person for some defendants in those cases, *the effect of the prorogation of jurisdiction is mandatory under the sanction of absolute nullity*, since the prorogation of jurisdiction is always in favour of the higher court[37]. For the identity of reason, in view of the Decision of the Constitutional Court of Romania no. 302/2017, we consider that such a sanction also intervenes if the prorogation of jurisdiction is done in favour of the higher level prosecutor's office.

Analyzing the rules for determining the jurisdiction in case of compulsory or optional joinder of cases during the trial stipulated in article 44 of the Code of Criminal Procedure, we consider that **the sanction of absolute nullity** may be applied in the following **hypotheses**:

**A first hypothesis** could be that in which the trial of the joined cases is carried out in violation of the rules of jurisdiction in article 44 paragraph (1) of the Code of Criminal Procedure, more precisely in the case where the trial of the joined cases is not made by the higher court in relation to the nature of the offences or the quality of the perpetrators, but by a lower court.

**A second hypothesis** might be that in which the trial of the joined cases is carried out in violation of the jurisdiction rules in article 44 paragraphs (1) and (2) of the Code of Criminal Procedure, respectively by the military court instead of the civil court.

**A third hypothesis** could equally be the one in which the offences expressly stipulated in article 44 paragraph (3), namely the concealment, the favouring of the offender and the failure to report certain offences, are joined in the offence to which they refer and are judged by a lower level court, although they would have been in the jurisdiction of a higher level court in relation to the quality of the person what he has committed them.

Lastly, **another hypothesis** in which we consider that the absolute nullity sanction could also be imposed is that in which the court rejects the request for joinder, although, a compulsory joinder is applicable in this case and the jurisdiction to judge the joined cases would have rested with a court of higher level. We consider, however, that such a hypothesis would be more difficult to find in the judicial practice, since the compulsory joinder of cases is rather capable of a prorogation effect in the area of territorial jurisdiction, than an effect in terms of material jurisdiction.

From the perspective of the effects that a possible rejection of the joinder of cases in a compulsory case of joinder may have in the field of jurisdiction, the provisions of the supreme court stipulated in a decision passed in the appeal are relevant, considering that **the disregard of the obligation to join the cases** is sanctioned with absolute nullity when the prorogation refers to the material and personal jurisdiction and relative nullity when the prorogation relates to the territorial jurisdiction[38]. In that case, the legal situation was represented by the existence of two case files judged by the same court (Cluj Court) concerning material acts that were included in the content of a single continued offence of influence peddling for two defendants. Although there were no requests for joinder in the case, the failure to join the cases being criticized in the appeals, the Supreme Court considered, however, that in this case, it was not even a matter of prorogation of jurisdiction, since jurisdiction over the perpetrators and their offences rested with one and the same court - Cluj Court, and not to more courts of an equal level or different levels. As such, it was found that the *failure to join the cases did not in any way affect the material, personal and/or territorial jurisdiction* of the court that is legally gained by the same unique court, which was vested from the beginning to settle the two cases.

As regards the violation of the jurisdiction rules in case of optional joinder of cases, we consider that the analysis of a possible nullity can only be made if the request for joinder has been admitted (because only in this case an effect of prorogation of jurisdiction becomes possible), and the hearing of the cases by a non-competent court according to the distinctions contained in article 44 of the Code of Criminal Procedure.

**Finally**, all these distinctions regarding the sanction of nullity in the event of non-compliance with the rules of jurisdiction in the area of joinder of criminal cases are also properly applied *during the criminal investigation*.

## 6. Case joinder procedure

*During the trial*, according to the rules stated in article 45 of the Code of Criminal Procedure, the joinder shall be ordered **at the request** of the prosecutor, the parties, the injured party and, **ex officio, of the competent court** which has jurisdiction to judge by prorogation (the court which joins the cases). We consider that, although the law does not make a distinction, the holders of the request for joinder can be both those who determine the jurisdiction of the court judging the joined cases, as well as the ones in the court, judging the case to be joined.

As regards the procedural phase and the procedural stage of the cases, it is necessary for these cases to be in the **same procedural phase and stage** and the cases under the criminal investigation with those that are pending trial, the cases in progress with

[37] C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 133.
[38] High Court of Cassation and Justice, Criminal Division, decision no. 2379 of 14 June 2011, available on www.scj.ro.

those in the preliminary chamber procedure or the cases under appeal with those judged by the first instance court cannot be joined[39]. In this respect, article 45 paragraph (2) explicitly states that the joinder may take place if the cases are judged **by the first instance court**, even after the decision has been cancelled or annulled, or **by the court of appeal.** The joinder is essential for the cases to be judged at the same time, so that, to the extent that one of the cases has been finally judged, there can be no question of joining them[40].

Given that a new trial by the first instance court as a result of the cancellation/annulment of the decision in the appeals is a new trial on the merits of the case, we consider that two cases judged by the first instance court can be joined, one of which is in a first procedural cycle and the other in a second procedural cycle, determined by the cancellation/annulment with referral for a new trial.

In the doctrine, there was discussion about the possibility to join the cases in the preliminary chamber stage, the parties expressing their points of view. In this respect, the supreme court's view seems to be the one according to which **the joinder of cases cannot occur in the preliminary chamber.** Thus, the High Court of Cassation and Justice, in order to settle a challenge against the preliminary chamber resolution[41], considered that the joinder of cases could only be carried out *after the preliminary chamber procedure*. Consequently, the judge conducting the preliminary chamber may refer a case to a court to value the joinder with another case which is judged by it, only after the preliminary chamber procedure and the start of trial.

According to the judge conducting the preliminary chamber within the Supreme Court, the provision for referral of the case in order to value the joinder may be included in the report ordering the start of trial.

In order to state the above, the judge conducting the preliminary chamber within the Supreme Court considered that, in relation to the provisions of both article 43 but also of article 45, paragraph (2) of the Code of Criminal Procedure, the joinder of cases may be made if **they are judged by the first instance court**. According to the same judge, by using the phrase *"by the first instance court"*, in relation to the provisions of article 3 paragraph (1) letter d) and paragraph (7) of the Code of Criminal Procedure and the name of Chapter II - "Hearing by the first instance court" in Title III - "Trial" of the special part of the Code of Criminal Procedure, **the legislator wanted the cases to be joined only after the preliminary chamber procedure**. In fact, according to the judge, another argument to support this theory is the fact that, in the preliminary chamber, the filter procedure is carried out by the judge conducting the preliminary chamber and not by *the court*.

Consequently, in relation to the foregoing, the judge conducting the preliminary chamber considered that the joinder of cases in criminal matters is made before the first instance court and not in the preliminary chamber procedure.

We also embrace the arguments put forward by the judge conducting the preliminary chamber of the High Court on the subject matter and we consider that the joinder of criminal cases cannot take place in the preliminary chamber procedure. In addition to the textual arguments put forward in this case, the possibility to join the cases in such a procedure should also be examined in the light of the solutions or measures that may be taken in the this procedure.

For example, if the cases are joined in the preliminary chamber, and the judge conducting the preliminary chamber would order, in the first instance, to remedy the irregularities of both documents instituting the proceedings which are the subject of the verifications conducted in the preliminary chamber. Given that we are talking about two distinct indictments, so two procedural documents belonging to different prosecutors, we would practically have situations in which the filter procedure would be unduly delayed, with each prosecutor being liable for his/her own indictment and his/her own file. At the same time, a possible joinder in the preliminary chamber can never lead to a joinder of the prosecution files pending before the court, especially as we are in the presence of prosecutions which are, basically, finalized.

Finally, the court competent to judge the joined cases shall decide on the request for joinder or, on its own initiative, by a **court session report** which can be appealed only with the merits of the case.

*During the criminal investigation*, the case joinder procedure is different in view of the nature and specificity of this procedural stage, although, in principle, the rules applicable in the field of joinder during the trial apply accordingly. In particular, the joinder during the criminal investigation may be ordered at the request of the parties but also of the main subjects, namely the suspect and the victim, as well as ex officio by the prosecutor's office competent to carry out the criminal investigation for all the joined cases. The joinder, as a procedural act, is ordered by the prosecutor by means of an ordinance.

## 7. Conclusions

Considering all the above matters, it can be concluded that the joinder of the criminal cases in the Romanian procedural law is a complex institution with

[39] C. Voicu, în N. Volonciu (coord.), *Codul de procedură penală comentat*, Ediția a 3-a revizuită și adăugită, Editura Hamangiu, 2017, p. 133.

[40] In the same sense, see also Timișoara Court of Appeal, by the criminal court sentence no. 153/PI of 27 February 2018, available at www.jurisprudenta.com.

[41] High Court of Cassation and Justice, Criminal Division, judge conducting the preliminary chamber, court session report no. 827 of 14 September 2017, available at www.scj.ro.

many practical implications and even difficulties of interpretation and application.

Any controversial issue of the application of the joinder of criminal cases should be solved, by starting with the analysis of the regulation of this criminal procedural law institution. It is necessary to firstly observe the main purpose of regulating this procedural measure, namely, which is the good administration of justice, without neglecting the fundamental human rights of the parties in a criminal case.

Although it may seem that the joinder of cases in criminal matters is a simple institution, it may give rise to different interpretations, especially with regard to the sanctions that may apply for breaching the provisions regulating this institution. As usual, the most important aspects to be dealt with on this matter remains the sanction of procedural nullity.

A further legislative approach on the matter should focus maybe on providing clearer regulations with regard to the procedural phases and stages of the criminal proceedings in which the joinder may be ordered, especially in respect to those special procedures that may not fall directly under the cases of joinder provided by art. 43 of the Criminal Procedure Code in force (*e.g.*: complaints against the acts of the case prosecutors of non-referral to the court, challenges to the enforcement of the court decisions, etc.).

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- Pursuant to article 38 paragraph (2) of the Criminal Code, there is a *combination of offences* when an action or inaction committed by a person, due to the circumstances in which it has occurred or the consequences which it has incurred, accomplishes the content of several offences. In this situation, the perpetrator undertakes a single action, which, by its pursuit, affects at least two social values protected by different offences by the legislator.
- The offence is *continuous* when its material element (action or inaction incriminated by the criminal law) is naturally extended. In fact, we are talking about a single material act extended over time, therefore, of one offence in its materiality. For this analysis, we consider that only the *successive continuous offence* is likely to be the subject of a compulsory joinder of cases, because, by itself, it assumes the natural interruption and the resumption of the material act, without generating multiple offences - as is the case, for example, of the offence of driving a vehicle without having a driving license.

- For a similar definition of the successive continuous offence, see C. Mitrache, C. Mitrache, *Drept penal român, Partea generală,* Universul Juridic, București, 2014, p. 301.
- The *complex offence* is expressly regulated by article 35 paragraph (2) of the Criminal Code providing that the offence is complex when its content includes an action or an inaction which constitutes an offence stipulated in the criminal law, as a constituent element or aggravating circumstance element. *The compulsory joinder of cases seems natural if the committed offence is a complex one, i.e. it includes at least two actions or inactions which are incriminated as freestanding offences under the law.*
- Constitutional Court of Romania, Decision no. 719/2016 - the exception of unconstitutionality of the provisions of article 43 paragraph (1) of the Code of Criminal Procedure, published in the Official Gazette no. 125 of 15 February 2017, paragraph 21.
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- *The participation in the offence* refers to the legal situation in which several persons participate as co-perpetrators, instigators or accomplices in the commission of an offence under the criminal law act.
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# EUROPEAN PROTECTION ORDER IN CRIMINAL MATTERS: A NEW FORM OF COOPERATION IN EUROPEAN UNION

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**Abstract**

*Treaty on the Functioning of the European Union (TFEU) emphasized judicial cooperation in criminal matters, based on the principle of mutual recognition of all types of judgments and decisions of a judicial nature. In a common area of justice without internal borders, it was considered necessary to adopt a EU legal instrument that should provide achievement of the following desideratum: protection provided to a natural person in one Member State is maintained and continued in any other Member State to which the person moves or has moved.*

*Directive 2011/99/EU of the European Parliament and of the Council sought to establish rules by means of which protection measures adopted in criminal matters in the issuing Member State can be extended to any of the executing Member States.*

*In this context, the purpose of the article is to analyze if Romanian authorities transposed the Directive according to the purposes for which it was adopted and whether the measures taken at national level by Law no. 151/2016 ensure effective protection of fundamental rights protected in all Member States: life, freedom, physical or sexual integrity, etc.*

*The objectives of the present study are to analyze the European protection order in criminal matters as it is regulated by the above mentioned national law of transposition, to explain the terminology used, to analyze the procedure of issuing this protection measure in a Member State/recognizing it in another Member State and, last but not least, practical aspects related to execution.*

**Keywords:** *European protection order. Directive 2011/99/EU of the European Parliament and of the Council. Issuing Member State. Executing Member State. Supervision Member State.*

## 1. Introduction

The Treaty on the Functioning of the European Union[1] (TFEU) has granted a special importance to the subject of international cooperation in criminal matters, based on the principle of mutual recognition of judgments and judicial decisions. This principle is found in article 82 (1) a, d of TFEU regarding:

- the introduction of norms and procedures that will insure the recognition, throughout the entire EU, of all categories of judgments and judicial decisions.
- the facilitation of cooperation between judicial authorities, or their equivalent, in Member States in the area of criminal investigation and enforcing court decisions.

Placing in the centre of attention the component of judicial cooperation between Member States has appeared as a stringent necessity, able to respond to the needs pointed out by other measures adopted by the EU. Among these measures the gradual abolition of controls at common borders on EU territory stands out, issue that has given the possibility for EU citizens to travel free, but has also allowed the criminals to act easier at a transnational level[2].

In order to rebut the transnational organized crime phenomena the Lisbon Treaty has comprised measures meant to encourage international cooperation in criminal matters, as well as regulations meant to ensure that the rights of the victims are effectively protected throughout the EU.

The Stockholm Programme – an open and secure Europe serving and protecting citizens[3], has shown the way that an united Europe wants to take on the matter of judicial cooperation, establishing as its goal that mutual recognition should be extended to all types of judgments and judicial decisions of a juridical nature, regardless if these are, depending on the legal system, either criminal or administrative.

In particular, in the EU there has been a constant preoccupation for consolidating the rights of the victims of crimes, as well as the protection that the national authorities are obliged to give them. Thus came the need to find a mechanism of cooperation between Member States that would guarantee the mutual recognition of all decisions that comprise measures of protection for the victims of crimes conferred by criminal proceedings.

In a common area of justice without internal frontiers it was considered necessary to adopt, at EU level, an instrument meant to ensure the fulfilment of a desideratum: the protection provided to a natural person in a Member State is maintained and continued

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[1] Signed by the EU Member States at the 13th of December 2007, in force following December 1st 2009

[2] Kristiina Milt, http://www.europarl.europa.eu

[3] Published in the Official Journal of the European Union (2010/C 115/01) on 4/5/2010

in any other member state in which that person moves or has moved.

On December 21st 2011, in the Official Journal of the European Union, the Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order was published, this act having been intended to be an instrument for the protection of all persons that have been or could become victims of crime, its stated goal being the extending of the protection stemming from certain judicial decisions given according to the internal law of a Member State, to other Member States , where the protected person decides to move to or to reside.

The aforementioned Directive 2011/99/EU of 13 December 2011 on the European protection order was further implemented in the internal legislation in 2016 trough the passing of Law no. 151/2016 on July 13th 2016[4].

In this context, the aim of the article is to analyse the extent in which the Romanian authorities have implemented in the national legislation and have taken in the abovementioned Directive according to the goals for which it was adopted and if the measures taken at a national level are able to ensure the efficient protection of certain fundamental rights recognized and upheld in all Member States: life, freedom, physical or sexual integrity etc.

Concurrently, this study aims to analyse the European protection order in criminal matters, to explain the terminology used by the national legislation, to analyse the procedure carried out for the issuing/recognition of this protection measure, and last but not least, reveal practical sides of the executing procedure itself.

The analysis of the case-law of the national courts is also able to probe if the national judicial instrument corresponds to the assumed objectives.

## 2. Content

The European protection order is represented as a decision adopted by a judicial authority, or an equivalent one, of a Member State, comprising a protection measure, on whose grounds a judicial authority, or an equivalent one, of another Member State orders the adequate and appropriate measures, under the provisions of its national legislation, in order to provide continued protection to the protected person.

Out of reasons of legislative technicality, for a better clarity of the legal text, the national rendering of the law clarifies the meaning of the terms used in Law no. 151/2016, such as: "measure of protection", "protected person", "issuing State" or "executing State".

Thus, „*protection measure*" refers to a final decision in a criminal matter adopted in the issuing State and trough which one or more prohibitions or restrictions are imposed on the person causing danger, in order to prevent the committing upon the protected person of a crime that might endanger its fundamental rights recognised and upheld in all Member States such as life, physical and psychological integrity, dignity, personal freedom or sexual integrity.

It must be said that, in the denotation of the law, "protection measure" refers **exclusively** to the decisions taken in criminal matters, whilst, for mutual acknowledgement of the protection measures in civil matters the provisions of Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 are applicable[5].

The prohibitions and the restrictions that may be enforced in this procedure may be:

1. the prohibition to enter certain localities, places or specific areas where the protected person resides or visits;
2. the prohibition to contact, under any form, the protected person, including by phone, electronic or ordinary mail, fax or any other means;
3. the prohibition to approach the protected person closer than a prescribed distance.

In the event in which the court ruling deems it satisfying, its decision can only refer either to a partial limitation or the precise lining out of the way of contacting or approaching the protected person.

In general terms, the European protection order may be issued, or recognized and enforced, according to the specific situation, only when the protected person has established its domicile or residence or has inhabited for a period of time or is about to establish its domicile or residence or will inhabit for a period of time on the territory of another Member State than in the one where the protection measure was issued.

By interpreting *ad literam* the provisions that set the scope[6] of this judicial instrument, it comes down to the idea that for issuing the European protection order, at least two requirements must be met:

a) a protection measure was previously adopted on the territory of a Member State, by a judiciary (or equivalent) authority, prior to the request of issuing the protection order.
b) the beneficiary of a protection measure on the territory of a Member State must establish or intends to establish its' domicile/residence/lodging, for a period of time, on the territory of another Member State.

Because the European protection order represents a judicial instrument that may be applied throughout the European Union, the regularization of different working procedures was necessary, depending if

[4] Published in the Official Journal of Romania, Part I no. 545 on July 20 2016
[5] Published in the Official Journal of the European Union of 29/6/2013
[6] Art. 2 Law no. 151/2016

Romania is issuing or executing such an order, thus being either the issuing State[7] or the executing State[8].

**2.1. The procedure when Romania is the issuing State**

The general rule is that the competent authority to issue the European protection order is *the judicial body held to rule the case* in which the protection measure has been taken, on whose basis the issuing of the European protection order is requested to be made.

Thus, out of reasons regarding a good cognition of the circumstances that led to the necessity of taking certain protection measures, the law has also granted the competence to the same judicial body that has ruled the case to appreciate upon the necessity and the opportunity of issuing the European protection order.

Establishing in this way, trough regulation in this fashion, the authority in favour of the national competent body, may be seen as a positive aspect, given the fact that in order to decide upon issuing the order, there must be analysed, alongside other criteria that will be discussed in this study, also aspects regarding the factual danger for the protected person or the proportionality of the measure. Since the judicial authority was the one that initially instated a protection measure, it is also the most recommendable to further analyse the necessity on maintaining it by issuing the European protection order.

Derogatory from the general rule is the situation in which in the court case where the protection measure was ruled, on whose basis the European protection order is demanded to be issued, a final decision was given to convict the offender, the competence to issue the European protection order is given to *the judge delegate in charge of enforcement*, according to art. 554 of Law no. 135/2010 regarding the Criminal Procedure Code.

If a decision to condemn the offender has not been given, but the Court has ruled to postpone enforcement of a penalty, the competence is given to the *Court* that has first pronounced the postponement of penalty enforcement.

This being said, we can state that the national competent authority to issue a European protection order may either be: the court, the preliminary chamber judge, the judge for rights and liberties, the judge delegate in charge of enforcement or the prosecutor (if the case is under criminal investigation).

In order for the European protection order to be issued, the protected person, personally or by representative, must file a *petition* to the competent judicial body. The request must contain, along side the personal identification data of the protected person, highlights regarding the Member State where the protected person will establish its domicile or residence or where it will stay or intends to stay and the time period for these dislodgements.

In order for the competent authority to issue the European protection order the following conditions must be met:

a) the protected person must be granted the *status of victim* in a criminal trial under way or where a penalty has been enforced trough a final decision, or the postponement of penalty enforcement has been pronounced.

Also a member of the victims' family may ask for the European protection order to be issued, if it is in turn a beneficiary of a protection measure[9];

b) the protected person stays or will stay or has established, or will establish its domicile or residence *in another Member State* of the European Union;

c) the person causing danger has the *status of defendant, convicted individual*, or a *person for whom the postponement of penalty enforcement has been pronounced* during criminal proceedings and against it one or more measures listed in the Criminal Procedure Code[10] and Criminal Code[11] have been enforced.

d) issuing the European protection order is *needed to eliminate* a future or present *danger* for the protected person.

Referring to the measures listed under letter c), it must be mentioned that these are actually restrictions/prohibitions and obligations enforced upon the defendant during the criminal proceedings, with the ordering of judicial control, or judicial control under bail[12], or house-arrest[13], postponement of penalty enforcement[14], conditional release[15], enforcing non-custodial educational measures[16], or enforcing additional or ancillary penalties of receiving a ban on the exercise of a number of rights[17].

For example, these measures may refer to the prohibition for the defendant to return to the family domicile, or to come near the victim or the victim's family, to communicate with the victim, or to go in certain locations.

When deciding upon the issuing of a European protection order, the national competent authority in the issuing State shall take into account, a series of

[7] According to art. 1 Law no. 151/2016 the issuing State means the Member State in which a protection measure has been adopted that constitutes the basis for issuing a European protection order

[8] The executing State means the Member State to which a European protection order has been forwarded with a view to its recognition and execution

[9] From the persons listed under letter c)

[10] Law no. 135/2010 published in the Official Journal of Romania no. 486 on July 15th 2010

[11] Law no. 286/2009 published in the Official Journal of Romania no. 486 on July 24th 2009

[12] Obligations listed under art. 215 (2) lit. b) or d) of the Criminal Procedure Code

[13] Obligation listed under art. 221 (2) lit. b) of the Criminal Procedure Code

[14] Obligations listed under art. 85 (2) lit. e) or f) of the Criminal Code

[15] Obligations listed under art. 101 (2) lit. d) or e) of the Criminal Code

[16] Obligations listed under art. 121 (1) lit. c) or d) of the Criminal Code

[17] A ban on one of the rights listed under art. 66(1) lit. l)-o) of the Criminal Code

predetermined **criteria** such as the actual danger for the protected person, the length of the period of time that the protected person intends to stay in the executing State, the proportionality of the measure and any other relevant circumstances able to demonstrate the opportunity and need of the protection measure.

In all situations, the European protection order may be issued only for the duration of time in which the protected person is staying or will be staying, or has established its domicile or will establish its domicile or residence in another EU Member State. Also, it may not surpass the duration of time for which the measure that is the ground for the order has been enforced.

Upon the protected persons request, the court, the preliminary chamber judge, the judge for rights and liberties, the judge delegate in charge of enforcement will pass a court **resolution** and the prosecutor will give a **prosecutorial order**.

When the judicial body observes that the petition of the protected person is well-founded a *final court resolution/order* will be given, *in chambers*, issuing the European protection order. In other words, when the national competent authority will rule the issuing of the European protection order, the resolution, or the order, issued for this purpose can not be challenged.

The procedure of issuing the European protection order stated under the provisions of art. 6 of Law no. 151/2016 **does not impose** the citation of the protected person or of the person causing danger, nor the prosecutor, because the law says nothing about their presence.

Still, the apparent lack of provisions seems to have its fundament in art. 6 (4) of the Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, which clearly states that:"Before issuing a European protection order, the person causing danger shall be given the right to be heard and the right to challenge the protection measure, **if** that person has not been granted these rights in the procedure leading to the adoption of the protection measure." Nevertheless, the procedural warranties given to the defendant by the national legislation bestow upon him the right to challenge the protection measure, from the moment it was adopted throughout the entire criminal proceedings, so that the summoning of the involved parties in the issuing procedure of the European protection order is not necessary[18].

Nevertheless, if the protected persons' petition to issue the order has been rejected, the ruling can be challenged in 3 days time from receiving notification of the decision. The legal text does not mention to whom the court resolution or the prosecutorial order containing the rejection of the petition for the European protection order will be communicated to, nor who are the persons allowed to take effective remedy by challenge of the decision.

By trying to supply for the lack of clarity of the legal provision, we consider that the court resolution/prosecutorial order of rejection of the request of issuing the European protection order *is communicated exclusively to the protected person, upon issuing the ruling.* We believe that the time frame for filing the challenge shall start from the date when the ruling regarding the decision upon the protected persons request for issuing the order was communicated and does not start from the notification of the reasoned court resolution. We take into account the fact that whenever the Romanian law has wanted to establish as the moment for starting the count of a time frame for filing a challenge with a different moment than the communication of the decision, it has stated it an express provision[19].

The author reckons that, *the holder of the right to challenge* the rejection decision of the issuing of a European protection order is only the protected person, as the only one that can justify a legitimate interest in advancing the challenge.

The challenge shall be settled by the Judge for Rights and Liberties, respectively by the Preliminary Chamber Judge from the court that is higher than the notified one or, as the case may be, by the court higher than the notified one, but the legal text says nothing about the composition of the judicial panel. We reckon that this oversight can be complemented trough the analysis of incidental provisions in the Law governing the organisation of the judicial system[20]. Thus, according to art.54 ($1^1$) of Law no. 304/2004, it was established in general terms that the challenges against rulings regarding criminal matters coming from first instance courts and tribunals during first instance trials, issued by the judges for rights and liberties and the preliminary chamber judges of those courts, is adjudicated by a panel of 2 judges.

In order to settle the challenge *the protected person* is **summoned** and in order to keep to the equality of arms ground rule, *the person causing danger* and the *prosecutor* are summoned as well.

Thus, in this procedure the prosecutor is summoned as well, just as the plaintiff (the protected person) and the defendant (the person causing danger), which means that the Public prosecutor may or may not present itself at the settlement of the challenge. In support of this allegation are the provisions of art. 6 (2) in its final theses[21], stating that the absence of the summoned persons (including the prosecutor) does not preclude the ruling of the cause.

To sum up, it may be possible upon the adjudication of the challenge for all the summoned persons to be present, or just some of them, or none, since the presence of the prosecutor is not mandatory.

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[18] See also the Decision of the Constitutional Court of Romania no. 139/2017 , published in the Official Journal of Romania no. 336 of May 5th 2017

[19] According to the provisions of art. 347 (1) of the Criminal Procedure Code

[20] Law no. 304/2004 published in the Official Journal of Romania, Part I, no. 827 on September 13th 2005

[21] Law no. 151/2016 on the European protection order

The challenge is settled **in chambers** within a time period of 3 days, but neither does now the law say since when does the count for the time frame begin. Having in mind the necessity of rapidly solving the protected persons petition (that is also implied by the fact that a solution can be given without the presence of the parties), we reckon that the count begins upon the registration of the case file containing the challenge with the competent authority.

As for the prosecutorial order containing the rejection of the request, it can be challenged before the chief prosecutor of the prosecutor that has rejected the petition, according to the above mentioned distinctions and time frames.

After the court resolution or prosecutorial order has remained final, the solution is communicated, regardless if the European protection order was issued or not, both to the protected person and to the person causing the danger.

If it was decided for the European protection order to be issued, a copy of the order is also communicated to the parties and another one is attached to the case file.

A forth copy is sent by the issuing judicial body, *by any direct and safe means which leaves a written record* to the competent authority of the executing State as to allow the competent authority of the executing State to establish the authenticity of the European juridical instrument.

After the issuing, the European protection order can be renewed, revoked, or modified in its content.

The order can be **renewed** if the measure that is the grounds for its enforcement is prolonged and if the reasons taken into consideration upon its issuing are maintained. Although the law does not provide the *procedure* applicable for renewal, we reckon according to the *ubi eadem est ratio, eadem solutio esse debet* principle, that it must be *similar* to the one that led to the issuing of the European protection order and the measure is notified to the executing State.

The European protection order may also be **revoked** if the protection measure that it is issued upon ceases or is revoked.

Finally, the European protection order may be **modified** in its content if, for example, the protection measure on which it was based is replaced with another protection measure with a different content. In this case the competent national authority may issue a new European protection order.

### 2.2. The procedure when Romania is the executing State

If Romania is the executing State, the competent authority to recognize the European protection order, adopt the measures for its enforcing and impose the replacing or ceasing of these measures is the *Tribunal* in whose venue the protected person stays or will stay, or has established or will establish its domicile or residence.

Thus, in a different way from the procedure presented in item I[22], the national competent authority to receive and enforce a request of recognition for a European protection order can only be a **Court**.

From the procedural standpoint, the trial is conducted *urgently*, *in chambers*, by a panel of one judge, with the *citation* of the protected person, the person causing danger and the prosecutor. The absence of the summoned persons does not preclude the ruling of the cause.

It is noticeable that, although the procedure of recognition and enforcing of the European protection order demands urgency, the trial can not take place unless the parties[23] are legally summoned, and often this procedure contains norms that imply the use of international law applicable to the relation with the requested state, that demand the use of judicial cooperation[24] instruments adopted for the EU.

Thus being the case, upon establishing the court hearings, the court will take into consideration the necessity of having fulfilled the procedural demands, alongside the specific circumstances of the case, such as, the date for the arrival of the protected person in Romania or the emergency of the situation.

In order to be recognized by the Romanian authorities, the European protection order must comply with these **requirements**:

a) it must be translated in Romanian;

In the event that the order is not translated in Romanian, the court will ask the competent authority of the issuing State to send the translation in a time limit of maximum 5 days starting from the moment when the request was made.

b) to be complete;

If this requirement is not fulfilled the court may deny the recognition request or may ask the competent authority of the issuing State to send the necessary data in a time frame of maximum 10 days, the term being established according to the particularities of the case.

c) to be issued on the premises of one or several of the protection measures adopted in the issuing State by a judgment in a criminal matter;
d) the lack of any of the grounds for the rebuttal of the request.

In the hypothesis of the fulfilling of these requirements, the Court will take a decision to recognise the European protection order and will enforce upon the person causing danger one or more of the **prohibitions** that would be available under its national law, similar or with the closest content to the prohibition stated in the European protection order, such as:

- The prohibition to be in certain localities or places as established by the Court;
- The prohibition to communicate with the

[22] Where Romania is the issuing State
[23] The protected person and the person causing danger
[24] E.g. The Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of May 29th 2000

protected person or to go near that person;

- The prohibition to go near the domicile, workplace, school or other locations where the protected person carries social activities, in the conditions established by the Court.

At times the national courts considered that the recognition of the European protection order may be done by referring to the provisions of Law no 151/2016 and also Law no. 217/2003 on preventing and combating family violence.

In consequence, by the first court decision no. 16 of 18 February 2019 of the Prahova Tribunal the European protection order issued by the Court of First Instance for Violence against women no. 1 in Arganda del Rey – Spain was recognised, the Court having in consideration the provisions of art. 13 of Law no. 151/2016 and art. 23(1) d and f of Law no. 217/2003[25].

We reckon that the provisions of Law no. 217/2003 **do not** fall under the subject of the European protection order for which Romania is the executing State, and the prohibitions the Court may enforce are strictly limited, as stated under art. 13 (5) of Law no. 151/2006, such as they have been previously analysed, and by no means taken from the national legislation on preventing and combating family violence.

Immediately after the issuing of the decision, the Court shall inform the protected person, the person causing danger, the General Police Directorate of Bucharest Municipality or the County Police Department where the protected person inhabits or will inhabit, or will reside, or in whose circumscription stays, or will stay or will reside the person causing danger, or in whose circumscription the places targeted by the prohibition are.

The decision is also notified to the competent authority of the issuing State.

The Court may reject the request of recognition and enforcement of a European protection order, **the non-recognition grounds** being stated by the Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order under art. 10 as follows:

- the European protection order is not complete or has not been completed within the time limit set by the competent authority of the executing State;
- the European protection order has not been issued on the grounds of a protection measure as stated by art.1 b) of the national law.
- the protection measure relates to an act that does not constitute a criminal offence under the law of the executing State;
- the protection derives from the execution of a penalty or measure that, according to the Romanian law, is covered by an amnesty and relates to an act or conduct which falls within its competence according to Romanian law;
- there is immunity conferred under the Romanian law on the person causing danger, which makes it impossible to adopt measures on the basis of a European protection order;
- criminal prosecution, against the person causing danger, for the act or the conduct in relation to which the protection measure has been adopted is statute-barred under the Romanian law, when the act or the conduct falls also within its competence under Romanian national law;
- recognition of the European protection order would contravene the *ne bis in idem* principle;
- the person causing danger falls under the provisions of art. 113 of the Romanian Criminal Code[26],
- the protection measure that laid the grounds for the issuing of the European protection order relates to a criminal offence which is regarded as falling under the competence of Romanian criminal law[27].

In these cases, the decision by which the request of recognition of the European protection order is rejected is without undue delay notified to the competent issuing authority, to the protected person, the latter being also informed about the possibility of requesting the adoption of protection measures in accordance with its national law[28].

The Court decision on the request of recognition of the European protection order can be **appealed** in a 48 hours time frame starting when it was notified, regardless if the issuing of the order was granted or not. We believe that all the persons summoned in this procedure can file the appeal, meaning the protected person, the person causing danger and the prosecutor, even if they were not present in court when the case was tried.

When the appeal is filed, its effect shall not suspend the execution. Thus, if the protection order was recognized and enforced, by filing the appeal the protection measures taken for the safety of the protected person will not be suspended form execution.

By recognizing the protection order the Court will enforce the **prohibitions** available in its own national legislation for the duration of time demanded in the European protection order request, but no more than the Romanian law permits for similar, or with the closest content measures that were the grounds for issuing the protection order. In all cases the protection measure can only be enforced for a 180 days period.

After the recognition of the European protection order, while being in force, **incidents** may occur such as: breaches of prohibitions or changes in the execution of the protection order.

Thus there are situations when the person causing danger does not comply with the prohibitions

[25] Published in the Official Journal of Romania, Part I, no. 205 of March 24th 2014

[26] The juvenile who has not turned 14 years of age, or who is between 14 and 16 years of age, for the latter if proven that the act was committed without competence

[27] Art. 8 of the Criminal Code

[28] Law no 217/2013 on preventing and combating family violence published in the Official Journal, Part I, no 205 of March 24th 2014

established by the Court. In this event, the executing Court must inform the competent authority of the issuing State or of the State of Supervision[29]. Thus, the national judicial authorities may take measures against the person that breaches its obligations, except when these breaches fall under the Romanian Criminal law.

At the same time, it may be possible for the issuing State to modify the European protection order, in which case it will address the Romanian judicial authorities with a new request for recognition and enforcing of the order. The Court will undertake a new evaluation of the request and may either order the modification of the protection measures in a corresponsive manner, either reject the recognition of the modified order if any of the non-recognition grounds exists.

The execution of the European protection order **may cease** when the maximum term for which the European protection order has been recognised has expired [30], *or* if there is clear indication that the protected person does not reside or stay in the territory of Romania, or has definitively left its territory. In a similar way, the execution may cease if after the recognition and the enforcement of the European protection order, Romania recognizes a supervision measure, a probation measure or an alternative sanction regarding the person causing danger for which the European protection order was issued[31].

The enforcement **ceases** upon revocation or withdrawal of the European protection order by the issuing State.

In all situations, the competence to decide upon the discontinuation of the European protection order belongs to the **Court** that has initially recognized this judicial instrument.

Although the national law does not state the applicable procedure in the hypothesis of existing reasons for discontinuing the European protection order, we reckon that the **notification** of the court can be done: by the judge delegate in charge of enforcement, by the police authorities, or by the judicial authorities of the issuing State.

The trial will be held **in chambers**, *without* the citation of the protected person, the person causing danger or the prosecutor.

After the court has ruled the discontinuation of the execution of the order, it has the obligation to notify without any delay the competent authority of the issuing State, and also, if it is possible, the protected person.

## 3. Conclusions

The transposition in the national law of the Directive 2011/99/EU of the European Parliament and of the Council corresponds to the aim for which it was adopted and ensures the assumed desideratum: the creation of a juridical instrument by which the protection granted to a natural person in a Member State is maintained and continued in any other Member State in which that person moves or has moved to.

The national authorities have established the juridical framework to ensure the efficient protection of all fundamental rights upheld in all member states such as life, freedom, physical or sexual integrity etc.

Even if, at times, the national regulation is not extremely clear an precise, the judicial cooperation in criminal matters carried out on the premises of the Treaty on the Functioning of the European Union (TFEU) regarding this legal work instrument represents a success, aspect that leads us to trust in the principle of mutual recognition of all types of judgments and decisions adopted in the Member States.

Future examination activities may look upon the means of solving the identified problems in the present study in a unified manner, alongside the direction given by the case-law of the Courts and the analogy with the national provisions applicable for the protection of victims of violence (Law no 217/2013 on preventing and combating family violence); Order no 146/2578/2016 regarding the management of domestic violence by the police force.

To rally up, we reckon that a new analysis on the European protection order institution may target exclusively the jurisprudential orientation of the national useful courts.

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[29] According to art. 1 of Law no. 151/2016, 'State of supervision' means the Member State of the European Union to which a final decision, enforcing upon a natural person that has commited a crime, one of the sanctions or measures stated under art. 170 [1], or art. 170 [17] of Law no 302/2014 on international judicial cooperation in criminal matters, has been transferred to.

[30] Before ordering the discontinuation, the competent Court can ask the national authority of the issuing State to provide information as to whether the protection provided by the European protection order is still needed in the circumstances of the case in question.

[31] As stated by art. $170^{1}$ (2) a) and art. $170^{20}$ of Law no. 302/2004

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# CRIMINALISTICS TACTICS IN CASE OF CATASTROPHIC PLANE DISASTER

**Nicolae MĂRGĂRIT***

**Abstract**

*This article is showing the criminalistics tactics in case of catastrophic plane disaster. It was analysed the crime scene investigation and the criminalistic methods of research of the victims in case of a plane disaster. The catastrophic plane disaster can be seen as a crash of an air plane after a collision between two planes, a collision with other obstacles, or other types of disaster if it generates the consequences of death or injured people, or plane and goods destruction and it is a crime referred to in the Air Transport Code. Catastrophic disaster is a tragic event, of great proportions, with no advance notice, with disastrous consequences. The catastrophic disaster is a generic notion. In practice there are two major catastrophic groups: natural catastrophes and disasters. Natural catastrophes are natural phenomena that occur according to physical laws and arise as a result of a brutal, but passive imbalance between the factors underlying these physical laws, predictable as manifestations, unpredictable as a moment of occurrence, observing as tragic events of great proportions and disastrous consequences on social - economic level. The disasters represent the catastrophe group in whose's production is incriminated the direct or indirect action, voluntary or involuntary of human being. Concluding, we can say that through catastrophe we understand all-natural phenomena, unexpected damage or accidents that hit a city, a country or a group of people linked by labour relations or during a trip and whose combat requires a large supply of people and means.*

**Keywords:** *criminalistic tactics, Crime scene investigation, catastrophic plane disaster, photo orientation and sketch, flight crew*

## 1. Introduction

**The activity carried out in the sector of air transportation is particularly important to the economy of Romania, and for this reason it is subject to proper regulation.**

The regulatory documents in force define the airspace, determine the activities in connection with the airspace, indicate the bodies that are responsible for regulating and controlling air travels, and set rules for flight discipline and safety. They also stipulate the serious acts which threaten the security of air travels and which are labelled as offences.

The first category of incriminatory acts refers to the conduct of the staff in charge with the aircraft, such as when a crew member or any person participating in piloting the aircraft is intoxicated with alcohol and goes on board of a civil aircraft which is to take off.

The second category of incriminatory acts refers to actions or inactions committed during air navigation and which are such as to prevent the normal operation and travel of an aircraft, precisely:

- Destroying or damaging the air navigation installations or perturbing their operation or the air navigation services, if any of these acts is such as to threaten the security of an aircraft during the flight.
- Communicating information while being aware that it is false, if this act threatens the security of an aircraft during the flight.
- Interfering with the duties of the crew responsible for piloting an aircraft, if this threatens its security.
- Taking control of the aircraft unrightfully, directly or indirectly.
- Committing an act of violence against a person on board of an aircraft in the air, if that act is such as to threaten the security of an aircraft.
- Destroying an aircraft in the course of its service or damaging it, which is such as to make it unfit for flight or to threaten its security during the flight.[1]

For the acts listed above, the law stipulates two aggravating forms in relation to the goal pursued (hijacking) and the consequences (killing one or more people, damage or loss of the flying machine).

As viewed by the legislator, an air disaster is the crash or the turnover of an aircraft after the clash of two such means of transportation, the impact of an aircraft against other obstacles, or the occurrence of such other act, if there are very serious consequences like the death of people or body injuries, the destruction of or damage to that means of transportation, of installations or goods. An air disaster may be viewed as a very serious consequence of one of the offences stipulated by the Air Code or the criminal law, in connection with the aircraft, and the people or the goods carried by it.

In case of air disasters, the on-scene investigation is mandatory. According to the rules and regulations in force, the Department for Civil Aviation organises and conducts the inquiry of flight accidents involving civil aircrafts in the Romanian airspace.

Without substituting the criminal prosecution bodies in their rights, the bodies responsible for inquiring flight accidents have a contribution, through their specific means, to determining the facts, and one may conclude that within the investigation of air disasters, the inquiry has a double purpose:

- to determine the technical causes which led to the disaster through a technical inquiry;

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[1] Revistă de informare, documentare şi opinii – Criminalistica, no.5, 6/2000.

- to determine any possible criminal responsibilities associated with the disaster through a judicial inquiry.

In consideration of the aforesaid, the on-scene investigation appears as the common start point for both inquiries, being indispensable for determining the causes, the consequences and any possible responsibilities in connection with the disaster. Specialists in the field of aviation, representatives of the Ministry of Internal Affairs, coroners and prosecutors contribute to the objectives of the on-scene investigation. If the aircraft belongs to another state, representatives of the company involved or the aeronautic authority of the state of registration of the aircraft usually participate in the investigation of the scene. Of course, the investigation team will be determined taking into consideration the provisions of the treaties in the field of aeronautics between the Romanian state and the states of registration of the aircrafts involved, as well as other clauses and obligations accepted by the signatory states[2].

In case of air disasters, the on-scene investigation pursues the following objectives:

- to discover, examine, retain and pick up traces and other types of physical evidence;
- to identify the victims, witnesses and other people in connection with the disaster, and to determine its consequences;
- for the specialists taking part in the investigation, to make technical-scientific findings and conduct expertises, in order to clarify the multiple aspects required by the investigation of causes;
- to determine the causes which led to the conditions and circumstances that brought forward the disaster.

With regard to the scene to be investigated in case of air disasters, we may say that it includes:

- the field where the debris is scattered, the bodies of passengers and crew members, the wreckage, the surrounding areas, as well as the regional direction and control centre, in case that the disaster occurred during a flight;
- the field where the debris is scattered, the bodies of passengers and crew members, the wreckage, the surrounding areas, as well as the regional direction and control centre, in case that the disaster occurred during the take-off and landing.

## 2. Distinctive features of the on-scene investigation in air disasters

### 2.1. Preparatory activities for the actual investigation

Until the actual investigation, there are some specific measures which need to be taken, some of them at the police station, others at the scene, if such measures have not been taken by the first responders at the scene. Some of these measures are:

a) Obtaining as much information as possible with regard to the disaster that occurred.

Such events are announced in most cases by the airport staff or the air traffic control and direction staff, after losing the radio contact with the aircraft, whether or not they received a prior DANGER message (which means that the aircraft is in a critical situation and needs help) or an EMERGENCY message (the aircraft is in a situation forcing it to land).

The relevant information in this phase is concerned with the nature of the danger, the location of the aircraft, its cargo, the possible crash site, the atmospheric and ground conditions which will be taken into consideration when organising the actions for the search and rescue of victims. Depending on the information that has been gathered, the involvement of other forces will be requested according to the search and rescue plan for aircrafts in difficulty, a plan made jointly by all the bodies which are able to provide help as necessary. The forces and means needed for the search and rescue of victims are also determined in this phase. It is possible to determine urgent measures to be taken by the people nearby in order to save the victims and limit the damaging effects[3].

b) Procuring, making operational and checking the necessary means for going to the disaster site, in order to provide medical help and carry out the necessary activities at the scene.

Unlike other situations, in case of an air disaster, the range of means used in the investigation is complex, and besides the forensic ones and those connected with medical help, airplanes or helicopters are necessary to fly over the area of interest, welding devices to cut the parts which will be subject to technical expertise, bags for carrying the bodies, vehicles necessary for transportation and so on.

c) Appointing the investigation team and moving to the scene.

The participants in an on-scene investigation in case of air disasters are specialists of Civil Aviation, representatives of the prosecution, staff of the Ministry of the Administration and the Interior, coroners, medical staff, fire fighters, and members of mountain rescue teams.

If the aircraft belongs to another state, representatives of the company involved and the aeronautic authority of the state of registration of the aircraft may participate in the investigation at the scene if they so request.

d) Providing first aid to save the lives of air disaster victims is part of the category of priority measures, which are applied even at the risk of destroying traces.

This measure involves asking the medical staff to support the team, and the victims shall be transported to the nearest medical facility.

[2]Association of Romanian Criminalists – Investigarea criminalistică a locului faptei, Bucharest 2004, p.117.
[3] Palcu Pavel – Consideraţii privind soluţionarea împrejurărilor controversate de la faţa locului, 2004 Arad, p. 53.

e) Securing the scene.

This measure is extremely important, and its purpose is mainly to protect the objects and preserve the traces, to remove the people who are not involved in the on-scene investigation, so as to avoid changes which could influence the judicial goal.

f) The assignment of the tasks to be completed by the participants in the investigation of the scene, determining how they will keep in touch, all these correlated with the large area of the site to be investigated, the complexity of the tasks to be performed and so on.

### 2.2. Conduct of the on-scene investigation

#### 2.2.1. Activities specific to the static phase

The static phase of an on-scene investigation in case of air disasters starts with some preliminary activities, insofar as they have not been already carried out.

Depending on the particularities of the site to be investigated and of the event, the following main activities will be carried out:

a) Identifying witnesses and obtaining the first information about the disaster.

In an on-scene investigation, the people who may provide information about the disaster that occurred shall be identified. Of course, it is important to identify them, but if the identification is not followed by getting the first information from these people, the result is not the expected one[4].

The statements of the people concerned shall be recorded on tape or videotape, an important role in solving the case being played by the statements given by the surviving passengers or members of the crew.

The hearing of these people tries to clarify some issues related to the time when the event occurred, the weather conditions, the cloud ceiling, the visibility, the direction of movement of the aircraft, the noises it made, the objects which detached from it, the obstacles encountered, the manoeuvres performed and so on.

It is important to underline once again the need to record the statements of survivors, because their health, in most cases, is precarious, and otherwise valuable information for solving the case may be lost.

b) The overall orientation – this is particularly important for determining the area of the ground to be investigated. While going over the crash site, depending on the peculiarity of the ground, it may be parcelled based on the location of the traces of the disaster and it is possible to decide the order in which the parcelled particularities will be investigated.

During the overall orientation, photographs will be taken for orientation and sketching, which will catch the consequences of the disaster, the condition and the position of the main traces and physical evidence.

The orientation photographs may be taken from a helicopter of from far away, while the sketching ones are executed based on the panoramic technique, they providing a more accurate image of the scene, the consequences and the location of different traces on the ground.

Photographing and video recording may also be used to retain the activities carried out by the investigation team, for locating and extinguishing fires or for saving victims[5].

c) The topographic survey of the landscape characteristics of the ground, as well as the position of the main objects, with the corresponding distances, for drawing the sketch of the scene.

d) Examining the traces which risk being changed or disappear, then retaining them as appropriate.

After searching for, discovering, retaining and picking up the traces and physical evidence at the scene and after interpreting them, with help from the specialists involved, it is possible to issue versions about how the air disaster occurred.

Based on the investigation of past air disasters, the following causes have been found:

- Technical causes – defects related to design, construction, or defects which appeared as a result of using the aircraft.
- Navigation errors or errors related to the piloting of the aircraft. Wrong coordinates and data are sent to the aircraft by the air traffic direction and control centres or the members of the crew execute commands erroneously.
- Fires or explosions on board, which may be generated by accident or produced on purpose.

The on-scene investigation shall consider all the traces and the physical evidence, it shall be carried out independently of the version that has been developed, and evidence will be gathered both to support and to deny such version[6].

#### 2.2.2. Activities specific to the dynamic phase

In the dynamic phase, the crash site will be examined thoroughly and the traces and the physical evidence will be analysed based on appropriate techniques, with the specialists participating and helping in their description and interpretation. The investigation of the disaster scene shall be carried out based on an order imposed by the specificity of the investigated surface area. The investigation is usually conducted at the place of impact, continuing with the area on which the debris and passengers and crew's bodies are scattered, and then extending it on the route between the place of impact and the airport, to the airport or the control centre. We should note that the investigation of the air traffic direction and control centre may take place simultaneously with the investigation at the crash site.

[4] Idem, p. 58.
[5] Pavel Palcu, ibidem, p.63.
[6] Pavel Palcu, ibid., p.68.

The categories of traces which arise and may be identified during the on-scene investigation are specific to the cause of the disaster, and they are mainly:

I. Traces specific to disasters which occurred because of technical malfunctions

All the parts of the aircraft shall be examined in order to discover traces which confirm the existence or inexistence of technical malfunctions which caused or could have influenced the occurrence of the disaster.

a) Traces created on the outside of the aircraft

They usually consist in dismantling, tearing, bending, and their interpretation may provide information about the phenomenon which caused them, the place where they started and their succession, the place of impact of the aircraft, the functioning of the engine at the time of the impact. The examination of the airscrew is particularly important for the interpretation of traces and the determination of the causes of the accident, when the aircraft is equipped with a piston or a turboprop engine, as well as the examination of the traces it creates.

If we know some particular data about the airscrew, precisely the number of blades, the engine speed, the engine-airscrew transmission ratio at the place of the disaster, it is possible to determine the speed of the aircraft and, in relation to it, other issues relevant to the inquiry may be determined and clarified.

The examination of the airscrew is required even if no traces created by it were identified on the ground, its examination and interpretation providing data about the angle at which the impact occurred, the travelling speed, the functioning or non-functioning of the engine; all these related to the deformation of the airscrew.

b) Traces created in the cell (fuselage) of the aircraft

The cell is that part of an aircraft without the engine and board equipment. Traces may form on the span, the fuselage or the empennage. In order to determine and interpret them in the course of the investigation, tears and deformations will be examined and a conclusion is drawn on whether they could have been produced or not at the time of the impact between the aircraft and the obstacle.

The examination of the cell should take into consideration any possible deviations related to adjustment and balance, whether or not the cover shows any previous deformation or deterioration, traces of ice, missing or loose rivets, and cracks. The exhaust area will be examined for traces of corrosion and deposition of combustion products.

The interpretation of these traces may consider, besides the configuration of the impact area, how the cargo was distributed in the aircraft in order to comply with the requirements related to balance, aircraft weight and other requirements.

c) Traces created by piston engines

To discover such traces, the condition of oil filters is checked to see if they retained any metal particles which confirm the breakage of parts before the impact, as well as the condition of the intake and exhaust manifold, for tightness, the colour of cinder and smoke black spots. The check will also include the condition of spark plugs and ignition installations, the cooling installation, other aggregates of the engine so as to determine, based on tests with special devices, the working regime of the engine corresponding to the position of the control levers.

Attention will be paid to the presence of fire traces, the condition of the change mechanism of the airscrew blades, as well as the use of fuel and lubricant for that type of engine, and samples of them may be taken for analysis[7].

Based on this examination and the subsequent findings, it is possible to determine whether or not the operational regime provided by instructions has been complied with.

d) Traces created by reaction engines (turboprop or turbojet)

The following will be checked to determine such traces:

- the condition and the position of the low-pressure filter of the feeding installation (whether they are obstructed or nor);
- the condition of the tubes and hoses of the feeding and greasing installation;
- the condition of the engine aggregates, the boxes of the driving gears, to determine any possible tears, cracks, indentations, etc.

The condition of the following will also be examined:

- the transmission bearings;
- the insulating layer of the reactive tube with regard to traces which could be left by broken parts of the engine and which were expulsed by gases;
- the turbine, especially the paddles, burning traces or other aspects relevant to the investigation.

e) Traces created at the aircraft commands

When examining such traces attention shall be paid to:

- the incorrect position of levers, rods, cables, pulleys and hydraulic amplifiers;
- the position of counterweights, compensators, and aerodynamic ailerons and brakes;
- the condition of steering, profounder, joysticks, rudder bars;
- abnormal margins, the correct angle of lock, the attachment and safety of all command articulations.

All these shall be examined in comparison and in relation to the position and the indications of the flight instruments which control their functioning. For rigid commands, the check will include the cleaning and greasing condition, the wear in articulations, the rollers, rods, deformations, cracks, exaggerated tightening of bearing axes, the existence of foreign objects on the command routes.

f) Traces created in the cockpit

[7] Crimnalistica – revistă de informare, documentare şi opinii, no. 4, December 2002.

To identify such traces, a thorough examination will be conducted with regard to the position of the board instruments used in the navigation and those which control the functioning of power plants, the position of levers and other controllers of the engine, the undercarriage and flaps. Of course, attention will also be paid to other instruments and devices, special installations, equipment (radio-location, radio-navigation, fire protection etc.).

g) Traces created on the takeoff and landing devices

For discovering them, the following shall be checked:

- the position of the rods of the hydraulic installation and the securing locks which makes it possible to determine whether the undercarriage was out at the time of the contact between the aircraft and the ground;
- the tearing direction of the components of the undercarriage;
- the presence of fuel traces on tyres, their pressure, air loss, mechanical deterioration, thrusting, non-tightness[8].

II. Traces specific to accidents caused by direction errors or pilot errors

In the Romanian air space, the flight of civil aircrafts transporting passengers and goods is executed only within airport zones, terminal control regions and air ways. Throughout its itinerary, the aircraft is provided with radio-electric protection. During the execution of a flight, the aircraft must be at all times under the direction and control of the air traffic bodies. During the flight, the commander of the aircraft has the obligation to follow the directives of the bodies responsible for the protection of air traffic, is responsible for their application, and must ensure the permanent phonic contact with the direction and control centres. The commander of the aircraft has the obligation to provide information to the direction and control bodies about the evolution of the flight in the form of position reports, which refer to the indicative, position, time, altitude or level, information on weather conditions.

The main traces which may be created and may be used in finding the causes of air disasters and determining any liability are the sound traces of voice and conversation, recorded on tape at the direction body and in the aircraft.

To determine the causes of an air disaster, it is necessary:

- at the direction body with which the aircraft kept contact, to pick up the magnetic tapes on which the conversations with the crew were recorded, checking first the integrity of their seals;
- in the aircraft, to look for and pick up the flight recorder (the "black box"), which is constructed to resist the consequences of a crash. This device records on tape or film the flight parameters, and the operational parameters of various equipment and aggregates. For some aircrafts, the flight recorder is doubled by a "voice recorder", which records all the sounds in the cockpit. Even if the plane sinks, the recorder may be recovered from water, because it is provided with an ultrasound emitter.

Besides the traces of voice and conversation, in case that the disasters are consequences of pilot or aircraft direction errors, it is also necessary to search for and discover other traces which may indicate the wrong manoeuvres executed by the crew or the erroneous direction by the direction and control body. For this purpose, it is necessary to look for the map indicating the route covered by the aircraft and due attention should be paid to the examination of the component parts of the aircraft[9].

III. Traces specific to disasters which occurred as a result of fire or explosions

a) Traces produced by fire

For this purpose, the on-scene investigation will consider:

- Traces indicating the possibility of ignition or self-ignition of fuel, which requires the examination of fuel tanks, fixing joints, whether there are any cracks in the fuel ducts and tanks, whether the fuel came into contact with the hot parts of the engine.

Samples of the fuel used by the aircraft shall be taken to determine the ignition and self-ignition point based on an expertise.

- Traces confirming a short-circuit on the electric wiring, at the electric conductors, the characteristic parts of the short-circuit. To determine any possible traces, the examination will include the electric starters, generators, accumulator batteries, conductors, cables, distributing boxes and the terminal panels of the electric equipment. One should not overlook the radio-location equipment, the maintenance, especially any changes to the installation, the chassis ground of the equipment, the voltage of the power source, fuses and protection devices, the insulation of conductors etc.
- The existence of fire points and traces which confirm the spread of fire, determining and retaining the degree of burns on the inside and outside of the aircraft, determining the intensity of the fire and how it propagated.

In this respect, the special fire protection equipment is very important, and it will be examined with regard to its technical condition, the seal of emergency command levers of fixed installations and the triggers of the mobile ones, the condition of the fire alarm devices, the condition of fire extinguishers and so on.

b) Traces resulting from an explosion and for this attention should be paid to:

- How the debris from the aircraft or its content is disposed; this is important for determining whether there was an explosion, if it occurred in the air or on

[8] Crimnalistica – revistă de informare, documentare şi opinii, no. 4, 6, December 2002.
[9] Mircea I. - Criminalistică, Ed. Fundaţiei Chemarea, Iaşi 2002,p. 136.

ground.

If the explosion occurred in the air, the debris is scattered on a large area, directly proportional to the height of the flight and the weight of the spread pieces. The falling apart of the aircraft and the scattering of the debris on a large area may result not only from an explosion, but also from a possible depressurisation determined by various causes, possibly connected to malfunctions or projectiles from fire arms.

In case that the parts of the aircraft are scattered on a large area, and the engines are shallowly sunk, the impact with the ground was under a small fall angle and at high speed, the crash not being the result of an explosion.

The focus of the explosion may be determined only after all the parts of the aircraft have been extinguished, which will be used to rebuild it. Based on the interpretation of traces, it is possible to conclude whether the disaster was the result of an explosion[10].

**2.2.3. Other specific activities of the on-scene investigation**

Besides the activities presented above, in order to solve all the tasks, in the course of the on-scene investigation, the members of the team will carry out other activities too in order to determine the causes of the disaster, its consequences in terms of victim identification, the search for and picking up of the aircraft documents, the recovery of goods[11].

1. The identification of victims

The main task of the on-site investigation, the identification of victims, is much facilitated compared to railway accidents or other accidents, due to the list passengers which contains the passengers' main identification data.

The navigation staff (the staff commanding the aircraft, pilots, air navigators, engineers and navigation mechanics, radio-navigation operators), the technical and ancillary staff (flight attendants), all being members of the crew, may be identified based on the place where they are found, their clothing, identity and work documents. If their bodies were not carbonised, the identification may be provisory on the spot, based on the objects which remained on the body (components of the headphones of the radio emission device etc.), and the certain identification shall be made based on the forensic examination, an important role in this activity being that of the medical record drawn by the team providing medical assistance, especially the odontologic report.

The forensic examination of the command staff shall search for traces on the body attesting the exercise of violence, and biological samples shall be taken for determining the level of alcohol.

The passengers shall be identified using mainly the data provided by the list of passengers, as well as the identity documents found with them.

The practice of air disaster investigation revealed that men are more easily identified and certainly on the spot compared to women, because of the identity documents which they keep with them. Women may be identified on the spot, without full certainty, because most of times they keep their identity documents in bags, which more often are not found on the body.

The identification activity continues and is completed in forensic laboratories, where specific activities may be conducted for the examination of the bodies in order to determine the sex, age, height, and particular signs, and the bodies will be fingerprinted, photographed or video recorded, and after dressing, both the bodies and the clothing or other personal belongings may be presented for recognition[12].

It is important to emphasise that the bodies should be photographed in compliance with the rules of criminalistics, and photographs shall be taken both at the scene and after dressing, as illustrated in the examples below.

2. The search for and picking up of documents and objects

During the on-scene investigation, the investigation team will look for and pick up the identity documents or other documents found with the passengers, as well as the obligatory documents on board which may lead to determine the causes of the disaster.

The obligatory documents on board, or part of them, depending on the nature of the flight, may be:

- The navigability certificate (provisional flight authorisation), based on which any civil aircraft is acknowledged as being able to fly, a document issued or validated for a determined period of time. The certificate also indicates the minimum numerical composition of positions for the aircraft (the crew).
- The registration certificate issued based on the registration in the single register of civil aircrafts, which also indicates the identification mark.
- The flight book of the aircraft where the commander records everything that happens during the mission and what is relevant for the execution of the mission, of the flight in general; these records may serve as official evidence for justifying acts or actions.
- The radio logbook – in case of aircrafts which have a radio-navigation device in the composition of the crew.
- The mission order – which indicates the nominal composition of the crew for each mission, the commander on board etc.
- A copy of the flight plan.
- The necessary navigation and meteorological documentation – documents on the passengers and the cargo, the excerpt of the agreement concluded with the beneficiary for utility flights and so on.
- Documents which the navigation staff are obliged

[10] Suciu, C. - Criminalistica, Ed. Didactică şi Pedagogică, Bucharest, 1972,p.263.
[11] Mircea I. - Criminalistica, Lumina Lex, Bucharest , 2001,p. 176.
[12] Colecţia de reviste - Criminalistica – Revistă de informare, documentare şi opinii, 1999 - 2005, no.3/2004.

to keep with them during the execution of flight missions, the brevet with the licence up-to-date, the radio-telegraphic certificate, the passengers' documents.

If the navigation staff or the passengers carried any armament, it is necessary to find and examine it in order to look for traces which could attest any recent firing.

3. Search for and recovery of goods

In the course of the on-scene investigation of air disasters, measures will be taken to recover the goods, among which there are:

- The recovery of the aircraft in so far as this activity is possible, or of parts of it, this task being executed by representatives of civil aviation. If the destruction is massive, or the disaster site is difficult to access or does not allow the transportation of the wreckage, a destruction or abandonment report shall be drawn up.
- The recovery of goods or passengers' belongings. After picking up these goods, inventory documents shall be drawn up, and proofs of handing them over to members of the family. Increased attention should be paid to the possessions of passengers, and measures for their security should be taken. The same measures are required with regard to the goods transported by air.

**2.2.4. Retention of the results of the on-scene investigation**

I. Retention of the results of the on-scene investigation

The results of the on-scene investigation are retained through description, as well as with the help of technical means. The main means for retaining the results of the on-scene investigation is the report[13].

a) The on-scene investigation report shall include all the findings, the dimensions and the spatial relations of the investigated area, the characteristics of all the traces and physical evidence, with peculiarities given by:

- the recording of the geographic coordinates, the altitude, the landscape characteristics of the site of the disaster;
- the recording of information as accurate as possible about the time of the announcement, finding the aircraft, the meteorological conditions at the time of the investigation;
- the nature of the flight, and its purpose (public passenger air transport or cargo air transport, utilitarian-sanitary, agricultural-forestry), training or practice, technical for check, sports, special. Moreover, if the flight takes place at sight or based on instruments, its regularity (regular, occasional, special, additional, charter) etc.
- the recording of the impact place as accurately as possible, the area on which the parts of ensembles and sub-ensembles are scattered, the position and the condition of different debris from the aircraft, the way covered by it;
- the identification of the aircraft, which is based on the flag, the records referring to nationality and the group of letters representing the identification mark, which are written on the body of the aircraft, as well as on a plate made of a fireproof material fixed in the proximity of the main entrance of the aircraft;
- the recording of the documents found, of the magnetic tapes picked up by the direction bodies, the data on the number of passengers, the nature of the cargo;
- the condition and the position of the flight instruments and of different mechanisms and equipment for direction and control, other installations (including those from the airport, if appropriate);
- the number of victims, their identification data, their clothing, the objects found and picked up, other consequences of the disaster.

b) The retention with the help of technical means is intended to reflect as accurately as possible the image of the site, to complement the description given in the report and is done by photographing, video recording, videotaping and sketching.

1. The photograph and the forensic film as a means of retention shall be executed in compliance with the known general rules and with some particularities. So, the orientation of the disaster site shall be done from a plane or a helicopter, so as to cover as much as possible the area containing the debris from the aircraft, the goods and the passengers.

The next to be retained is the impact place of the aircraft with the ground or with the mountain versant, the object hit in the fall, continuing with the retention of the main parts of the aircraft, of the engines at the places where they were found, without moving them, taking photographs and filming, the sketch, which may include aspects regarding the cockpit, the instrument board and the position of control levers, at the place and in the condition in which they were found, then the details of the board instruments, the bending of airscrews, the portions torn up, the deformation of the wings, the fuselage, cables and other traces.

2. The recording on magnetic tape or video tape has the advantage of rendering the statements of victims, witnesses or other people soon enough after the disaster. If they are not recorded, considering the serious condition of the victims, the investigation may lack many essential elements for solving the cause objectively [14].

With reference to video records, they have the advantage of retaining both the image and sound, as well as of catching activities in progress, in their evolution, from the incipient phase to the final one, or phenomena which evolve rapidly (a fire on board). The examination of these records after the investigation at

[13] Palcu Pavel – Considerații tactice privind pregătirea, etapele și mijloacele tehnice de fixare a cercetării la fața locului, Arad, 2004, p. 49.
[14] Palcu Pavel – Considerații tactice privind pregătirea, etapele și mijloacele tehnice de fixare a cercetării la fața locului, Arad, 2004, p. 56.

the scene may lead to valuable elements for clarifying the causes of the disaster.

3. The sketch of the site where the disaster occurred should render the essential elements of the investigated area, and it shall be completed simultaneously with the report, the photographs, the videotaping and the video recording. It is possible to draw it based on several techniques. A first technique for executing the sketch is the representation in horizontal projection. This makes it possible to make the orientation sketch containing the site where the debris from the aircraft is found, as well as other landmarks, the bodies of victims. This sketch reflects different position relations between various traces and the physical evidence existing at the crash site.

Another technique used preponderantly to illustrate the succession of the phases of the disaster, starting with the point of impact, when fragments of the aircraft are spread on sloped land (mountain versant), is the sketch in vertical projection[15].

## 3. Forensic methods for victim identification

### 3.1. The dactyloscopic identification

The digital impression obtained from bodies of unknown identity based on the methodology previously presented is compared with the fingertip's records existing in the criminal record or, as appropriate, with the papillary traces picked up from the homes of missing persons.

We consider that it is not necessary to insist on this category of expertise, the value of this identification being widely recognised, and its application being within the reach of any criminalist.

### 3.2. The collation of identification forms

The identification forms, which are an "anthropologic catalogue", are usually drawn up in three copies, one of them being sent to the General Inspectorate of the Romanian Police –National Institute of Criminalistics. This way, all the identification forms are concentrated at central level and are compared to see whether the data in the form of an unidentified body match the identification data in the forms of missing persons.

Because the form of a missing person is based on the statements sometimes subjective or incomplete of the person reporting the disappearance, and sometimes the condition of the body does not allow a correct evaluation of particulars, special attention should be paid when making the comparisons. When resemblances between two forms are found, an identification method that is certain is used, the results of these comparisons serving as a rough guide in principle.

Comparisons are made between general data referring to age, sex, the day the person went missing and the day when the body was found, the blood type and the Rh, then the matching of particulars, clothing and objects found with them. If possible, the photographs of the missing person are compared with those of the body, and when the data is available, the odontologic forms are compared16.

### 3.3. The portrait photograph expertise

When we have a recent photo of a missing person, we may use the expertise of the portrait photograph for identification.

The photograph of the missing person and the photograph of the unidentified body are enlarged at the same scale.

A separate and a comparative examination of the two photographs determine:

a) the anatomical particulars: sex, age, race, the shape of the head and face, the shape, size, location and colour of the component elements of the face;
b) the singular particulars: scars, spots, warts, moles, tattoos, wrinkles, as well as the particularities of some component elements of the face, which individualize the person through their nature, form, colour, size and location.

In order to clarify the objective of the expertise it is possible to use one or more methods of the portrait photograph expertise:

- collation-based comparison;
- determining the linear continuity;
- the face grid;
- angle measurements;
- the projection of common points.

If we have a photograph in profile of the missing person, identification may be made based on morphological aspects of the ear.

The ear, due to its cartilaginous nature, keeps its morphological characteristics for a longer period and is less influenced by the putrefaction process. With its multiple anatomic parts and their variation, the ear provides a possibility for identification.[17]

The body is photographed in profile, approximately at the same angle at which the photograph of the missing person was taken. The photographs of the ears are enlarged at the same scale, and then the comparisons for identification are made, observing the general principles of forensic expertise.

### 3.4. The over projection

This method is used when it is necessary to identify a body in advanced putrefaction or when only

[15] Palcu Pavel – Considerații tactice privind pregătirea, etapele și mijloacele tehnice de fixare a cercetării la fața locului, Arad, 2004, p. 67.
[16] Colecția de reviste - Criminalistica – Revistă de informare, documentare și opinii, 1999 - 2005, no.3/2004.
[17] Collective work – Tratat practic de criminalistica – vol. I, ed. 1976, p. 170-178.

the skeleton has been discovered. The over projection was used for the first time in England, in 1935.

The identification of a person based on this method is possible after taking into consideration:

a) general identification elements related to:
- race;
- typology;
- sex;
- anthropometrics, and

b) individual identification elements:
- metric;
- morphologic;
- functional;
- aesthetic.

To be able to apply the method, the general and individual elements found on bodies and those referring to the missing person must be corresponding.

Basically, the method consists in examining the overlap of the elements of a photograph of the skull that has been discovered and is to be identified.

The photograph of the missing person may be procured from the population registry office or from the personal photographs of the missing person.

A negative of the photograph of the missing person is taken with the dimension 9/12 or 12/18 cm. The negative is introduced in a photographic chamber with a mat glass, the mat glass is overlapped and a pencil is used to draw, very carefully, the characteristic features in vertical plane – the transversal line connecting the zygoma and the corners of the eye pit.

The skull is fixed on a special stand which allows its movement in all planes and after determining a position as close as possible to that of the head of the missing person, a negative with the same dimensions is taken.

Finally, the two negatives – of the person and of the skull – are projected on the same photographic paper, obtaining the photograph of the skull overlapped with the photograph of the victim. The overlapping may be total or partial.

The identity conclusion is based on the perfect overlapping of all the characteristics consisting in characteristic lines and anatomic graphic points.

Although simple, the method involves special precision, as well as some challenges related to the execution of the overlapped photograph.

For the application of this method, special devices have been made for taking the photograph of the skull. At the National Institute of Criminalistics there is such a device conceived in Romania.

This method has been considerably enhanced with the introduction of computing technology and the video technique which allow the electronic combination of the image of the unknown skull with the photograph of the missing person.

### 3.5. Odontology

Dentition keeps its characteristics for a long time, and it may be successfully used in the identification of bodies. The importance of the method lies also in the inclusion of the dental form among the identification forms.

The dental form is a drawing which represents the position of the 32 teeth of an adult person, as well as the legend which indicates the names of the teeth and the conventional signs used to indicate dentition changes.

When a body is discovered, the coroner helps to complete the odontogram.

In case of missing persons, this problem will be clarified with the help of people reporting the disappearance and by interviewing the relatives and the acquaintances of the missing person. Also, one should check if the missing person had any dental work done at the dental centre in the neighbourhood, where we could also find sketches or dental radiographs and the number of the dental plate, if any. The dentist who fixed the dental plate may help to identify the body by recognising that plate.

By comparing the odontogram of the body with that of the missing person, elements of coincidence may be found, which allow us to use other identification methods, if the odontogram of the missing person is incomplete or uncertain, because the interviewed people indicate only probable data about the condition of the missing person's dentition. If the records in the dental centre are found, this method is certain and sufficient to identify the body.

For people whose profession involves a higher level of risk – for example, sailors, navigation staff, etc. – several identification methods have been suggested in case of an accident. Such a suggestion was to insert, in case of a dental work, a rod in the tooth subject to the intervention, which could be found through a radiologic check. An aluminium plate containing the identification data of the person marked in miniature shall also be introduced in that tooth. The proposed method confers a high degree of certainty to the identification and is also easy to apply.[18]

## 4. Conclusions

Until the actual investigation, there are some specific measures which need to be taken, some of them at the police station, others at the scene, if such measures have not been taken by the first responders at the scene.

The static phase of an on-scene investigation in case of air disasters starts with some preliminary activities, insofar as they have not been already carried out.

In the dynamic phase, the crash site will be examined thoroughly and the traces and the physical evidence will be analysed based on appropriate

[18] P.L. Samis – Un nouveau procédé d'identification par les dents – in Revue internationale de police criminelle.

techniques, with the specialists participating and helping in their description and interpretation. The investigation of the disaster scene shall be carried out based on an order imposed by the specificity of the investigated surface area.

In the Romanian air space, the flight of civil aircrafts transporting passengers and goods is executed only within airport zones, terminal control regions and air ways. Throughout its itinerary, the aircraft is provided with radio-electric protection. During the execution of a flight, the aircraft must be at all times under the direction and control of the air traffic bodies.

In the course of the on-scene investigation, the members of the team will carry out other activities too in order to determine the causes of the disaster, its consequences in terms of victim identification, the search for and picking up of the aircraft documents, the recovery of goods

During the on-scene investigation, the investigation team will look for and pick up the identity documents or other documents found with the passengers, as well as the obligatory documents on board which may lead to determine the causes of the disaster.

The results of the on-scene investigation are retained through description, as well as with the help of technical means. The main means for retaining the results of the on-scene investigation is the report.

The digital impression obtained from bodies of unknown identity based on the methodology previously presented is compared with the fingertip's records existing in the criminal record or, as appropriate, with the papillary traces picked up from the homes of missing persons.

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# REVIEW OF IRRECONCILABLE DECISIONS

**Bogdan MICU**[*]

**Abstract**

*This article proposes a theoretical and practical approach of the review case which refers to the hypothesis in which two final decisions cannot be reconciled. The author is making an analysis even by the reference to two specific practical situations in which two courts of appeal have given radical solutions in two cases which were ruled in an erroneous manner by the merits court. In the given situations, the two panels of appeal invalidated each other's reasoning through their rulings. By reference to these hypotheses, which were not generalized so that a ruling by means of a second appeal in the interest of the law could be opportune, the author proposes an extension of the invoked review case also with respect thereto.*

**Keywords:** *review; extraordinary means of challenge; irreconcilable decisions; criminal lawsuit; final decisions*

## 1. General Issues

The review is one of the extraordinary means of challenge regulated by the Criminal Procedure Code under Art. 453, para. 1 letter e). In terms of the doctrine, it is shown that the review is the extraordinary means of challenge "through the use of which can be removed the judicial errors regarding the deeds retained under a final Court decision or the continuous violations of the rights guaranteed by the European Convention or the breaches of the constitutional provisions in case the Constitutional Court admitted a non-constitutionality plea after the decision remained final."[1]

It is admitted that some Court decisions which contain judicial errors may fall under the power of *res judicata*, although they fail to reflect the truth in reference to the case in which they were issued, and – in this case- they are confronted with the principle of finding out the facts and with that of the authority of *res judicata*.[2]

At the same time, the jurisprudence notes that: "The review represents an extraordinary means of challenge which can be exerted against the final Court decisions issued by the criminal courts of law, having the character of a withdrawing means of challenge, which allows the criminal court of law to re-analyze its own decision and, at the same time, the character of a *de facto* means of challenge, by means of which judicial errors which occurred in the ruling on criminal cases are found and removed. The review is filed versus a decision that obtained the authority of *res judicata*, on the strength of certain facts or circumstances which were not known to the court of law when they ruled on the case, which were found after the trial and represent proof that such trial is based on a judicial error."[3]

The judicial error is identified as consisting in the fact that the court of law maintains a factual state which does not match the true facts and can be generated by certain causes: „failure by the court of law to know certain facts or essential circumstances; use of distorted evidence (through the mediation of criminal activities); corruption of the judicial bodies which investigated or judged the case; the existence of contradictory (irreconcilable) decisions[4].

Being an extraordinary means of challenge, it may be exerted solely with respect to the decisions established under Art. 452 of the Criminal Procedure Code and only for the cases provided under Art. 453 of the Criminal Procedure Code and Art. 465 of the Criminal Procedure Code, the only articles that might cause a *de facto* reexamination of the criminal case.

## 2. Review of Irreconcilable Decisions

In accordance with Art. 453 of the Criminal Procedure Code, "the review of final Court decisions, with respect to their criminal side, may be required when: **a) they found out facts or circumstances which** were unknown when a ruling was made on the case and which prove the lack of grounds of the decision issued in the case; **b) the decision required to be reviewed was based on the statement made by a witness**, on the opinion issued by an expert or on the situations to which an interpreter drew attention, who committed the crime of false testimony in the case required to be reviewed, thus influencing the ruling made; **c)** a writ which served as grounds for the decision required to be reviewed was declared as false

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[1] M. Udroiu, Procedură penală partea specială, 4th edition, C.H. Beck Publishing House, Bucharest, 2017, p. 430.

[2] I. Neagu, M. Damaschin, Tratat de procedură penală, Partea specială, Universul Juridic Publishing House, Bucharest, 2018, p. 413.

[3] HCCJ (CD) Dec. No. 101/A/2017, https://www.universuljuridic.ro/conditiile-de-admisibilitate-ale-revizuirii-apel-ncpp/

[4] V. Dongoroz, comment to Decision No. 2793/1943 of the Court of Cassation, IInd Division in "Pandectele române" I.1944, pg.41 – 46, quoted in A. Olteanu, Analiza cazurilor de revizuire, available at http://old.mpublic.ro/jurisprudenta/publicatii/analiza_ cazurilor_de_revizuire.pdf

during the judgment or after the ruling was made, which circumstance influenced the ruling made in the case; **d)** a member of the Court panel, the prosecutor or the person who carried out acts of criminal prosecution committed a crime in connection with the case which is required to be reviewed, which circumstance influenced the ruling made in the case; **e) when two or several final Court decisions cannot be reconciled**;f) the decision was grounded on a legal provision which, after the decision became final, was declared as unconstitutional as a result of the admission of a non-constitutionality plea raised in that case, if the consequences of the breach of the constitutional provision keep occurring and can only be remedied through a review of the decision issued".

The review case provided under Art. 453 para. 1 letter e of the Criminal Procedure Code is relevant for this work; for the occurrence of such review case, the doctrine maintained that the fulfillment of certain conditions must be ascertained.

The first condition is the existence of two final criminal decisions, by which the courts could have ruled on the criminal law conflict of substance. The doctrine notes that the review cannot be exerted against a final decision ruling on the merits of the case and against an order to take no further action, because the latter is not a final decision ruling on the merits of the case[5].

More recent practice accepted the occurrence of this review case in the field of the application of the more favorable criminal law on the basis of Art. 6 of the Criminal Code[6], but not also if the irreconcilability affects a final decision which relates to the merits of a case and a ruling made within a second appeal in cassation or in the solving of a matter of law.

The second condition contemplates that the irreconcilable decisions should be the contents of the two final decisions. The doctrine shows that such irreconcilable character is maintained when the two rulings exclude each other and may envisage: the same deed, but different perpetrators, the same perpetrator and different deeds, different fact and circumstances if such are correlative. The plea determined by the hypotheses which envisage the application of the more favorable criminal law is also recognized, where the irreconcilable character may also envisage different factual situations, grounded on the same factual basis[7].

The third condition requires that decisions should not have been challenged concomitantly through the intermediary of other extraordinary means of challenge[8].

The judicial case law maintained that there is such a review case when: due to the data and provisions contained thereby, they exclude each other in the sense that there are different deeds committed in the same day, at the same time, but in different localities, by the same person[9]; in case that, for the deed with regard to which a person was convicted they were subsequently referred to another person for trial purposes[10];

We believe that such review case should be extended with regard to situations in which two decisions issued in different cases, but having the same specific [*nature*], are solved in a radically different manner. Please note that we are not referring to the hypotheses in which they ascertain that in the judicial practice there are two categories of solutions for the same matters of law which would have claimed the initiation of a second appeal in the interest of the law (Arts. 471 – 474[1] of the Criminal Procedure Code), but to those situations in which two isolated decisions would receive a radically different ruling, which circumstance would impair the principle of juridical security.

For exemplification purposes, we would like to refer to two specific rulings from recent judicial practice.

We are contemplating Criminal Sentence No. 115 of June 23, 2016 issued by the Bucharest Court of Appeal, I[st] Criminal Division, which remained final through Decision No. 266/A/2017 issued by the Criminal Division of the High Court of Cassation and Justice, on one hand, and Criminal Sentence No. 104 issued on June 9, 2016 by the Bucharest Court of Appeal, I[st] Criminal Division, subject to jurisdictional control by Decision No. 362/A/2017 issued by the Criminal Division within the High Court of Cassation and Justice, on the other hand.

The two sentences which ruled on the merits of the cases, issued by the same panel within the Bucharest Court of Appeal, I[st] Criminal Division, as a merits court, received different rulings within the means to challenge the appeal, based on the fact that they were examined by two different panels within the High Court of Cassation and Justice, although the manner in which the merits court proceeded was identical in both [*sentences*].

Thus, a first common point of the two sentences was the solution chosen by the merits judge to severe the civil side of the case and to leave it unsolved.

In the first decision, which we identify as Criminal Sentence No. 115 of June 23, 2016[11], the merits court, with regard to the civil side of the case, maintained that it has the legal obligation to propose the civil action in the case having as its object the recovery of the prejudice, there is the constitution as a civil party by means of which they intend to restore the situation previous to the perpetration of the deed, appreciating that the solving of the civil action, through the complex

[5] B. Micu, A.G. Păun, R. Slăvoiu, Procedură penală, Curs pentru admiterea în magistratură, Hamangiu Publishing House, Bucharest, 2017, p. 551.
[6] I.P. Chiș, Inconciliabilitate sau încălcarea autorității de lucru judecat?, in Dreptul No. 11/2015, p. 180-187.
[7] M. Udroiu, Op. cit., p. 440.
[8] G. Bodoroncea, in M. Udroiu coord., Codul de procedură penală, Comentariu pe articole, C.H. Beck Publishing House, Bucharest, 2015, p. 1132.
[9] HCCJ, Criminal Division, Decision No. 468/2015, www.scj.ro
[10] HCCJ, Criminal Division, Decision No. 2041/2002, www.scj.ro
[11] Final through HCCJ Decision No. 266/A/2017.

matters of the criminal case,…..their solving would lead to an excess of the reasonable term for solving the criminal case, a reason for which they severed the civil action from the criminal action" (pages 125-126 of HCCJ Decision No. 266/A/2017)

On the strength of the provisions of Art. 25 para. 2 of the Criminal Procedure Code, related to Art. 397 para. 5 of the Criminal Procedure Code, they ordered that the civil side should be left unsolved, and the case was severed from this perspective. (page 129 of HCCJ Decision).

With regard to the sentence invoked, the High Court of Cassation and Justice indicates in Decision No. 266/A/2017 that among the reasons of appeal claimed by defendants and which – in their opinion – would justify the solution of referring to the merits court the case for re-judgment purposes, since the judge from the merits court – they did not motivate the sentence *de facto* and *de jure*; – they copied the indictment; - they did not deliberate; - they did not establish the factual situation and the guilt; - they ordered the conviction for the crime of qualified abuse of office without individualizing and analyzing each material act which enters into the composition of the continued form; - they did not establish the quantum of the prejudice, a condition indispensable for the realization of the constitutive elements of the indicated crime; - they did not analyze the defenses filed by all the parties and by the defendants; - they left the civil action unsolved and also severed it, therefore they did not rule on the civil action joined with the criminal action; - they ordered the severance of the civil action, directly through a sentence, an order appreciated as unlawful by the defense because such a solution could only be ordered through a ruling issued under contradictoriality conditions." [*sic!*]

The appeal court noted in this case that: all the criticism is subsumed to the breach of the right to a fair trial stated also in the jurisprudence of the ECHR, the breach of the double rank of jurisdiction, because the judicial control court does not have the possibility to analyze the reasons for the unlawfulness or for the groundlessness of the sentence, such sentence is virtually inexistent, although it has more than 284 pages, therefore the judgment of the case would only go through the stage of appeal, Art. 13 of the Convention being –thus- breached as well.

The High Court appreciated in Decision No. 266/A/2017 that such criticism, as reasons for appeal, is not grounded.

The court noted that all the indicated criticism was virtually classified by the defense under the hypotheses provided by Art. 421 item 2 letter b of the Criminal Procedure Code; however, none of this criticism is grounded because referring the case to the same court for re-judgment purposes can be ordered, according to the text, only if the judgment of the case at that court of law occurred in the absence of a party which was unduly summoned or which, being duly summoned, found it impossible to appear in court and to announce the court of such impossibility, invoked by that party, when the court did not rule on a deed maintained as the defendant's fault through the notification act or on the civil action, or when there is any of the cases of absolute nullity, except for the case of lack of competence, when the re-judgment by a competent court is ordered, therefore, the three situations are provided in a limitative and express manner as grounds for a solution to cancel the sentence and, in a correlative manner, to refer the case to the merits court for re-judgment purposes.

The statements made by the defense in the sense that the sentence is not motivated, that the merits judge did not deliberate, that the so-called motivation means the copying of the indictment by the merits court, were also appreciated by the High Court as ungrounded for the following reasons:

The content of the sentence is the content provided by Arts. 402-404 of the Criminal Procedure Code, even if the content of the exposition part is not always systematized, however, as Opinion No. 11(2008) issued by the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe maintained, the court's obligation to motivate its decision should not be understood as requiring a detailed response to each argument invoked to support an invoked defense argument.

The jurisprudence of ECHR indicated that, in order to respond to the requirements of a fair trial, motivation should highlight that the judge truly examined the essential matters which were submitted to him/her (ECHR – Case Helle versus Finland of February 19, 1997, case Perez versus France, Hotvan der Hurk versus The Netherlands of April 19, 1994, case Boldea versus Romania of February 15, 2007). In the spirit of Art. 6 of the Convention, ECHR indicated in numerous decisions that "the motivation of the decisions should not be interpreted as imposing a detailed response to all the arguments made by the parties. Court decisions must be motivated so as to indicated in a sufficient manner the reasons on which they are based" (ECHR, I$^{st}$ Division, Decision [*in case*] Driemond Bouw versus The Netherlands, February 2, 1999, ECHR, Grand Chamber, Garcia Ruiz versus Spain, 21.01.1999).

In the respective case, the appeal court found that the merits judge maintained that the factual situation established further to the judicial investigation, through the direct production of evidence, is the situation described in the notification act, while the arguments made, even if they are not summarizing, pertain to the manner in which the judge systematized his/her decision, the involvement of each defendant being related to the factual situation and to the indicting texts correlative thereto.

HCCJ Decision No. 266/A/2017 interpreted that, with respect to the civil side of the case, the solution ordered by the merits court is that it ordered the

severance of the civil action, for this conclusion being invoked the following *de jure* arguments:

According to Art. 19, para. 4 of the Criminal Procedure Code, the civil action is settled within the criminal lawsuit, if the reasonable duration of the lawsuit is exceeded thereby.

Art. 26, para. 1 of the Criminal Procedure Code provides that the court may order the severance of the civil action when its ruling determines the excess of the reasonable term for solving the criminal action. Solving of a civil action remains under the competence of the criminal court, para. 2 of the text providing that the severance is imposed by the court, *ex officio*, or at the demand of the prosecutor or of the parties, para. 5 of Art. 26 of the Criminal Procedure Code provides that the decision for the severance of the civil action is final.

Invoking the Case Tonchev versus Bulgaria of November 19, 2009 ECHR, the appeal court reiterated the states' obligation which, in case the internal legislation provides the right of the injured party to claim damages through the exercise of the civil action in the criminal lawsuit, this request should be settled even if the criminal lawsuit ceased through the intervention of the time-bar of the criminal liability, and it should not remain unsolved so that the court should not be obligated thereby to initiate a new judicial procedure with the civil court.

Interpreting the invoked procedural provisions, HCCJ Decision No. 266/A/2017 indicates that it results that the severance solution ordered by the merits court by its sentence is not only lawful, but it is also correctly justified in terms of the fulfillment of the conditions provided under the law, there being a perspective that the solving of the civil claims should cause a delayed solving of the civil action.

The examination of the wording of Art. 26, para. 5 of the Criminal Procedure Code, which refers to "order", does not lead to the conclusion that the court cannot order the severance of the civil action by a sentence, but it is only provided that "the severance of the civil action" can be made at any time during the judgment, even at the terms prior to debates, the lawmaker establishing, however, expressly that the order is final, this being also a concern of the lawmaker to not postpone the judgment of the criminal case through the filing of an appeal/a separate challenge against the severance order.

In the criminal case, solved on the merits through Criminal Sentence No. 115 of June 23, 2016, none of the defendants involved in the criminal activity was acquitted, so that the insertion in the wording of the decision of the wording of Art. 25 para. 5 of the Criminal Procedure Code is a mere material error, which is also proven also by the fact that the civil side of this case, being severed, is pending for judicial investigation with the competent merits court …. in which case the mentioning in the order of the maintaining of precautionary measures was made in order to avoid the concealment, destruction, disposal or absconding from prosecution of the assets which may be subject, *inter alia*, to the recovery of damages.

In reference to the defendants' criticism in connection with the erroneous option of the severance of the civil side, the High Court, taking into account the charges of abuse of office had as an immediate result a material impairment, the causing of a prejudice, and according to the expert appraisal report prepared in the case the value exceeded the limit provided under Art. 146 of the 1969 Criminal Code or by that provided by Art. 183 of the 2009 Criminal Code, which represents particularly severe consequences ….

Consequently, the appeal court rejected as ungrounded the appeals submitted by the defendants and ordered their conviction by HCCJ Decision No. 266/A/2017.

Another appeal panel within the High Court of Cassation and Justice proceeded in a different manner, its statements being radically different from those invoked at a previous time.

We are considering Criminal Sentence No. 104 of June 9, 2016 of the Bucharest Court of Appeal, I$^{st}$ Criminal Division (the same panel)[12] which indicates, *inter alia*, that: "On the basis of Art. 25 item 5, para. 1 letter f) of the Criminal Procedure Code the civil action of the criminal lawsuit was left unsolved, and on the basis of Art. 26 of the Criminal Procedure Code the civil action was severed on the basis of Art. 26 item 3 of the Criminal Procedure Code…"

In terms of the civil side of the case, the first court, on the basis of the provisions of Art. 26 of the Criminal Procedure Code, the severance of the civil action, without motivating the order and without raising it for the discussion of the parties.

The defendants were convicted for the perpetration of the crime of fraud ….in case of which: "the establishment of the damage caused by the actions of the perpetrators …is decisive for the existence of this fraud."

All the more, in case of the crime of fraud with particularly severe consequences and without the exact establishment of the quantum of the damage incumbent on each defendant, no solution regarding the criminal side of the case can be ordered.

Or, the merits court, without raising the matter for the discussion of the parties, severed the civil action, which was to be solved within a criminal file.

Such a procedure triggers the impossibility of the appeal court to rule on the criminal side of the case, since it cannot establish whether any damages were caused through the misleading actions. Also, the applicability of the provisions referring to the particularly severe consequences cannot be verified, as long as it is not known whether the damage is in excess of Lei 200,000. Therefore, the criminal action is indissolubly linked to the civil action and it cannot be solved separately.

[12] Verified within the appeal through HCCJ Decision No. 362/A/2017.

Also differently from the first hypothesis presented, HCCJ Decision No. 362/A/2017 also indicates the fact that the motivation of the solution issued by the court of law constitutes a duty which removes any discretionary aspect in the service of justice, giving the lawsuit parties a possibility to form their opinion with regard to the lawful and grounded nature of the solution adopted, while providing to the appeal courts the elements required for the exercise of the judicial control.

The right to a fair trial guaranteed by Art. 6 paragraph 1 of the Convention means, *inter alia*, the lawsuit parties' right to submit the observations they deem to be relevant for their case.

This right can only be considered effective if such observations are thoroughly analyzed by the notified court.

Art. 6 of the Convention entails as the court's duty the obligation to make an effective analysis of the parties' evidentiary means, arguments and proposals.

In addition, the notion of fair trial presupposes that a court which motivated its decision only briefly, by taking over the motivation made by the lower court or otherwise, should have actually analyzed the essential matters which were submitted to its judgment and should not have been satisfied by approving the conclusions made by a lower court, as the European Court stated in its jurisprudence.

With regard to the material acts of the stated crimes, it is found within the appeal that there is no description of such crimes, no mention of the perpetration date and circumstances, the evidence which proved the perpetration of each crime, being included only general references to all the defendants.

Thus, the appeal court cannot substantiate the adoption of any decision on the merits of the case, being unable to censor the defendants' criticism from this point of view.

On the other hand, it is remarked that the decision issued by the merits court is in fact a reproduction of the indictment and represents in fact a copy of the notification document, which is obviously and incontestably revealed by a comparison between the two procedural documents (the indictment and the sentence of the Bucharest Court of Appeal).

Thus, the conviction decision (pages 12-257) maintains the factual situation maintained in the indictment, and the court notification document was entirely copied (pages 16-296), being added the mention that the factual situation established by the prosecutor's office and evidenced is entirely maintained by the court and meets as of right the constitutive elements of the crimes for which the defendants were referred to judgment.

Such a formal mention does not constitute a motivation of the decision in the sense of the provisions of Art. 403 para. 1 letter c of the Criminal Procedure Code and Art. 6 paragraph 1 of the Convention, which entail an analysis of the evidence that served as grounds for the solving of the criminal side of the case, as well as for those which were removed, as required by the legal provisions.

Also, the description of the deeds perpetrated by defendants, the form and degree of their guilt are entirely copied from the indictment, the first court limiting itself virtually to confirming the notification document.

It is true that Art. 421 item 2 letter b) of the Criminal Procedure Code does not provide the cancellation of the sentence issued by the first court and the re-judgment [*of the case*] because the decision does not include the reasons on which the solution is based.

However, in the case Dumitru Popescu versus Romania (No. 2) – paragraphs 103, 104, the European Court of Human Rights consecrated that the status granted to the Convention in the internal law allows national courts to remove *ex officio* or at the parties' request – the provisions of the internal law that they consider as incompatible with the Convention and its additional protocols. This issue entails the national judge's obligation to ensure a full effect of its norms (the Convention) ensuring their preeminence versus any other contrary provision of the national legislation.

Therefore, Art. 6 paragraph 1 of the Convention is directly applicable in the case; this article imposes as the duty of the court examining the case in all of its *de facto* and *de jure* issues, the obligation to make an actual analysis of the evidentiary means, arguments and proposals invoked by the parties, which obviously the first court failed to do since it strictly reproduced the indictment.

Out of the presented reasons, HCCJ Decision No. 362/A/2017 maintains that re-judgment is required, and both the criminal side and the civil side of the case are to be solved jointly – the basis being Art. 421 item 1 letter b the Criminal Procedure Code, related to Art. 6 of ECHR.

## Conclusion

Here are, therefore, two rulings made in the judicial case law which have obvious elements of contradiction and which severely shake the trust in the system of criminal justice through the very fact that they were made by three judges who were all functioning within the Criminal Division of the High Court of Cassation and Justice. Through an extension of the review case, they might reconcile such rulings which are based on the same factual situation and yet exclude each other.

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# CONSIDERATIONS ON RE-SOCIALISATION, SOCIAL REINSERTION AND RECOVERY THROUGH EDUCATION

**Constantin Marc NEAGU**[*]

**Abstract**

*This paper mainly aims at pointing to the criteria that make a detainee be eligible for re-socialisation. In addition to this, we distinguish between negative re-socialization, when the expected result is not obtained, and positive re-socialization, when the ultimate goal is successfully accomplished. Moreover the definition of re-socialization is provided to better understand this concept.*

**Keywords:** *re-socialization, reinsertion, recovery, positive, negative.*

After 2000, scientific research in the field of the criminal law on the execution of penalties has taken off and the specialized literature in Romania has analyzed the main features of the prison population and the criminality nationwide, attempting to attune to the standards set by the Recommendations of the Council of Europe concerning the imprisonment norms, the alternative measures to detention, as well as the re-socialization means provided by criminal law.

Under current circumstances, re-socialization is expected to be highly integrative, as it involves not only official bodies such as the police and the prosecutor's office, but also institutions that contribute to the convicts' training, education, health, from the time when the final penalty is established until all forms of imprisonment and post criminal conditions are complied with, so that the individual could reintegrate in one's family, as well as society.

No matter how wide the cultural horizon of the individual is, how he is able to relate to the moral values of the society he lives in, in how many ways he divides his daily concerns, or no matter the way he fits into the community which has its own laws of organization and functioning, yet he is inexorably subject to his time, the age in which he lives, the laws that he has already found in the society he is willy-nilly a part of, as he belongs to a certain social class, an ethnic group, a gender group, a religion, he has a certain political position, a specific amount of wealth, as well as health. Consequently, we can say that the individual lives as a social being, contained in the tumult of the society to which he belongs, but we note that he is strongly determined and influenced by the micro-society (family, entourage, job, friends), as his concerns are close to or influenced by the micro-climate specific to any of these. If the elements of the micro-society the individual lives in are characterized by guidelines towards achieving life goals by observing the law, it is almost certain that he will feel such an influence. If the micro-society he lives in is downgraded, pauper, it is a broken home without moral values, or even if the members of his micro-society lead a carefree life due to their owning plenty material resources and they encourage a libertine lifestyle bordering crime, then the individual will copy the same behavioural traits.

Re-socialization is the process of reintegrating a person who committed an offense punishable in some form by the criminal law, within the social system that he left, as he has improved his values according to the requirements of morality, basic principles and laws. Reintegration may be particularly difficult if the individual who has served his prison sentence and has returned to society is forced to live by the old 'arrangements', in the same family or community environment where crimes are still committed. In this case, the proper reintegration begins by leaving that environment and trying to 'restart life', which sometimes means overcoming big material and social obstacles.

Reintegration can be negative and this is relatively easy if the individual resumes old ties and habits, as, one could assume that, while serving his prison term, he has become a 'professional criminal'. Under these circumstances, the respective person is very likely to commit similar or even more serious crimes and consequently to reappear in court. On the other hand, social reintegration can be close to success when old habits are willingly abandoned in order to happily resume normal family life, to obtain a steady income, to achieve emotional stability within a cultural, educational, religious or sports environment, by pursuing a hobby that could help the individual give up crime and the pleasure of committing it.

Re-socialization is defined as a set of measures for the social reintegration of marginal social groups, offenders or certain categories of people with disabilities[1]. Unfortunately, re-socialization can be negatively oriented, which could be corrected by means of the methods, programs and psychotherapy carried out in penitentiary institutions, psychiatric hospitals or programs for people with certain disabilities. Of course, in this paper, we are interested in the social

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[1] According to DEX (Romanian Explanatory Dictionary).

reintegration of the individual in the Romanian social system, by changing the deviant behaviour, relearning moral and legal rules of conduct, respecting the rights of others and the way of living in a democratic society.

The re-socialization of criminals unfolds along the entire prison term they serve[2], by means of an integrative concept on education, necessary medical treatment, information on the correct system of rules and behaviour, entertainment, as well as work. To be able to debate the re-socialization of the offender, the following aspects should exist:

1. a convicted person serving a prison term or undergoing an educational measure;
2. the stated purpose of the individualized educational intervention[3];
3. voluntary cooperation[4] when designing the individualized programs in order to prevent recidivism;
4. scientific methods for education, rehabilitation and treatment;
5. education is addressed to those who have suffered from negative socialization, whose bad habits are contrary to the generally accepted norm;
6. rehabilitation should be directed towards those who cannot comply in various ways with the system of rules and laws;
7. treatment entails proper therapeutic methods (surgical, medical and educational, psychotherapeutic, psychoanalytical) to reshape the personality, improving negative and criminal attitudes, changing negative motivation into positive one.

The New Romanian Criminal Code introduces the phrase 'the reintegration of minors' to refer to the ultimate aim of the custodial or non-custodial educational measures to be implemented. One considers that socialization measures[5] are appropriate in this case because they could help juvenile offenders become aware of their actions, future conduct and obligations as citizens, as the sanctions that apply are not punishments as such, but they are, as a matter of fact, custodial and non-custodial educational measures. It is one of the major reasons which have made us reconsider the re-socialization and reintegration activities for adults, especially that most of them can understand the consequences of their deeds and what they need to do if they want to change their conduct.

It might be needless to mention that one of the major problems of the reintegration of offenders is the poverty in which they have lived, are living and they are to live after they are released from detention. No matter how many educational, training or any other programs that could exert some positive influence these people are exposed to, unfortunately, poverty indefinitely marks the fate of children, young people and adults who have had to face scarcity on a daily basis all their lives.

In 2018, an Action Plan to reduce poverty and improve the inclusion of people in poverty or at risk of poverty in urban areas across the EU was drawn up[6]. Based on extensive discussion, four main insurmountable issues have been identified (child poverty; regeneration of urban deprived areas and neighbourhoods; homelessness; vulnerability of Roma people), which created the framework for the consideration of the need for access to quality services and welfare, as well as the continuous necessity to measure, monitor, and evaluate urban poverty. In Romania urban poverty has been detected spatially and socially, characteristic of all people regardless of where they live.

Consequently, an analysis regarding the reintegration of persons executing criminal sanctions (minors, young people, adults, elderly persons) should have been performed in order to take concrete measures on some practical issues which all European detention facilities, Romanian included, face daily:

a) There are difficulties in organizing the proposed activities due to the fact that the prisoner population is heterogeneous from many points of view: education, training, property, opinions and prejudices deeply rooted in their conscience. This population is already organized based on their legal situation (length of the sentence, dangerousness, risk of relapsing, criminal experience), not on their educational needs;

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[2] Recommendation REC(2006)2 of the Committee of Ministers to Member States on the European prison rules (adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies), Principle 6: 'All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.'

[3] REC 2006/2 Implementation of the regime for sentenced prisoners, art. 103: 1. 'The regime for sentenced prisoners shall commence as soon as someone has been admitted to prison with the status of a sentenced prisoner, unless it has commenced before. 2 As soon as possible after such admission, reports shall be drawn up for sentenced prisoners about their personal situations, the proposed sentence plans for each of them and the strategy for preparation for their release. 3 Sentenced prisoners shall be encouraged to participate in drawing up their individual sentence plans. 4 Such plans shall as far as is practicable include: a. work; b. education; c. other activities; and d. preparation for release. 5. Social work, medical and psychological care may also be included in the regimes for sentenced prisoners. 6 There shall be a system of prison leave as an integral part of the overall regime for sentenced prisoners. 7 Prisoners who consent to do so may be involved in a programme of restorative justice and in making reparation for their offences.'

[4] In the New Romanian Criminal Code art. 64 (1), art.91 (1) (c), art.117 (1), 119 ( 1), art.120, art.121, all these activities are regulated only if the criminal's consent exists or if he is willing to do that activity.

[5] According to art. 135, Law no. 254 /2013 '(1) When implementing custodial educational measures, the aim is to reintegrate the interned person back to society as well as to raise their awareness, so that they would assume responsibility for their actions and avoid committing new offences. (2) Custodial educational measures are applied in such a way so as not to restrict exercising a person's right to privacy more than it is inherent to these measures.'

[6] EU URBAN POVERTY PARTENERSHIP – Final action plan 2018, HOMELESSNESS Conference, Budapest, 21.09.2018 (https://ec.europa.eu/futurium/en/urban-poverty/final-action-plan-urban-poverty-partnership-available)

b) The mental state of the person who committed the offense (direct intent; basic intent – foreseeing or not foreseeing the outcome of their actions; oblique intent) is important when classifying their offense. It is difficult to give a complete account of the mental state behind a crime because of its complexity, especially if it comes to planning and justifying personal actions or inactions, as each offender has his own representation on the causes of his crime. The guilt is placed most often than not beyond his conscience, his ability to take decisions and perform actions, placing the blame on the others (environment, family, friends, strangers that happened to be at the scene of the crime) or on adverse circumstances (drunkenness, under the effect of drugs etc.). Based on various studies conducted so far, most criminals, who have just started their prison term, consider themselves innocent or not so guilty in contrast to the severity of the penalty administered to them, as well as less guilty as compared to offenders who have committed similar crimes. Only after serving a relatively large part of their prison term they take responsibility for their actions, their violation of the law or the harm done to their victim, which causes their sorrow and desire for reformation.

c) There is large discrepancy between the needs of re-socialization and the prison term set for the execution of penalties. The penalties – prison terms or educational measures – are individualized according to general criteria (seriousness of the offense, the dangerousness of the offender) [7]. Each offender has his own re-socialization needs, and behavioural flaws acquired during childhood (when behaviour becomes part of an individual's personality), youth (when training and education are strongly influenced by the living environment) or adulthood, when asocial or antisocial habits already mark an individual's conduct, cannot be fought against during the relatively short period of time of the penalty, especially since criminogenic factors are overwhelming;

d) So far, detention facilities have not been specialized in providing education for adults, youth, minors, since, as a matter of fact, all re-socialization activities represent an accessory to the detention specific activities, such as security, surveillance, escorting, which vary according to the regime of the respective facility (maximum security, closed system, half-open and open). For example, in Romania, only 10% of prison staff is involved in organizing and carrying out re-socialization activities, whereas 80% deals with operational activities and 10% with logistics, material resources and finance. '*Alexandru Ioan Cuza*' Police Academy in Bucharest is the Romanian higher education institution that prepares the personnel (officers in particular) that will work in the Romanian prison system, and their university curriculum comprises few subjects related to re-socialization, the majority being focused on police science, administrative law or criminal law. Moreover, only few of the prison staff hired from external sources have attended a course on criminal law on the execution of penalties.

e) Putting offenders off cultural and educational concerns, creating and promoting television programs highly appreciated by the general public has resulted in a large group of citizens who find it pleasurable to watch unhealthy humour shows, films with explicit sexual content, music and concerts that encourage libertinism and challenge authority, or programs in which the role models are the people who have loose morals or the people that have become rich by breaking the law or people that have taken advantage of 'the legislative loopholes' and have committed white collar crimes. Unfortunately, even some of those who should be role models for the Romanian people, high officials from various state levels, offend trying to escape criminal charges by various methods to delay their accountability.

f) 'White collar' criminals are highly trained, educated, have wide material resources and can easily reintegrate into the society of origin. It is because of them that the personal efforts of some common criminals, who might have been eager to change their moral values, have disintegrated or vanished into thin air. Therefore common criminals got discouraged when they realized that people holding high public offices were almost never held accountable for the great 'robberies' that occurred in Romania's economy and patrimony. Moreover, they think that what they need to do is continue being offenders and not change themselves into honest people, but change their criminal methods and partners in order to achieve their goals. This way, committing offenses becomes a habit, a way of living, an acceptable way to transform their material desires into reality. Dissolute standards of morality condone illegal conduct and there have been individuals, who have risked being sentenced to several years in prison and serving the respective term, if, by various means, they could keep some of the possessions obtained from illegal acts they committed.

g) The aetiology of the crimes committed by

[7] According to art. 74, the New Romanian Criminal Code: '(1) Establishing the length or amount of a penalty shall be made on the basis of the seriousness of the offense and the threat posed by the convict, all of which shall be assessed based on the following criteria: a) the circumstances and manner of commission of the offense, as well as the means that were used; b) the threat to the protected social value; c) the nature and seriousness of the outcome produced by the offense or other consequences of the offense; d) the reason for committing the offense and intended goal; e) the nature and frequency of offenses in the convict's criminal history; f) the convict's conduct after committing the offense and during the trial; g) the convict's level of education, age, health, family and social situation. (2) When the law stipulates alternative penalties for the offense, the criteria stipulated in par. (1) shall be a factor in selecting one of those alternatives.'

educated, well-informed people who either hold important political positions or assets can be explained by their struggle, which at first is honest, to achieve a lawful purpose perhaps pursued for years, using their own personal resources or those of the institution they work in, and, when the aim is achieved, accomplished, they need a new target, a higher social standing, more wealth, more recognition on the national or international social scale. Then, naturally comes the use of illegal means, connections and partnerships with the underworld, such as drug dealers, human traffickers, arms dealers, and, consequently, the whole structure will shortly collapse like a house of cards. The re-socialization process for this kind of individuals should begin with a psychological examination to identify what determined them to paranoidly seek ways to gain power, and then, blinded by power, to accept and embrace corrupt moral and social values.

h) It is impossible to achieve re-socialization with a certain type of criminals, that is with people who are mentally ill, having polymorphic psychopathies, serious degenerative diseases, psychotic and paranoid individuals with serious behavioural disturbances, who may commit offences when left unattended by their rightful guardians. These individuals, although they are criminally liable, as well as others[8], who are mentally ill, suffer from dissociative identity disorder, so that their behaviour differs from one day to the other, and even one situation to another. They may seem normal people until a trigger is pulled which unleashes behaviour that can cause aberrant acts characterized by extreme gravity[9].

i) According to the statistical data of the Romanian Prison Service, at the beginning of 2018, 1938 persons were under pre-trial arrest, 8908 convicted persons were sent to half open prisons, 3430 convicted persons were sent to open prisons, 6341 convicted persons were sent to closed prisons, 1539 convicted persons were sent to maximum security prisons, 288 convicted persons were sent to an educational facility, 119 convicted persons were sent to a detention centre. Basically in the last five years, the trend has gone downward: 2013 – 33434 convicts; 2014 – 30156 convicts; 2015 – 28334 convicts; 2016 – 27455 convicts; 2017 – 23450 convicts). Habitual offenders represent the following percentages out of the total prison population per year in Romania: 45.78% - 2013; 43% - 2014; 40.33% - 2015; 38.27% - 2016; 38.37% - 2017. It seems that the percentage of habitual offenders is in decline, however, that the absolute value is constant, around 40% of the total prison population[10].

Since habitual offenders have 'benefited' from the numerous programs provided by the detention facilities where they served their sentence terms and since most of them have been released on parole, two research hypotheses could be inferred:

a) the first hypothesis assumes that offenders have complied with the requirements of the programs, nevertheless they have failed to change their values and mentalities;

b) the second hypothesis assumes that it is impossible for former offenders to reintegrate into society, because this society is not prepared to receive them and give them a 'second chance', or that former offenders lack training and education related skills, which makes it difficult for them to exploit the advantages of living in a free society, of engaging in legally lucrative activities which could yield enough income to allow them to live by observing not only the law, but also other people's life, rights and property.

## Conclusions

As far as the process of social rehabilitation, social reinsertion and educational recovery is concerned, we could say that its outcome is not always positive, that most of the times the path towards reaching the set goal is so steep that the convict has to get rid of the old habits in order to be welcomed by the society, he has to acknowledge a pro social behaviour and commit to psychological counselling programs in order to overcome temptations and obstacles that may interfere with his desire to assimilate as much as possible so that he could return to the right path.

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# THE CONCEPT OF SOCIAL REINTEGRATION IN ROMANIA AFTER 1989

**Constantin Marc NEAGU**[*]

**Abstract**

*This paper attempts at pointing to the way in which social reintegration has evolved in Romania, starting with the communist era and ending with present time. First, we briefly outline the organisation of social reintegration under the communist regime and then we present how this concept has been approached in the last thirty years, under the new political circumstances, stemming from the recommendations of the Committee of Ministers of Council of Europe to Member States. Our conclusions focus on the role of education, which is fundamental in accomplishing successful social reintegration.*

**Keywords:** *communist era; education; local community; credits; activities*

## 1. Educational solutions provided by the Recommendation No. R (89) 12 of the Committee of Ministers of Council of Europe to Member States[1] on Education in Prison.

It is worth mentioning this European recommendation because, since 1989, Romania has made special efforts to attune its legislation to European Union law. As for the law on the execution of penalties, after 1989, Romania first embraced the principles dictated by the rule of law.

The provisions of this new Recommendation were slowly accepted, as the mentality of the prison staff, who were trained to see the people behind bars as the enemies of the Romanian people, people that should be excluded from society, gradually changed. Moreover, the rebellions that broke out in prisons due to the change of the political regime between 1989 - 1991, which resulted into collective protests, revolts, arsons, taking hostages, as well as death threats, created a barrier that was difficult to pass in order to ensure normal relations and cooperation between the prison staff and the detainees when starting acceptable projects. The switch to the market economy system, the massive unemployment, the collapse of the economic areas which used sentenced persons as their workforce, lack of self-financing income represented serious obstacles for the organization of educational and lucrative activities in Romanian detention facilities. For almost a decade (1989-1997), activities for the reorganization of the Romanian prison system were carried out: the Romanian Prison Service became part of the Ministry of Justice, destroyed prison buildings were repaired, new staff was recruited to replace the employees made redundant, existing norms were amended by orders given by the Minister of Justice, rebellions and protests that frequently broke out were thwarted[2].

The particular context, in which this Recommendation had to be applied, transformed its provisions into milestones for educational activities organised in Romanian prisons, as they were used to develop annual programs by the Romanian Prison Service. Mainly, the Recommendation comprised valuable ideas put forth by the working group who had seven meetings between 1984-1988. The European governments were recommended to implement policies such as:

a) all detainees shall have access to basic education, training, cultural activities;
b) education for prisoners should be like the education provided for similar age-groups in the outside world;
c) education in prison shall aim to develop the whole person bearing in mind his or her social, economic and cultural context;
d) all those involved in the administration of the prison system and the management of prisons should facilitate and support education as much as possible;
e) education should have no less a status than work within the prison regime and prisoners should not lose out financially or otherwise by taking part in education;
f) every effort should be made to encourage the prisoner to participate actively in all aspects of education;
g) development programmes should be provided to ensure that prison educators adopt appropriate adult education methods;
h) vocational education should aim at the wider development of the individual, as well as being sensitive to trends in the labour-market;
i) prisoners should have direct access to a well-stocked library;
j) physical education and sports for prisoners should be emphasised and encouraged;

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[1] Adopted on the 13th of October, 1989 during the 429th reunion of Deputy Ministers.
[2] Ioan Chiș, *Istoria penitenciarelor – ieri și azi (The History of Prisons – Past and Present),* Editura A.N.I., București, 2003, pp. 103-127.

k) social education should include practical elements that enable the prisoner to manage daily life within the prison, with a view to facilitating his return to society;
l) wherever possible, prisoners should be allowed to participate in education outside prison;
m) where education has to take place within the prison, the outside community should be involved as fully as possible;
n) the funds, equipment and teaching staff needed to enable prisoners to receive appropriate education should be made available.

As we are to explain, these principled recommendations were included in the acts that were subsequently passed by the Romanian Parliament, in the orders of the Romanian Minister of Justice, as well as in the decisions of the Head Officer of the Romanian Prison Service, so that the core activities set for educating prisoners started[3].

For a period of at least five years, the educational activity was marked by the real and continuous latent conflict that existed between the prison staff, marked by the prisoners' excesses in the period immediately following the 1989 Romanian Revolution, when dramatic events took place (rebellions, protests, escapes, suicides, serious crimes against prisoners or staff, etc.). During this time, the security reasons made the re-socialization activity be severely hampered, as the time, the programmes, the staff were directed towards ensuring security and surveillance. Moreover, among prison officers there was only one educator and for the entire prison system there was only one psychologist. In the first decade after 1989, getting prison staff to become involved in the re-socialization process was limited and timid. The prejudiced mind was keeping the prison staff back, considering that prisoners have more rights than they did, as the detention conditions had been humanized due to the fact that prisoners' rights were re-evaluated and enhanced.

Nevertheless, Recommendation R (89) 12 had a positive impact and led to the adoption of new rules which granted prisoners a wider range of rights (including for the juvenile offenders who were convicted), to the drafting of the bill on execution of penalties and the measures ordered by the judicial bodies during the criminal trial.

## 2. Changes in the rules on the execution of penalties referring to the re-socialization activity, after 1989

Since Law no. 23/1969 came into force, several periods of time passed that marked the re-socialization activity. Applying this law referring to the execution of penalties did almost nothing for re-socialization, unless we consider that the fear for serving the prison term or for the admission to juvenile rehabilitation centres meant a sufficient incentive for some offenders to try not to break the criminal law.

It had been over 49 years since the concept of reintegration was last discussed scientifically and applied to the needs of our country[4]. In 2004, 15 years after the events that led to changes to the rule of law, the first bill on the execution of penalties and the measures ordered by the court during the criminal trial[5] was drafted. Although it seemed that the humanitarian provisions of the law will influence the re-socialization activity, they were not applicable, not only because the context was unfavourable, but also because the provisions were intricate and inconsistent with the existing administrative infrastructure. It seems inconceivable, but this law has never been applied. Although it has never been applied, as a theoretical exercise, we can show that this law included both the execution of non custodial sentences, community service, converting a fine as community service, postponing the execution of the penalty and the execution of custodial sentences. Reintroducing, in art. 25 of this law, the penalties abandoned when the 1968 Penal Code entered into force (i.e. how to serve the prison terms; strict imprisonment; severe imprisonment and life imprisonment) meant going back in time for the Romanian prison system. The new penalties and the four execution regimes made it impossible for the prison facilities existing at that time to legally separate and classify prisoners.

Nevertheless, legislative developments were positive. Law no. 294/2004 was the first legal document which set specific rights for convicted persons, their rights as citizens and how to exercise them. Besides labour regulations for convicted persons, modern methods of re-socialization were provided[6].

Chronologically, two years later, the concept of re-socialisation gained momentum when Law no. 275/2006[7] was passed. In this law, under Chapter VI new regulations were introduced on the educational, cultural, therapeutic, psychological counselling and social assistance activities, as well as educational and

[3] The programmes were developed to satisfy the right to education: the right to read and write, ask and reflect, imagine and create, write and read about the living environment, have access to educational materials, develop personal skills.

[4] Attempts to depopulate Romanian prisons between 1976-1977 by means of amnesty and pardon decrees, as well as by means the 1988 acts of clemency were no more than populist measures meant to eulogize Nicolae Ceaușescu's policies, and the return to prisons by increased relapse proved more dangerous (author's footnote )

[5] Law no. 294/ 28.06.2004 on the execution of penalties and the measures ordered by judicial bodies during the criminal trial, Official Gazette of Romania no. 591/1.07.2004.

[6] According to art. 75 para. (1), Law no. 294/2004: 'Socio-educational activities, psychological treatment and counselling, providing advice and assistance to get a job or pursue a professional activity after prison release are organised in every prison facility and aimed at the social reinsertion of convicted persons who execute custodial sentences.'

[7] Law no. 275/2006 on the execution of penalties and the measures ordered by judicial bodies during the criminal trial.

vocational training for persons serving prison terms. For the first time, the old concept of 'prisoner re-education' was done away with and replaced with new phrases: 'social reintegration of the persons serving prison terms' and 'the recovery of minor offenders.'

By means of the Enforcement Regulation for Law 275/2006[8], the purpose of executing the penalties was introduced explicitly, namely 'assisting inmates in their social reintegration and prevention of committing new crimes.' Consequently, at that point, it was also the first time when a nationally strategic document on how the Romanian Prison Service[9] could be developed so that prisoners would become interested in re-socialization, and human and material resources from institutions charged with accomplishing social tasks would start being purposefully used.

On July 19, 2013 Law no. 254/2013[10] came into force, for the first time ever in Romania being established procedures for re-socialization attuned to the categories of persons convicted and the regime that applied to them. Each prisoner gets a personalized re-socialization program for the entire prison term, with progressive transition from one regime to another. Thus, for more severe regimes, the re-socialization activities take place in a controlled manner, inside the prison facilities, whereas in less severe regimes, inmates can voluntarily take on more responsibilities, they can assess their situation and informedly decide whether they are willing or not to participate in one program or another[11]. As we mentioned before, the concept of re-socialization is closely linked to the prison regime (including security measures, security, surveillance, escort) and re-socialization is possible only if these measures are effective.

On the contrary, we believe that, by means of the re-socialization activity, the atmosphere in the prison facility is characterized by a higher degree of normality, the individual risk of the person executing the penalty is related to other criteria, not to the prison regime. This represents a weakness of the law on the execution of penalties, because prison regimes should have been developed primarily in relation to the need for re-socialization and secondly in relation to the need for security.

The principle according to which educational activities should not hinder operational activities should be abandoned, especially because, in the 21st century, technology is sufficiently advanced to ensure thorough, safe and immediate surveillance, so it is possible that a prison facility specialized in maximum security would be characterized by the same order and discipline as a low security one.

We would also like to point out to the progress made as far as the re-socialization measures for young people[12] are concerned. We should not forget that Law no. 252/2013, Law no. 253/2013, Law no. 254/2013 represent a legal package that regulates the execution of penalties, the probation, the execution of non-custodial sentences, as well as the execution of custodial sentences, which are closely interrelated with the enforcement of the provisions included in the New Romanian Criminal Code and the New Romanian Criminal Procedure Code[13]. New criminal and criminal procedure regulations, as well as new regulations on the execution of penalties came into force and, consequently, in a relatively short period of time, in Romania, the number of adult prisoners has decreased from 33,000 to 23,000 at present, and the number of minors in re-education centres from 5,000 to 500, which proves the effectiveness of these measures and the positive impact of re-socialisation.

Due to the entry into force of the new criminal codes and the law on the execution of penalties, new necessities popped up. Thus, to attune to their content, it was absolutely necessary to draw up rules on the main activities, tasks, measures, work instructions, equipment, as well as the use of financial, human, material resources and common organization. Unfortunately, it did not happen very quickly as it took three years to develop the Enforcement Regulation for Law no. 254/2013[14]. Other laws, government decisions, orders of the Minister of Justice, decisions of the Romanian Prison Service's Head Officer, containing subsequent, secondary or tertiary rules, are still being developed today, along with the modification of the

[8] Romanian Government Ordinance no.1897/2006 on the approval of the Enforcement Regulation for Law no. 275/2006 on the execution of penalties and the measures ordered by judicial bodies during the criminal trial.

[9] The Strategy on the Development of Romanian Prison System 2007-2010, (accessed on 08.10.2018 http://www.snlp.ro/strategia-2007-2010-administratia-nationala-a-penitenciarelor.pdf).

10 Law no. 254/19.07.2013 on the execution of penalties and the custodial measures ordered by judicial bodies during the criminal trial, Official Gazette of Romania no. 514/14.08.2013.

[11] According to art. 41, Law no. 254/2013, '(1) The individualization of the prison regime for the execution of custodial sentences is determined by the commission provided under art. 32, depending on the length of the sentence, behaviour, personality, risk level, age, state of health, identified needs and possibilities for social reinsertion of the convicted person. (2) Taking into account the criteria in para. (1) The convicted person takes part in educational, cultural, therapeutic, counselling, moral and religious activities, as well vocational training. (3) The activities under para. (2) are organised by staff belonging to education and psychosocial services in prisons, with the participation, where appropriate, of probation officers, volunteers, associations and foundations, and other representatives of the civil society.'

[12] According to art. 42, Law no. 254/2013, 'along their prison term, young prisoners attend special educational programmes, which address their psychological and social assistance needs, depending on their age and personality. Under this law, young people are convicted persons under the age of 21.'

[13] Law no. 286 /2009 on the Criminal Code; Law no. 135/2010 on the Criminal Procedure Code.

[14] The Enforcement Regulation for Law no. 254/2013 on the execution of penalties and the custodial measures taken by judicial bodies during the criminal trial, 10.03.2016.

codes and the law on the execution of penalties, as required by the practical situations that arise[15].

The permanent concern with drafting, promulgating and then amending the rules governing the deprivation of liberty in criminal proceedings and the execution of penalties, by means of new administrative rules, shows the need for this field to keep pace with the development of the Romanian society as a whole, with the implementation of new technologies and the protection of networks and computer data communication in the places of detention, to comply with the recommendations of the Council of Europe and to correct certain aspects pointed out by the ECHR.[16]

New rules are being drafted either by the Romanian Minister of Justice or by the Romanian Prison Service, on daily specific activities related to feeding, equipment, accommodation, as all these aspects are closely linked with the organisation of educational, cultural, sports, vocational activities, by means of specialised EU funded programmes[17].

An important clarification of the concept of re-socialization can be found in the practical work of the institutions that run programmes with the people executing penalties, institutions which cooperate by appointment of the judge delegated with the execution of penalties, such as NGOs performing activities to support reinsertion or volunteers representing various religious cults trying to support the assimilation of moral norms by those with disturbed consciences due to having led a disorderly or antisocial lifestyle. Fighting against drug trafficking, the consumption of drugs, alcohol and ethnobotanical substances, human trafficking is not exclusively reserved to the places of detention, probation institutions and the justice system in general, but to all institutions involved in organising educational, vocational, artistic, musical, sports activities, as well as those which provide jobs, social housing or long-term paid placements.

In 2005, the Romanian Government drafted a document on the reinsertion of the persons deprived of liberty, named 'the National Strategy of Social Reintegration of the Persons Deprived of Liberty, 2015-2019', Bucharest, May 27, 2015. An interministerial[18] commission undertook various tasks dealing with coordination, the mobilisation of resources, communication, project planning and recommendations. Moreover, the commission initiated public policies on reintegration, set up working groups made up of specialists from central and local

[15] Law no. 293/2004 on the Status of civil servants with special status in the Romanian Prison System, republished, as amended and supplemented; Law no. 48/2012 on the financing of Romanian Prison Service and Romanian Prison Service facilities; Romanian Government Ordinance no. 652/2009 on the organization and functioning of the Ministry of Justice, as amended and supplemented; Romanian Government Ordinance no. 756/2016 on the organization, functioning and duties of the Romanian Prison Service and on amending Romanian Government Ordinance no. 652/2009 on the organization and functioning of the Ministry of Justice, as amended and supplemented; Romanian Government Ordinance no. 584/2005 on assigning specific activities and on financing health units belonging to the defence, public order and national security system, as well as the health units of the Ministry of Justice, as amended and supplemented; Order of the Minister of Justice no. 160/C/2018, 8.01.2018 on approving the Regulation for the organization and functioning of the Romanian Prison Service; Minister of Justice Order no. 1302/C/2017, 21.04.2017 on the composition and duties of the Technical and Economic Council of the Romanian Prison Service; Order of the Minister of Justice no. 3936/2017 on approving the Regulation for the organization of educational centres and detention centres subordinated to the Romanian Prison Service; Order of the Minister of Justice no. 3725/2017 on approving the organization and functioning of the Supplies, Management and Repairs Unit; Order of the Minister of Justice no. 1548/2017 on approving the organization and functioning of the National School for Training Penitentiary Officers Târgu Ocna, as amended and supplemented; Minister of Justice Order no. 1662/C/2011 on approving the competences for human resources management of the Minister of Justice, the Head Officer of Romanian Prison Service and senior officers in charge with subordinated units; Order of the Minister of Justice no. 1316/C/2012 on approving the Rules on providing motor vehicles for the Romanian Prison System and its facilities, as amended and supplemented; the decision of the Romanian Prison Service's Head Officer no. 543/2012 on approving the Internal Regulations of the Romanian Prison Service; the Decision of the Romanian Superior Council of Magistracy no. 89/2014 on approving the Regulation organizing the activity of the judge supervising the deprivation of liberty, Official Gazette of Romania no. 77, 31.01.2014; Order of the Minister of Justice no. 1676/C/24.06.2010 on approving the Regulation for the safety of the detention facilities under the coordination of the Romanian Prison Service, Official Gazette of Romania no. 523, 27.07.2010; Order of the Minister of Justice no. 420/2011 on the conditions according to which the convicted persons can volunteer to work, Official Gazette of Romania no. 181, 15.03.2011; Order of the Minister of Justice no. 433/C/125, 7.02.2012 on ensuring medical assistance to persons executing custodial sentences within the Romanian Prison Service, Official Gazette of Romania no. 124, 21.02.2012; Order of the Minister of Justice no. 433/2010 on approving minimum mandatory rules on the accommodating persons executing custodial sentences, Official Gazette of Romania no. 103, 15.02.2010; Order of the Minister of Justice no. 432/5.02.2010 on approving the Instruction for individually and statistically registering the persons executing custodial sentences in the prison facilities coordinated by the Romanian Prison Service, Official Gazette of Romania no. 157, 11.03.2010; the 30.04.2013 Methodology on granting awards to the persons in the custody of the Romanian Prison System, based on the Credit System relate to prisoners' participation in educational, psychological treatment, socialisation, work activities and programmes and risky situations, Official Gazette of Romania no. 353, 14.06.2013; the 12.06.2012 Internal Regulations for the Romanian Prison Service, Official Gazette of Romania no. 423, 26.06.2012.

[16] Romanian Constitutional Court, decision no. 453/4.07.2018, on the unconstitutionality of the provisions of the sole article subsections 2-5 and subsection 10 of the Law amending supplementing Law no.254/2013 on the execution of sentences and custodial measures ordered by the judicial bodies during the criminal trial.

[17] The Norwegian Financial Mechanism 2014-2021: Correctional Project; CHILD Project – 'Inserting minors by education and development'; 4NORM-ality Project – 'Improving Romanian correctional services by implementing the normality principles'; EIGEP Project – European Interaction Guidelines for Education Professionals when Working with Children in juvenile Justice Learning Centres; Menace Project – Mental Health, Aging And Palliative Care In European Prisons; DERAD Project – Counter-radicalisation through the Rule of Law; RASMORAD Project – Raising Awareness and Staff Mobility on violent RADicalisation in Prison and Probation services; SIPOCA 60 Project – Institutional Consolidation of the Romanian Prison System.

[18] The interministerial commission is made up of representatives (civil servants is in management positions, at least as directors) from the following public institutions: a) Ministry of Justice; b) Ministry of Labour, Family, Social Protection and the Elderly; c) Ministry of Education and Scientific Research; d) Ministry of Internal Affairs; e) Ministry of Health; f) Romanian Probation Directorate; g) Romanian Prison Service. The chair of this commission is the representative of the Ministry of Justice.

institutions, so that proposals evaluating the specific activities could be drafted. This strategy is ongoing, and the efficiency of the interministerial commission is to be assessed at the end of 2019. Meanwhile, the cooperation among the Ministry of Education, the Ministry of Labour, the Ministry of Health resulted in common regulation orders, necessary in qualified assistance in three extremely important domains. Moreover, it is worth mentioning the Protocol signed by the Romanian Prison Service and the Administration of the Romanian Orthodox Church on providing moral guidance in penitentiaries, in 1990.

To have a complete picture of the numerous legislative amendments that are to be passed, it is necessary to mention that the rules included in Law no. 254/2013 are debated in the Romanian Parliament, as far as the following domains are concerned: redrafting some provisions on parole; amendments on the prison regimes for the execution of penalties; organising home detention; participation of the convicted persons in the public hearing of appeals; participation of the convicted person in some serious family events; the convicted persons' writing scientific papers; changing the competence of judgment for parole; establishing certain rights and facilities for those remanded in custody; granting unrestricted permissions for humanitarian reasons.

These amendments, together with the provisions on the normalisation of the accommodation conditions[19] in penitentiaries, currently bring about new ideas on the necessity for structural and conceptual reformation of the entire activity within the places of detention so that the re-socialisation of the convicted persons could be successfully achieved.

In the 21st century, the normalization, culturalisation, as well as the 'spiritualization' of the prison 'bars', as well as other activities that are organized in the places of detention should become a reality not just a dream, stated the Romanian Minister of Justice, Gabriel Chiuzbaian, in 1994. The 21 ministers, who occupied the ministerial chair for justice after 1989, generally considered that the administration of penalties is an additional burden, so this activity has become a real problem identified by the ECHR, which has delivered judgments of conviction for the Romanian state amounting to several million euros in recent years[20]. Thus, due to circumstances, useful, important activities and programs have started being organized, though timidly and cautiously.

In recent years, internal assessment analyses[21] of the prison system, probation, educational measures enforced in educational or detention centers have resulted in the development of very important documents which highlighted the need for immediate measures for the improvement of accommodation, medical care, legal assistance, for streamlining release opportunities and proper integration. Analyzing the content of these documents we could conclude the following:

a) the re-socialization activity takes place in particular during the execution of criminal penalties, post-criminal activities are sporadic, lacking financial and material support;
b) all activities that take place in the places of detention have substantially bureaucratic load and they are quantitatively measured to account for their efficiency as far as social integration or the prevention of relapse are concerned;
c) the prison system organizes numerous activities as compared with the probation service, which lacks sufficient human, material and financial resources;
d) the numerous programs related to reintegration are directed toward group activities (conferences, artistic activities, schooling, professional training) and much less on personalized activities;
e) in the last five years the activity of re-socialization and educational rehabilitation of the minors has had positive effects, as the prison population has decreased, although the degree of relapse is constant; the professionalization and the employment from external sources of those in charge with re-socialization has become a major concern for the Romanian Ministry of Justice;
f) Romania's population still holds the prejudice that all criminals 'have to go to jail', and the means to inform, explain and educate citizens are insufficient to demonstrate the effectiveness of non-custodial measures, even the prosecutors and judges are not sufficiently familiar with the European recommendation[22], so custodial sentences are still given, although the law provides that the application of non-custodial sentences[23]

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[19] Law no. 169/2017 on modifying and supplementing Law no. 254/2013 on the execution of penalties and the custodial measures ordered by the judicial bodies during the criminal trial, the Official Gazette of Romania no. 571/18.07.2017.

[20] The 2017 Romanian Prison Service Report – the sums of money paid, following the EHRC judgements in the last 5 years, are: 2013 – 221,819 euros, 2014 – 196,400 euros, 2015 – 459,275 euros, 2016 – 1,624,670 euros, 2017 – 2,296,451 euros.

[21] Internal documents of the Romanian Prison Service, accessed on 10.10.2018: Diagnostic analysis of the penitentiary system 2008; Report of the Romanian Prime Minister's Control Body; Strategic plan on turning the penitentiary system more efficient, 2008; the Romanian Prison Service's study, 'The Assessment of the Current Situation for Re-socialisation', 2009; Studies resulting from externally funded projects – 'The Strategy for Occupation and Qualification through Education and Activities for Liberty', 'The Increase of Chances for social insertion for the convicted persons by better informing the society and the improvement of the prison activities', by the Regional Research Institute in Lombardy, Former convicts' return to the labour market and their integration into society.'

[22] Recommendation No. R (92) 16 of the Committee of Ministers of Council of Europe to Member States on the European Rules on Community Sanctions and Measures (adopted by the Committee of Ministers on 19 October 1992, at the 482nd meeting of the Ministers' Deputies).

[23] According to art. 74 para. (2), the New Romanian Criminal Code 'When the law stipulates alternative penalties for the offense, the criteria stipulated in para. (1) shall be a factor in selecting one of those alternatives.' According to art. 115 para. (2): '(2) The educational measures to be taken against a juvenile shall be chosen in terms of Art. 114, according to the criteria stipulated in Art. 74.'

should take priority.

The concerns about the re-socialization of the convicted persons in the places of their detention (prisons and detention and educational centers) are currently identifiable by the organization of diversified programmes, which have recently started being personalized. Thus, we can acknowledge the effect of Recommendation 2006/2, but, nevertheless, we are not able to predict its outcome on the evolution of the Romanian prison system.

We consider that the numerous rights granted to prisoners, the change of the prison system to accommodate educational programmes[24] and to eliminate coercion and force will transform the places of detention into institutions highly focused on re-socialization, hence the need for a Code on the execution of penalties to determine, starting with the names of the institutions, their purpose and means, a revival of change for the better for those who are forced to go and live in prison for a period of time.

It is time to move from acknowledging the fact that the places of detention are criminogenic to accepting the necessity that it is fundamental to change the execution of penalties to determine offenders to change their lifestyle.

## Conclusions

Social reintegration in Romania both during communism and after 1989 meant drafting a lot of documents which unified the doctrine and the case law related to this field. Before the 1989 revolution, the detainees in Romanian penitentiaries were subject to inhuman or degrading treatment, even to torture. After 1989, the conditions of detention in Romanian prisons could not change very quickly. Once Romania became a member of the European Union, new rules needed to be adopted, in order to attune to EU directives and recommendations. Nevertheless, not all obstacles could be overcome, and at present there are still problems related to overcrowding in prisons, the lack of compliance with suggested sanitary requirements, the inefficiency of the socio-educational programs, as well as the lack of specialized training of the personnel working for the Romanian Prison Service. In addition to this, this paper also highlighted the progress made in the legal field of criminal law on the execution of penalties, which represent small steps in the democratic society we live today.

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[24] Subsequent regulatory documents on the re-socialisation of the convicted persons: Decision no. 315/15.01.2018 on approving 'The literacy programme for detainees who cannot attend school'; Decision no. 646/10.10.2018 on approving the programme for general psychological assistance, 'The animal-assisted therapy for detainees'; Decision no. 302/03.01.2017 on approving 'The programme for training the detainees holding responsibilities in educational activities and programmes'; Decision no. 396/15.03.2018 on supplementing the Decision of the Romanian Prison Service's Head Officer no. 302/2017 on 'The programme for training the detainees holding responsibilities in educational activities and programmes'; Decision nr. 421/05.04.2018 on approving 'The Programme for specific psychological intervention dedicated to adults aged over 55'; Decision no. 929/04.07.2017 on 'The organisation and unfolding of topic-based and sports competitions, as a result of activity projects'; Decision no. 448/29.04.2011 on approving 'The instrument for assessing the educational needs of the detainees in the Romanian prison system'; Decision no. 449/29.04.2011 on approving 'The instrument for assessing the social assistance needs of the detainees in the Romanian prison system'; Decision no. 535/21.07.2011 on approving 'The credit system in some units belonging to the Romanian prison system'; Decision no. 500015/28.07.2017 on approving 'The strategy for the computerisation of the prison system for the time period 2017 – 2020'; Decision no.729/27.04.2017, published in Official Gazette of Romanian no. 359/16.05.2017, on 'The conditions to ensure the materials necessary to organise shows, exhibitions and other cultural and artistic performances in which detainees are involved'; Decision no. 441/2.05.2018 on modifying the Decision of the Romanian Prison Service's Head Officer no. 581/2016 for founding a 'Therapeutic centre for women within Gherla Penitentiary', financed under the Programme RO23 'Correctional Services, including Non-custodial Sanctions', by the Norwegian Financial Mechanism 2009-2014, published in Official Gazette of Romanian no. 412/15.05.2018; Order no. 1322/C/2017, on April 25, 2017 on approving 'The regulation for organising and unfolding of educational, social assistance, psychological treatment activities and programmes in the places of detention', coordinated by the Romanian Prison Sentence, published in Official Gazette of Romanian no. 432 bis/12.06.2017.

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# CRIMINAL PROFILING IN CRIME INVESTIGATION

**Constantin NEDELCU***

**Abstract**

*This article proposes a theoretical and practical approach of the criminal profiling and underlines its importance for the criminal investigation domain. The process by which are indicated the personality characteristics of a crime author, taking into account the analysis of the crime scene, various types of personalities of the perpetrators to criminal activity, the statistical data of similar acts can be called "criminal profiling", although there is no unanimously accepted definition so far.*

**Keywords:** *the psychological profile, criminal profiling, criminal investigation, behavioural characteristics*

The shaping of the psychological profile of the author is an investigation process in criminal prosecution, through which it is tried to examine and to comprehend the personality traits and, implicitly, the behaviour of the crime author in order to indicate the possible person (or its type) responsible for the criminal activity. The method is to be regarded as a help in criminal investigation, with the role of orienting the activities towards the most suitable suspects, to remove the suspicions concerning the suspects not related to the crime and, after the identification of the authors should not be seen as making a composite sketch of the crime author, but mostly as a description of his personality.

The most common definition is Veron Géberth's: "the psychological profile is the result of providing the investigators with specific information about an unknown author who committed a certain crime, process based on the detailed investigation of the crime scene, victimology and known psychophysical theories"[1], and other authors define profiling" as "a technique for determining the personality and behavioural characteristics of an individual, taking into account his criminal background, various types of personalities of offenders committing similar acts".[2]

In the early 1960s-1970s, the American authorities have given a higher importance to the contribution of psychology and psychiatry to identifying unknown authors who committed sever or less sever acts. The Federal Bureau of Investigation (FBI) from US has adopted this new "investigation method" which did not have as result the immediate identification of the crime authors, but did bring an important contribution related to investigation's targeting their faster finding. This method, known in the US as "psychological profiling" ("profiling"), it is an endeavour essentially founded on the expertise, logic, intuition and large knowledge in various domains such as: scientific philosophy, forensic medicine, criminology technique, sociology, psychology, psychiatry, etc.

The development of the criminal profiling method is due to the profound knowledge of the personality of violent persons. Numerous researches and documentation were made in the prison environment, and important and conclusive information have been obtained. During many years, the authors of many sexual assaults, homicide, fire, destruction, etc. were systematically interviewed. They detailed the reasons about committing various acts for which they were found guilty, about their remorse, the way they choose their victims, their childhood and teenage years, the education they received and their entire life to the moment of committing the act.[3]

These researches and documentation had as purpose the establishment of the National Center for the Analysis of Violent Crimes, who's necessity was proven by obtaining positive results after applying the psychology in solving some criminal cases and the alarming increase (at least in the US) of crimes committed through violence. The establishment of this Center was not the last step done in the process of introducing the author's profile in criminal investigation. At the moment, not only in the US, but in many countries of the world, a greater importance is granted to this field, known by us under the name of "psycho-forensics".

The importance of this method has been witnessed since the 1950s, when into the FBI was created a research and profiling development Center, called Investigative Supportive Unit. It was very helpful creating a large database containing the information obtained by interviewing the convicted criminals, storing at the statistical level, all these deviant behaviours with all the personality traits arising from. From 1976 to 1979, many FBI agents have been known, including the well-known John Douglas and Robert Ressler, have interviewed 36 serial killers with

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[1] Vernon Geberth, Forensic Science University Package: Practical Homicide Investigation, Fourth Edition.

[2] Ressler R., Criminal Profiling from Crime Scene Analysis in Behavioral Sciences and the law, nr.4, 1986, p.401-405.

[3] Lea Winerman, „Criminal profiling: the reality behind the myth", article published on the American Psychology Association, Volume 35, No. 7, July 2004, p. 66. http://www.apa.org/monitor/julaug04/criminal.aspx

the purpose to develop theories and categories of various types of criminals.[4]

In 1972s, the Behavioral Science Unit (BSU) was set up within the FBI Academy as a specialized unit in profiling techniques. The specialized unit has developed certain techniques and procedures in behavioural analysis programs.

In Europe, in 1933s, Interpol established a crime analysis unit called ANALYTICAL CRIMINAL INTELLIGENCE UNIT (ACIU), a unit that assesses the nature and size of various criminal activities, including serial killers or organized crime groups, introducing structures, techniques and methods for carrying out a complex analysis of the criminal phenomenon.

Even though the FBI's approach has gained **public interest, some psychologists have doubted** its scientific knowledge. Robert Ressler, John Douglas and other FBI agents did not have studies in the field, so the psychologists who studied their theories and researches did find methodological mistakes. Some psychologists developed their own researches in criminal profiling field and have develop new approaches, concept, classification systems.[5]

The modern profiling did build a strong foundation on the researches from criminology, psychology, psychiatry and forensic fields.

## General Considerations

Criminal profiling is operating with the personality concept - a multidisciplinarity construct. The personality concept[6] incorporates the essence of the human as subject and object of the historical-social process, a system of biological, psychological and social attributes, behavioural, temperamental, character structures, personal values related to social values which a person can have. Any person having intellectual, affective, volitive, character and temperamental peculiarities, being different and being similar at the same time to his peers, presents himself also as a unique personality, organized according to his genetics and environment influences.

Criminal profiling implies in the whole concept the given idea, taking into account a particular case, the law of the judicial investigation. „The research of the personality of an unknown offender, even though takes in consideration concept models, psychology elaborates in order to define and determine its profile, however makes use of particular schemes, accepted in the special sciences field."[7] Thereby, in the process of drawing the profile, it is tried to define the offender's personality traits, the elements related to motivation, skills, preparation and behavioural - criminal orientation. The need of a large research of the criminal personality it is conditioned by both law's tasks: discovering, researching, punishing the crimes and orienting the activity towards crime prevention; and the contemporary general-human orientation toward humanism, social relationship harmonisation, annihilation of distorted factors which are provoking interpersonal and intergroup conflicts.

A contemporary research of the criminal profile involved in a crime is referred to a series of aspects. No doubt that the law research of the offender's personality, which identifies it with crime and is oriented towards its four components - crime's subject, its objective and subjective causes, shall not offer sufficient material for the full understanding of both, criminal personality, and the concrete person and the actions provoking the criminal case. It is required a dynamic treatment, which takes in consideration the genesis and the affirmation of the most productive personality, which are capable of other sciences - psychology, sociology criminology. The analysis of the personality under these sciences offers knowledge which allows the comprehension of all the aspect of the deviant behaviour.

Criminal profiling is a complex and complicated activity. In the psychological profile of any human being involved in crime, shall blend both positive qualities, as well those which shall characterize the occurrence of a certain social group - criminals. The psychical qualities of any human cannot fatally decide his antisocial role of offender. There are however some psychical peculiarities like social factors, which shall determine the psychological profile and behavioural orientation. When we talk about the offender's personality's, these are to be analysed.

Some authors, researching on the criminal formation process[8], mentioned the role of psychological and physiological peculiarities - of the

[4] Lea Winerman, „Criminal profiling: the reality behind the myth", article published on the American Psychology Association, Volume 35, No. 7, July 2004, p. 66.
http://www.apa.org/monitor/julaug04/criminal.aspx

[5] Lea Winerman, „Criminal profiling: the reality behind the myth", article published on the American Psychology Association, Volume 35, No. 7, July 2004, p. 66.
http://www.apa.org/monitor/julaug04/criminal.aspx

[6] Personality is a wide-spread term which sense it is known to the common language. The majority uses the word to refer to a complex of characteristics defining the way in which a person sees and acts in the world - something similar to the combined processes of thinking and behavioural. In psychology, it could be determined as emotional, cognitive, and behavioural unique traits of each individual, learned and evolved through expertise and relatively consistency throughout time.
Is is unlikely to find a consent between psychologists related to personality's nature. There is no unique perspective over which all researchers could agree. It is difficult to find an agreement for sole personality definition, but mostly related to its characteristics. Rather than looking for a convergence, the psychologists belonging to various schools, did advance theories and definitions of personality which they sustained and defend with great passion and belief.

[7] Tudorel Butoi, „Tratat universitar de psihologie judiciară", Publishing House Phobos, Bucharest, 2003, p. 125.

[8] Nicolae Mitrofan, Voicu Zdrenghea, Tudorel Butoi, „Psihologie judiciară", Publishing House Şansă, Bucharest 1992, p. 162.

psychical, behavioural, character type system, and social factors, mostly of those which shall determine the socialising process of the individual. In the circle of the subjective causes of a crime, the author marks his thinking and consciousness, dominated by certain representations, contradictory to those general-humans, social orientation as result of needs, interests and motivation with an antisocial character. It is obvious the orientation of the research of the offender's personality in order to appoint the correlation between social and biological, this process being analysed only through its dynamic: "within the process of social development, personality formation"[9].

Criminal profiling offers information to all law agents which are conducting the criminal investigation. It is a fact that in the criminal investigation, a simple profile cannot lad to the exact identification of the offender. However, criminal profiling can eliminate an important part of variants, restricting enough the suspects circle. More data offers the criminal profile and more efficient will be the criminal investigation.

Criminal profiling was defined as "a collection of clues"[10], "an educated try to offer specific information related to a certain type of suspect"[11] and as a biographic sketch of behavioural models and possible tendencies arising from these[12]

Some authors have confirmed related to criminal profiling that it is especially useful when the offender suffers of a form of psychopathology. The FBI defines criminal profiling as being that identification technique of the major personality traits and behavioural characteristics of an individual, starting from the crime analyse. The investigator's ability consists in recognising the dynamic of the scene and its correlation to various criminal figures which committed similar crimes.

Criminal profiling is based on the principle that any author of a crime, independently of the committed crime, will act on a "values set" basis. These values or "signatures", are same way personalised as handwriting and once identified, they can be used to help investigators in the physical identification of the criminal[13].

## Scientific methods of drawing up the criminal profiling

### A. FBI's method: the investigation of the crime scene[14]

The original method used by FBI, was performed by the FBI agents Howard Teten and Pat Mullany and involves the first overall impression on the mental status of the criminal based on the overall observation of the crime scene.

Later, in 1979s and 1983s, following a study based on the interviewing of the sentenced criminals, FBI agents, Douglas John and Ressler Robert have updated the process of the profiling in the current approach: analysis of the crime scene. The importance of researching the crime scene, its urgent nature and irreplaceable as well as its wealth of samples that can be gathered (not just physical evidence, but also psychological) have been understood by the forensics long time before the official development of the FBI method. This takes place in six steps[15]:

- The collection and evaluation of the primary data (Profiling Imputus)- in this step, particularly important, whose achieving depends the whole investigation and its results, where all the information regarding the case are gathered: the photos of the crime scene and of the victims, the autopsy results and of the analysis of the samples founded at the crime scene and all the other information that can be relevant in shaping a precise picture of what happened before, in the middle and after murder.
- Templates of data systematisation (Decision Process Models) – the second step involves all of the information assembling collected into a logical, coherent pattern of the preceding stage. As a result of data systematisation can be determined the crime.
- The systematic interpretation of the criminal activity (Crime Assessment), is the time of

[9] Jenkins, P., „Using murder: The social construction of serial homicide". New York: Aldine de Gruyter, 1994, p. 142.
[10] Nicolae Mitrofan, Voicu Zdrenghea, Tudorel Butoi, „Psihologie judiciară", Publishing House Şansă, Bucharest 1992, p. 163.
[11] Vernon Geberth, Forensic Science University Package: Practical Homicide Investigation, Fourth Edition, 2008, p. 164.
[12] Idem, p. 165.
[13] Jenkins, P., „Using murder: The social construction of serial homicide". New York: Aldine de Gruyter, 1994, p. 146.
[14] A school case in this sense, is Râmaru killer's profile analysed by Univ. Prof. PhD Tudorel BUTOI and by Alina TĂNASE in the article Profiler. In „the Eagle" operation – Analysing the case Râmaru (father and son) from the psychological perspective:
"A young man in his mid20s (insane courage - "youthful arrogance", correlated with the ages of the victims).
Disturbingly often (prolific criminal, whose timeless attacks don't follow a pattenr), so it's probably about a psycho criminal, with a compulsive behaviour, the crimes being lived as a way of achieving satisfaction.
The free of remorse psychopath, believing that the victim had received what deserves (this results from the way in which he left the bodies).
Victims: young women (sexual moving body –sexual psychopath) over which he was going into the night, in their own homes (by forcing the window, break-in – Freud: rape), from the basement (the underground in Freud's psychoanalysis – the symbol of early childhood, so probably once abused, where the inability to have normal relations with the young women that he was murdering of, attachment disorder in the early childhood– violence against women: the need of killing them, not necessarily to rape them, so the need of absolute control).
Weather: strong storm, heavy rain, which means nature's "help", specific "Wolf Man" through surprising attacks and for easier hide, because otherwise he wouldn't be able to approach the women.
Cowardice (the shyness is the result of particular neurotic tendencies; they may have the source, typical, in early childhood education by the hyper authoritarian families) because he has to attack them over night, on a weather he can hide, while they're sleeping, without the possibility to defend themselves. This means a lack of self-confidence in order to have normal relationships."
[15] Nicolae Mitrofan, Voicu Zdrenghea, Tudorel Butoi, „Psihologie judiciară", Publishing House Şansă, Bucharest 1992, p. 162.

reconstitution of the events and of the criminal behaviour of the author as well as the victim. Are intended to understand the role each participant had (victim and perpetrator) in what happened.

- Establishing the criminal profile - There shall be a characteristics list of the possible author of the crime, list that could target: a range of age, the sex, ethnicity, some particular physical traits (like a deformity, or a specific disease), the weight, the height, occupation, level of education and culture, behavioural symptoms, possible speech defects, matters concerning author's relations to other people. Data serve to determining identification process, detention of the suspect and the establishment of appropriate questioning methods of the suspect.
- The Investigation. Being realised the author's profile, it is surrendered to criminal Courts. Ideally would be that the profile to point direction that focuses the efforts of the investigators and to narrow the circle of the suspects. The Profile can suffer changes, unless doesn't lead to any suspect or if appear new evidence, the profile is reconsidering in order to incorporate new evidence.
- The Apprehension. In this stage are compared the characteristics of the suspect to the original profile prior identified therefore. In many cases, this comparison or verification can't be realised because of the missing author of the crime.

At the bottom of the FBI's method there is the dichotomy of the organised - disorganised offender[16], according to which are classified the crime scenes. An organised crime scene shows the attentive planning and control from the offender's side when he commits the murder; this thing makes reference to educated individuals with social competences, which are able to maintain harmonious relationships with people around. At the opposite end there is a disorganised crime scene, which indicates the lack of control and capacity to take intelligent decisions. The disorganised criminal is not trying to cover his tracks, presuming an individual which has either a lower level of intelligence, or uses drugs or alcohol regularly.

This classification seems reasonable, but at an attentive analysis it can be seen that the crime scenes often have organised, as well disorganised characteristics.

Despite critiques, the FBI's method to analyse the crime scene remains one of the most taught methods worldwide at the moment.

### B. CANTER'S METHOD: investigation psychology[17]

David Cantor's method is based on statistics: starting from the offenders' population database, the typologies shall be defined (offenders groups) and the crimes with unknown authors are compared with those from the typologies. This procedure follows the similarity and has as result a list with the probable characteristics of the unknown author. The difference between the FBI's and Canter's method consists that the last one updates its database.

The model elaborated by Canter, named the model of the five factors, is based on five aspects of the interaction between the victim and the perpetrator; these are the following:

- The interpersonal coherence is represented by the assumption that the offenders will relate with their victims the same way they do with every day persons. Another assumption is that the victim symbolises a very important person from the offender's life.
- The time and the crime scene can provide information about the offender's mobility, contributing to determining his probable residence. Since the time and place are chosen by the perpetrator, they can give information related to his personal life and schedule.
- Criminal characteristics allow the analyst to refine the classifications on offenders groups and to offer a profile with the most probable traits which can

[16] Continuing the case presented above, we can notice the dichotomy Organised-Disorganised

Organised:

- from the geographical profile it can be determined that he crosses the city to attack his victims, proving a great mobility (he kills in both center of the city, a maximum risk area, and in the neighbourhood close to suburbs) [subsequently it was shown that he was an ITB driver, so we knew quite well all the city areas].
- the victims belong to a very obvious pattern: young women in their 20s, alone, on their way home during the night or living in buildings basements.
- cured aspect ( the military boots are freshly painted).
- does not know the victims (they are strangers especially targeted to fit in his victimisation profile), being able to easily manifest his sadism and brutality.
- he is coming in the criminal area with the crime weapon and dos not leave it there; this and the fact that the victims are brutally attacked prove the premeditation and the tendency of a ruthless "hunter" which "is hunting his prey" in his best advantage (his tracks are covered by the nature and the biological human cycle (sleep or night, when the visibility is low and the vigilance is attenuated) ensure him a minimum defence reaction of the victims.
- leaves physical evidence at the crime scene, but these do not help to identification. From here we can conclude that it might be either a very brave primary offender, which overestimates his ability to hide, or we talk about a very agile offender, which, without being identified, "experimented" through multiple crimes (probably burglaries, robberies) until he shaped an operating mode which he considers valid.

Disorganised:

- leaves boots and digital tracks at the crime scene (this should be interpreted with caution because the fingerprint technique was a new science at that time, so its utility in the investigations could not be known to the wide public, especially at the end of the war).
- does not lure the victims in his comfort zone (inadequate from a social and probably sexual point of view)
- the corps is left at the crime scene (the crime discovery is prevented only by the locked door from the inside; does non make any effort to hide the corps o make identification difficult)
- the crime scene is pretty "dirty" (blood and brain particles, scattered on the walls)

[17] Tudorel Butoi, „Tratat universitar de psihologie judiciară", Publishing House Phobos, Bucharest, 2003, p. 54.

characterize a certain offender.

- Criminal Career is referred to the possibility of the existence of other criminal activities and the type of these activities.
- Forensic Awareness is referred to the elements which prove that an offender knows the investigation and samples collecting techniques. Such elements can be wearing gloves, using condoms o removing any object which may have the perpetrator's fingerprint or blood.

Since this method uses statistic means in order to elaborate the offender's profile, similar criticism can be brought like to the FBI's method, especially because the typologies can not be applied in other environment but in the one where the initial data were collected (in the case of Canter's model, in Great Britain).

**C. Turvey's METHOD: Behavioural Evidence Analysis**

Starting from the observation that the crime authors lie most of the times when they talk about how they committed the crime, Truvey Brent elaborated a profiling method where the most objective evidence related to what happened in a crime is the reconstruction of the criminal behaviour. Behavioral Evidence Analysis covers four steps[18]:

- Equivocal Forensic Analysis. The term equivocal refers that the interpretation of the samples can lead to more meanings and the purpose of this step is to evaluating which is the most probable meaning of the evidences. The sources of Equivocal Analysis and interpretation are the following: photos, registrations, sketches of the crime scene, investigators records, material evidences found, autopsy records and its photos, witnesses' statements, the map of the victim before the death, the victim's past etc.
- Establishing the victim's profile (Victimology). In this step is established a very precise portrait of the victim's profile. The answer about why, how, where and when o certain victim was chosen can say a lot about the perpetrator. One of the victim's characteristics taken in consideration is the measures (height, weight); so, if it can be established that the victim could be moved, there is a series of conclusions to understand the power and the physical conformation of the perpetrator.
- Crime Scene Characteristics are referring to the crime scene traits, determined by the perpetrator's decision related to the victim, the place and its meaning for him. In this stage, the crime scene is related to other similar crime scenes and it is determined the way how to approach the victim. These information can lead to the same perpetrator.
- Offender Characteristics are the behavioural or personality traits shown after the above steps. The profile reached is not final, it has to be analysed permanently along with the new shown evidences and denied older information. Offender Characteristics can refer to: physical conformation, gender, professional status, the presence of remorse and guilt feeling, the criminal background, the abilities and skills level, the aggressiveness level, offender's residence referred to the crime scene, his medical background, the marital status, the race etc.

Since the analysis of the behavioural samples does not use to a referral group which base a profile is created, Petherick (2006) considers this method as being the biggest transcultural application. The method considers all the physical evidences, the offender's behaviour and the victim's characteristics, which lead together at the perpetrator's profile. The critiques brought to this method refer at its time frame, to the need of a great professional preparation and the dependency of the quality of the final result with the quantity of information to which the profiler has access.

## Geographic profiling

Profiling or geographic profiling is a management information system and at the same time an investigation methodology which is evaluating the series of the crime scenes in order to determine the most probable area where the perpetrator lives.

This technique may apply in serial crimes, rapes, burglaries, fires and planting bombs. At the base of the technique the is the Brentingham (Webb, 2006) model, according to which all people have an "activity space" dependent on the area where we live, work and relax and this activity space is producing a distinct pattern of travelling throughout the city; applying this model to the criminal activity we can understand that an offender must know a certain area before committing the crimes. The crime scene is determined by the intersection of the travel route with that area.

By geographical profiling are predicted the most probable places where the offender lives, works, relates or the most probable routes which he is following, the data referred to the time, distance and movement towards and from the crime scene are analysed to obtain a three-dimensional model called risk surface.

The risk surface contains the most probable places where the offender can be found and helps the investigators to focusing their effort onto the areas where he is active.

Geographic profiling methodology presumes a series of procedures[19]:

- File's examination: witnesses statements, autopsy record, psychological profile (if any);
- Crime scene inspection;
- Discussion with the investigators;
- Crime scenes visits (if any possibility);
- Local statistics analysis referred to criminality and demographic data;
- Study of the roads and transportation routes;
- Global analysis of these data and completion of

[18] Tudorel Butoi, „Tratat universitar de psihologie judiciară", Publishing House Phobos, Bucharest, 2003, p. 56-58.
[19] Univ. Prof. Phd Tudorel Badea Butoi, "Psihologie judiciară. Tratat Universitar, Publishing House Solaris Prinţ, Bucharest, 2009, p. 153.

the record.

Often, profiling techniques are gathered as one and same method, with a single set of procedures and practised by persons with the same type of preparation.

It is obvious though that these techniques are different as well as the professional preparations of persons applying them. The FBI's method presumes the comparison of an offender's behaviour to those criminals which the profiler has met in the past and to groups/typologies established throughout studying similar crimes and criminals.

The investigation psychology is based on the environmental psychology and the analysis of the situational elements (place, time, offender's experience at a certain moment), making recourse to statistics also. The behavioural samples analysis does not utilize statistics, but leans first of all on the reconstruction of the incident, starting from the physical evidence and on psychology and psychiatry in order to interpreting the perpetrator's behaviour. In this technique is more or less visible, the psycho-behavioural signature which can differentiate between two offenders with similar operating mode.

Geographical profiling is a complementary instrument which does not refer to psychological information, but is having as purpose, like the others techniques, the restrain of the searching area of suspects and the shaping of a more accurate direction for the shaping of the investigator effort to put an end to crimes.

## Logical forms of reasoning in the elaboration of the crime author's profile

The behavioural and personality analysis of the perpetrator of the crime involves a logical approach, different according to the arguments type used for the evaluation. Therefore, the arguments, as logics study elements can be divided in two distinct types, according to how their premises are leading to conclusions: inductive and deductive.

In the speciality literature, the logical forms of reasoning in the shaping of the crime author's profile were divided as inductive and deductive.[20]

The inductive profile presents the following characteristics:

- the premises do not give final solutions for the conclusions, they only offer the support and allow the general way, which even if it's nor correct, is based on the statistical analysis.
- starting from the behaviour and characteristics which many authors who have been studied in the past have, is generalised also for the suspect in the investigates cause, presuming the crime authors have similar motivations in similar situations.
- in order to draw the intended statistics and to elaborate the inductive profile, the data are collected from three sources: the studies on the population imprisoned; the practical investigators experience, the public sources, media included.
- even if it has the advantage of easiness and speed, the presence of the specialists not being necessary, the inductive profile was criticised because it turns to a limited number of population of known authors, by extending the obtained data from them, to innocent persons.

The deductive profile presents the following characteristics[21]:

- it offers unquestionable grounds for conclusions, having as primary objective the clarification of the relationship between premises and conclusions.
- is the exclusive result of the correct examination of the tracks discovered after the investigation of the crime scene, forensic expertise, followed by the analysis of the crime scene characteristics and those of the victim, so the profile of an individual which could commit the crime with that victim can be deducted, in the proper conditions of that crime scene.

From this prospective, the characteristics and behaviour of the author's crime can be deducted from several information categories, classified as follows:[22]

- material evidences. The forensic psychologist analyses all the samples taken at the crime scene in order to ensure that those are correctly sustaining the peculiarities at the crime;
- the characteristics at the crime scene are determined after a complete evaluation of the material evidences and are individually determined and analysed as developed, in chronological order. This examination can lead to conclusions referred to the motive and purpose of the offender and to his operating mode;

Victim's characteristics. In order to study the victim's characteristics, to create its own profile, is a part of the elaboration of the offender's profile, and involves speciality personnel with the expertise in the crime scene investigation, in interpreting the laboratory analyses and knowledge in the psychology field. The forensic psychologist must establish a unique behaviour of the offender, by crossing from an universal set of characteristics of a suspect to particular characteristics of a certain individual.

There is no exact rule of a certain method in a specific case and the profiling elaboration methods can be adapted by the investigators, according to their needs and specific of the investigation.

## The future of criminal profiling.

Criminal profiling has an out-of-court character and not even in the United States is considered as an evidence proof which serves in finding the truth,

[20] Stancu, Emilian, "Criminalistică. Vol. II: Tactica şi metodologia criminalistică", Bucureşti, Publ. House Actami, 1995, p. 43;
[21] Stancu, Emilian, "Criminalistică. Vol. II: Tactica şi metodologia criminalistică", Bucureşti, Publ. House Actami, 1995, p. 47;
[22] Idem 48

however through it, acts with unknown authors could be rapidly solved, the identification and capture of the crime authors allow also o comparative evaluation, and it is natural that in the future this type of investigation shall have a well-earned, efficient and indisputable place.

Criminal profiling as instrument in the criminal investigation begins to enjoy a major interest on both investigators and media. However, even if it became quickly accepted by the wide public (especially because of the movies to consecrated it), a lot of questions related to its applicability and objectivity were arising.

Criminal profiling did not arise to solve the case by itself. It is not a magical instrument or a precise science. According the FBI's internal records, it has a 17% success rate. However, criminal profiling had an important role in crime investigation in the US and not only. It is known to be used in at least 11 countries: Great Britain, Sweden, Finland, New Zealand, South Africa, Germany, Canada, Malaysia, Russia, Zimbabwe and Holland[23]. Therefore, despite controversies related to this field, more and more profiling specialists appear every year. This leads to the increasing of the researches number which can only lead to a higher success rate of the predictions.

Therefore it is to be expected that profiling importance increases every year, and in a not so far away future, shall become indispensable in the investigation of crime committed with violence.

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# THE SIZE AND THE IMPORTANCE OF THE EVIDENCE GOVERNED DURING THE PROSECUTION IN REM

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**Abstract**

*The jurisdiction developed on the edge of the implementation of the provisions of Code of Criminal Procedure, relating to the verification of the legality of the referral to the court, the legality of the management of evidences and documents of the prosecution, has proved the fact that in front of the judges of preliminary chamber has come, not infrequently, the request of the exclusion of the evidences governed during the criminal prosecution in rem, on the ground that these evidences have been managed either in total or in the majority of them, at this stage absolutely secret of the criminal prosecution, even though the offender of the deed was known and in this way, the future suspect or charged, has been deprived of any realistic and concrete possibility to defend himself, to assist with the help of a lawyer in the management of theses evidences and to combat them by appropriate procedural means.*

*This raises the question which is the size of the evidences that reasonably can be taken during the criminal proceedings in rem, thus the suspect/ defendant should not be harmed in his procedural rights, in particular with regard to his right of defence.*

*To search for an answer to this matter, this is very present in the proceedings in front of the judge of preliminary chamber, legal provisions must be primarily examined that implicitly separates the criminal prosecution in rem from the moment of further performing of the prosecution towards a certain person.*

**Keywords:** *Evidence, prosecution, in rem, procedural, suspect, defendant.*

## 1. Introduction

*The criminal process represents the activity, through which the specialized bodies of the state discover the criminal offences, identify and catch the criminals, gather and manage the samples, accomplish the penal liability and apply the penalties.*[1]

The judicial bodies carry out a complex activity which exceeds the strict limits of the resolution of criminal case within the framework of the jurisdictional detent, executing a series of legal procedures in order to conduct the act of justice in good conditions.

On the basis of succession of judicial activities carried out by the competent bodies for the sole purpose of making the truth and pull the penal liability of persons who committed crimes found the samples, the nature of the evidence and processes of evidence.

Underlying succession of judicial activities carried out by the competent bodies for the sole purpose of finding out the truth and criminal responsibility of individuals who committed crimes find evidence, evidence and evidence procedures.

## 2. The proof. General considerations

### 2.1. Evidences, means of evidence and proceedings of evidence.

The legislator defines the notion of *proof* in the content of the provisions of Article 97 (1) as being "any element of fact which serves at the disclosure of the existence or non-existence of an infringement, at the identification of the person who committed it and at the knowledge of the necessary circumstances for the fair resolution of the cause and which contributes to finding out the truth in the criminal trial."

The means of the proof represents the means of investigation or of discovery of the evidences and the management of the evidence in the criminal trial.[2]

The evidence is obtained in the criminal trial by the following means that sample: the declarations of the suspect or of the defendant, the declarations of the injured person, the declarations of the civil party or of the responsible party from a civil point of view, the declarations of the witnesses, expert reports or findings, reports, photos, material means of sample or by any other means of sample which is not forbidden by law.

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[1] Nicolae Volonciu, „Tratat de procedură penală Vol I", ed. Paideia, 1993, p. 9;

[2] V. Dongoroz, Curs de procedură penală, București, 1942, p. 207.

### 2.2. The object of the evidence and the aim of the evidence

The object of the evidence represents all the facts and the circumstances which have to be proved, for the purpose of solving the criminal cause and also shows the limits of the judicial research and the performance of the evidence.

According to the article 98 of the Code of Criminal Procedure, the object of the proof is constituted by tye existence of the offence and its commission by the defendant, the facts concerning civil liability, when there is a civil part, the facts and the circumstances of fact which depends on the enforcement of the law and any necessary circumstance for a fair resolution of the case.

The charge of the proof mainly belongs to the prosecutor in the criminal proceedings, civil parts or, as the case may be, the prosecutor who pursues the civil action in the case in which the injured person lacks the capacity of exercise or has a capacity of limited exercise.

The suspect or the defendant benefits of the presumption of innocence, not being obliged to prove his innocence, and he has the right not to contribute to his own indictment. Thus, in the case in which the prosecution fails to fully overturn the presumption of innocence, the fact will be interpreted as an evidence in favour of the innocence of the defendant (*in dubio pro reo).* According to the judicial practice, even if the defendant reports himself the Court cannot order his sentencing, if the presumption of innocence has not been overturned during the criminal trial, whereas any doubt takes advantage of the defendant and the defendant's admission does not have absolute evidential value.

## 3. The management of the evidences during the prosecution stage

### 3.1. The beginning of the criminal proceedings and the continuation of the criminal prosecution against a person

The informed body of the criminal prosecution by denunciation or complaint has the obligation to check in the first stage the fulfilment of *the conditions of form of the information* and respectively of the mentions from the content of the information which relates to the way of describing the deed, in order to establish, if the conditions of form are met, on the one hand, and, on the other hand, if the description of the deed is complete and clear. The verification of the criminal prosecution body has a judicial result in refunding the denunciation or the complaint through administrative way to the petitioner, where the conditions relating to the form or conditions relating to the description of the deed are not fulfilled.

The article 305 (1) from the Code of Criminal Procedure provides that "When the document of information accomplishes the conditions laid down by the law, the criminal prosecution body disposes the beginning of the criminal prosecution relating to the committed deed or whose commitment is prepared, even if the author is shown or known."

According to the article 305 (3) from the Code of Criminal Procedure "When there are evidences indicating reasonable suspicion that a certain person has committed the deed for which the the criminal prosecution has started and there is not one of the cases provided by the article 16 (1), the criminal prosecution body disposes that the criminal prosecution should be carried out in front of him, who acquires the quality of suspect. The measure ordered by the criminal prosecution body shall be carried out within 3 days of the confirmation of the prosecutor who supervises the criminal prosecution, the criminal prosecution body being obliged to present the prosecutor even the case file. "

The fact that it is not immediately possible the acquisition of the official quality of suspect as soon as the criminal prosecution bodies were informed relating to the commitment of a criminal deed by one or more people represents a guarantee justified by the necessity to protect the rights of the people against whom such a referral was made, in order they may not be the subject of such criminal charges without a minimum verification of support, to the effect of indicating both the existence of the deed and the non-existence of a case which prevents the exercise of the criminal action, and the reasonable suspicion that they have committed a deed prescribed by the penal law.

Reported to the administration of numerous evidences and sometimes of all evidences in the stage of criminal prosecution *in rem* and to the existence or not of a physical injury of the right of defence of the suspect/ defendant, by the impossibility to assist through a lawyer, I their management, especially in the conditions in which after further criminal prosecution *in personam,* the request of re-administration of the evidences was rejected by the prosecutor, different solutions have been pronounced in jurisprudence.

### 3.2. The management of the evidences within criminal prosecution *in rem*

Thus, in a case, in which the defendant, in the procedure of preliminary chamber requested the exclusion of the evidences managed before being brought to the attention the charge and the beginning of the criminal prosecution against him (criminal investigation that began three years ago, without being brought to attention of the charge meanwhile), the judge of the preliminary chamber kept in mind that the sanction that would be incident in this case is that of relative nullity, only that this penalty cannot operate because the defendant has not proved the existence of a physical injury which could not be removed otherwise than the cancellation of the procedural act concerning the management of the evidences and the exclusion of all evidences thus managed.

It was argued the solution through which the criminal prosecution is characterized by the lack of advertising and contradiction, which means that although the defendant had, at least virtually, the possibility of assisting by the defender at the interrogation of the witnesses, this fact did not suppose for the defender an active interrogation of the witnesses. Especially that during the criminal prosecution the prosecutor meets in his person the functions of process of accusation, defence and resolution of the case and in very few exceptions, such as for example, the confrontation, and all parties are present at the same time to carry out the criminal prosecution.

It was also noted that the nullity may not interfere only if the physical injury cannot be removed differently or, in case, the remedy is given by the possibility of re-interrogation of the witnesses directly by the Court, during the judicial investigation and that the criminal law of process does not restrict the administration of all evidences only after disposition of further carrying out of the criminal prosecution, the contrary conclusion leading to the necessity of re-administration of all managed evidences in the stage of criminal prosecution *in rem*, *or* this is not the purpose of the legislator.

Therefore, it was concluded that the defendant was not caused any physical injury to found the request of exclusion of the evidences.

To the contrary, the Court has decided in a supreme decision of the case, prior to coming into force of the new criminal provisions of process, but the reasons remain valid and they are fully applicable in relation to the new provisions[3].

Thus, the Supreme Court held that the provisions of art. 6 paragraph 3 (c) of the European Convention of the human rights, European standard of protection in the field of the right to dispose of the necessary time and facilities to prepare the defence, it also applies at the stage of criminal prosecution, being an element of the notion of fair trial, to the extent that the initial failure of this right might compromise the fair character of the criminal trial. (imbroscia against Switzerland, 1993)

The Supreme Court, taking into account that the injured person and the majority of the witnesses have been interrogated in the stage of prior acts (the correspondent of the criminal prosecution *in rem*), the request of re-interrogation has been rejected on the grounds that they were interrogated by the prosecutor respecting all the guarantees and thus being managed the most important evidences in the preceding act stage, stated that the equality of arms has been violated, the accused being placed in a position where he no longer can present the cause in such way as not to be disadvantaged compared to the incrimination ( case S against Switzerland 1991). The Court held that the presence of the lawyer in the administration of these evidences would have conferred the right to make requests, conclusions, and complaints according to the rights conferred by extension of the sphere of judicial assistance in criminal prosecution stage including the possibility granted by the prosecutor to ask questions on the occasion of the interrogation of the injured person and of witnesses.

He further held that the hearing of the injured person and of witnesses on the occasion of judicial research cannot complete the obligation of the prosecutor to manage the evidences with the respect of the rights of defence.

In a third case[4], clarifying for the problem in question, from my point of view, it was held that the evidences managed between the moment of the beginning of the criminal prosecution *in rem* and the moment of the disposition by the prosecutor to continue to carry out the criminal prosecution against the suspect and, respectively, bringing to the attention of this person the quality of suspect, cannot be stuck by nullity, as long as the time intervals between the two moments mentioned above, reported to the dates and the circumstances of the case, are justified, a condition which the judge considered as being fulfilled in question, since it is a period of time of only 15 days. It was held that in the lack of an obvious abuse in the timing of the stages of process during the criminal prosecution, the judge cannot censure the way in which the body of the criminal prosecution has planned the beginning and the continuation of the criminal prosecution, not having data in the file to the effect that the prevention of the defendant in the exercise of the right of the defence had been sought.

### 3.3. The continuation of the criminal prosecution against a person. The phrase "reasonable suspicion"

In the recent doctrine[5] drawn up on the New Code of Criminal Procedure, it was stated the opinion according to which the order of the carrying out of a further criminal prosecution against the suspect in the case in which the conditions provided by the article 77 and art. 305 (3) of the Code of Criminal Procedure are fulfilled constitutes a positive procedural obligation of the body of criminal prosecution, and not a faculty of this one, being regulated in order to ensure an effective guarantee of the right to defence of the people accused in criminal proceedings. The precise determination of the moment of the formulation of an accusation in criminal matters (the notion of accusation in criminal matters signifying the official notification issued by an authority accusing a person of committing an offence, fact that attracts important repercussions on that person) is of particular importance because the respective person becomes the holder of rights and obligations at this point, having guaranteed the rights

[3] Decizia penală nr. 242/3 decembrie 2012 a Înaltei Curți de Casație și Justiție, disponibilă pe www.juridice.ro;
[4] Încheierea penală nr. 345/CO/CP/2.09.2016 a Curții de Apel București, secția a II-a penală, nepublicată;
[5] M. Udroiu, Procedură penală, Partea specială, Ediția a 4-a, Editura C.H.Beck, p. 52.

provided in art 6 of ECHR. It was shown next that the acquisition of the quality of suspect interferes with ex law, when the conditions provided by article 77 and art 305 (3) of the Code of Criminal Procedure are fulfilled which impose the body of criminal prosecution on acknowledging the existence of a charge in criminal matters and to order the carrying out of the further criminal prosecution against the suspect and on bringing to the attention of the rights. The violation of the positive procedural obligation, by carrying out the criminal prosecution *in rem* beyond the moment when it could be made a charge in criminal matters in a reasonable way, may lead to a significant and substantial injury of the right of a fair trial for the defendant, such as to draw the incidence of the penalty of relative nullity provided in art 282 of the Code of Criminal Procedure, relating to act of process or the evidences managed after this moment, being essential for the retaining of the injury of process, being as after a further criminal prosecution *in personam* , the right to defence may have been affected in its essence by the impossibility of obtaining the re- administration of the evidences or the participation at other acts of process.

It was also stated the opinion that the prolongation of the criminal prosecution *in rem* beyond the time when there are evidences to the effect of reasonable suspicion that a certain person committed the deed for which the penal prosecution was initiated is a procedural abuse.[6]

The European Court, in its jurisprudence[7] has stated that a person acquires the quality of suspect that draws the application of the guarantees provided for in the art. 6 ECHR, not from the moment in which the quality is notified to him,but from the moment in which they had plausible reasons to suspect the concerned person of committing the offence.

The European Court has stated that even at the time of the preceding acts, according to the Code of Criminal Procedure of 1968, the art guarantees were applicable 6 of the ECHR even if they were not provided for national law.

The European Court has shown that, at the time of the Acts prior to, according to the Code of penal procedure in 1968 was applicable to guarantees of Article 6 of the European Court for Human Rights in Strasbourg, even if there were laid down in national law.

It was shown in the case of Argintaru against Romania that the delay in the fulfilment of the obligation to provide further criminal prosecution against the suspect, and consequently, the extension of the placement of the person to whom there is a penal accusation in concreto apart from the penal trial, constitutes an infringement of the right fair trial.

The European Court has shown that even at the time of the fulfilment of the preceding acts, according to the Code of Criminal Procedure from 1998, the guarantees were applicable in art. 6 of ECHR, even if they were not provided in national law.[8]

In our opinion, this issue was, in principle, discovered in the recitals of the Decision no. 236/2016 of the Constitutional Court[9], by which, although the exception of unconstitutional of the provisions of art. 305 (1) and (3) of The Code of Criminal procedure were rejected as unfounded, it was held that "the interval of time that separates the moment of the beginning of the criminal prosecution *in rem* from the moment of the beginning of the criminal prosecution *in personam* is not strictly and expressly determined by the provisions of the Code of Penal Procedure." However, the criminal provision of process states that the prosecutor provides that the criminal prosecution should be further carried out to a person, when the existing dates and the evidences in question have effect in reasonable clues that this one has committed the deed for which the criminal prosecution has started. Thus, the prosecutor is obliged that, in the moment when there are reasonable clues that a person has committed the deed for which the criminal prosecution has started, to provide further criminal prosecution towards this person. This has the effect from the use of the legislator of the verb at imperative mood "provide", and not "may provide", so that it could be interpreted that there is a faculty of the prosecutor to postpone the time of the beginning of the criminal prosecution *in personam* until the necessary fulfilment of the probation for the beginning of the penal action and the direct order of this measure.

In principle, the existence of reasonable clues is concomitant with the formulation of an accusation *in personam* which has the valences of an accusation in criminal matters. However, there may be situations in which the two elements do not have a simultaneous existence. To the extent in which, in disagreement with the above provisions, the prosecutor does not comply with those requirements, then, in the case of issuing the bill of the indictment, the suspect has become a defendant and may submit to the censorship of the judge of preliminary chamber the examination of the legal administration of the evidences and the carrying out of the acts by the bodies of criminal prosecution, thus according to the art. 342 and art. 345 (1) and (2) of the Code of Criminal Procedure, in the filter procedure, the judge of preliminary chamber has the possibility to ascertain the nullity and to exclude the acts of criminal prosecution and the managed evidences with breaking the law which confers ,among other things, an effective right to defence.

The Court has noted in this respect that the provision of the art. 282 (1) of The Code of Criminal Procedure establish that breaking the legal provisions determine the nullity of the act when by the failure to

[6] Viorel Paşca, Principiul egalităţii armelor în procesul penal roman-O realitate sau o ficţiune, Revista Universul Juridic;
[7] Cauza Brusco contra Franţei, Hotărârea din 14 octombrie 2010, cauza Sobko împotriva Ucrainei;
[8] Curtea Europeană a Drepturilor Omului, cauza Argintaru contra Romîniei, decizia din 8 ianuarie 2013;
[9] Decizia CCR nr. 326/19 aprilie 2016, publicată în M.Of. nr. 426/7 iunie 2016;

comply with the legal requirements was brought a harm of the rights of the parties or of the main subjects of process that cannot be removed other than by the abolition of the act. Therefore, whenever all or most of the evidences from the criminal prosecution stage have been managed only during the criminal prosecution *in rem* , then the aspects of implementation of law with overlooking of the specific guarantees to the right to a fair trial can be called into question, such as the right of the suspect to be informed regarding the deed for which he is investigated and the legal classification of this one, the right to consult the file, under the law, to have a chosen lawyer or one of the office for cases of compulsory assistance, to propose the administration of evidences, to raise exceptions and to put conclusions, to make any other requests relating to the resolution of the civil and penal side of the case, to appeal to a mediator, in cases allowed by law, to be informed regarding his rights, or to the right to benefit from other rights stipulated by law. As long as depending on the particularities of each case it is proved the suspects/ defendants are deprived of the rights conferred by the Code of Criminal Procedure, being severely affected the right of defence during the criminal prosecution, then the evidences and the documents drawn up with the failure to comply with the legal requirements may be removed until the completion of the procedure of the preliminary chamber.

Towards the evolution of the jurisprudence of the European Court on the matter of the right to defence, towards the vision of the Constitutional Court on the fair interpretation of the provision of art 305 (1) and (3), the conclusion that is drawn up is that, in the event of ordering a further criminal prosecution against a person beyond the moment at which the body of criminal prosecution had to order in this respect in a reasonable way with the consequence of the lack of the suspect of the rights conferred by law, in particular that one to be able to assist, through a lawyer, at the interrogation of the parties, of procedural subjects, of witnesses, to be able to take part in carrying an expertise, etc., the compensatory in such situation would be the re-administration of the managed evidences in the criminal prosecution stage in rem or the removal from the appreciation of those evidences managed in the breach of the rights of the suspect.

## Conclusions

Thus, to the question which is "the quantity" of evidences that can reasonably be managed in the criminal prosecution stage in rem, from the corroborated interpretation of the provisions of art 305 (3) of the Code of Criminal Procedure and art 99 paragraph 3letter c of the ECHR, the answer is that, in the criminal prosecution stage in rem must not be administrated only those strictly necessary evidence to provide reasonable clues that a person committed the offence with which the body of criminal prosecution has been referred to, not being necessary to have evidences at the level of those who found the sentencing to court.

Under no circumstances at this stage may not be administrated all the evidences during the criminal prosecution, in such a case, the injury caused to the suspect being not only evident but also irremediable. In such a case, even the re-administration of the evidences can no longer constitute a remedy for the removing the injury, because in case of a contradiction of the evidences, there will be a tendency for the body of criminal prosecution to take into account those administrated at the stage in rem. Neither the re-administration of these evidences at the judicial research stage is a remedy, such as some courts have stated, because the progress of the proceedings in compliance with the procedural guarantees in the criminal prosecution stage is essential, being possible that on the conditions of the management of the evidences with the full respect of the right to defence, the result of the criminal prosecution should be other than that of a made research without compliance with those guarantees. On the other hand, the administration of the evidences in this manner sometimes deprives the defendant of the possibility to use the simplified procedure, because it is possible to wish to admit the deed but at the same time he may invoke the existence of certain mitigating legal circumstances, of some causes of non- immutability, for which in front of the court, legally it is no longer possible to request evidences.

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# REPLACING THE JUDICIAL CONTROL WITH THE PREVENTIVE ARREST

**George Octavian NICOLAE***

**Abstract**

*In the practive of the courts, there are situations where, due to a violation of the obligations imposed by the measure of the judicial control or the case of the commission of new offenses, it is questionable to replace the judicial check with a heavier preventive measure, namely preventive arrest or home arrest.*

*The present study aims to adress the steps to be followed in this procedure and to analyze the relevant issues and incidents which may arise.*

**Keywords:** *preventive arrest, judicial control, criminal prosecution; European Convention on Human Rights; criminal law.*

## Introduction

The measure of judicial control is the least intrusive preventive measure, since it does not infringe upon the personal freedom.

The judicial control indeed interferes with the defendant's right to free movement, which is why we consider that the provisions of art. 2 of the Additional Protocol no. 4 to the European Convention on Human Rights are applicable, according to which: anyone who is lawfully on the territory of a state has the right to move freely and freely elect his residence; any person is free to leave any country, including his own; the exercise of these rights may not be subject to any restrictions other than those which, by law, are necessary measures in a democratic society, or fot the interest of national security, public security, public order, crime prevention, and others; the rights recognized in paragraph 1 may also, in certain specified areas, be subject to restrictions which, under the law, are justified by the public interest in a democratic society.

## Content

According to art. 211 and art. 202 of the Criminal Procedure Code, in order to institute the measure of judicial control, there must be evidence to raise a reasonable suspicion that the defendant has committed an offense, the measure of judicial control must be proportionate to the seriousness of the accusation brought against the person concerned and necessary for the purpose of good unfolding of the proceedings, preventing the eviction of the defendant, preventing the commission of another offense, and if there is no reason to prevent the criminal proceedings.

While under judicial control, the defendant has to comply with the following obligations: to appear before the criminal investigative body, the preliminary chamber judge or the court, or as soon as he is called; to immediately inform the judicial authority which has taken the measure the change of adress; to appear before the police body designated with his supervision by the judicial body that ordered the measure, according to the program prepared by the police or whenever he is called.

The defendant may be the subject of, depending on the particularities of each case, other obligations: not to exceed a certain territorial limit, fixed by the judicial body, except with its prior consent; not to go to specific places established by the judicial body or to move only to the places set by it; to wear a permanent electronic surveillance system; not to return to the family home or to approach the injured party or members of his / her family, other participants to the offense, witnesses or experts or other persons specifically designated by the judicial body and not to communicate with them directly or indirectly; not to practice the profession, to do the job or not to carry out the activity in the exercise of which he has committed the deed; to periodically communicate the relevant information regarding his means of existence; to undergo control, care or medical treatment measures, particularly for detoxification purposes; not to attend sporting or cultural events or other public gatherings; not to drive specific vehicles established by the judicial authority; not to not use or to wear weapons; not to issue checks.

In order to ensure the predictability of the necessary conduct, the judicial body, which has taken the measure of judicial control, will specify in the act of taking the measure (ordinance or minute) what are the obligations that the defendant has to observe and will be reminded that in case of violation in bad faith of his obligations, that the measure of judicial control can be replaced by the measure of house arrest or the measure of preventive arrest.

According to art. 215 par. 7 Code of the Criminal Procedure, all throughout the duration of the measure, should the defendant infringe upon in bad faith his obligations or there is a reasonable suspicion that he

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intently committed a new crime for which criminal proceedings have been brought against him, the rights and liberties judge, preliminary chamber judge or court, at the request of the prosecutor or ex officio, order the replacement of this measure with house arrest or arrest, as provided by law.

Regarding the replacement of preventive measures, art. 242 of the Code of Criminal Procedure is applicable. A preventive measure is replaced ex officio or upon request, with a harder one, if the conditions provided by law for taking it and the evaluation of the concrete case and the conduct of the accused during trial, is established that the measure the harsher preventive measure is necessary to achieve the goal provided by art. 202 par. 1. According to art. 202 of the Criminal Procedure Code (C.p.p.), preventive measures, which include the arrest procedure, may be adopted if there is evidence or indications which point to the reasonable suspicion that a person has committed a crime and are necessary to ensure normal criminal proceedings, preventing the accused to skip trial or to prevent new crimes.

Any preventive measure must be proportionate to the seriousness of the accusation against the person to whom it is taken and necessary to achieve the aim pursued by its disposal.

In order to arrest an individual during criminal prosecution, reasonable suspicion should emerge from the evidence that the defendant perpetrated an offence and the conditions art. 223 letter. (a), (b), (c) or (d), Criminal Procedure Code, are met.

Thus, in order to fulfill the prerequisite condition for replacing the measure of judicial control with the measure of preventive arrest, it must be demonstrated that the defendant: either escaped or hid in the purpose of escaping from the criminal prosecution or trial, or did preparations of any kind for such acts; attempts to influence another participant in committing the offense, a witness or expert, or to destroy, alter, hide or evade material evidence or cause another to engage in such behavior; puts pressure on the injured person or tries to make a fraudulent deal with him; there is a reasonable suspicion that after criminal action has been initiated against him, he has comitted a new offense or is preparing a new offense.

However, in order for pre-trial detention, only a reasonable suspicion that the accused person has comitted an offence from the list mentioned in art. 223 paragraph (2) of C.p.p. is necessary, or that an offence punishable by law with 5 or more years of imprisonment be comitted.

Regarding the case of the measure of preventive arrest provided by art. 223 par. 1 lit. D C.p.p., we note that it contains two theses. The first sentence assumes the existence of a reasonable suspicion that the defendant intentionally or prataer-intentionally committed a new offense after the criminal proceedings had been initiated before him. Although the law does not provide, we consider that in this situation it should be both the initiation of criminal prosecution and the prosecution *in persona*, since it is only in these circumstances that a reasonable suspicion of committing a new offense committed by a particular person can be established.

The second thesis, referring to the fact that the defendant is preparing a criminal offense, refers to the execution or comitting acts of execution with no independent criminal meaning. If these preparatory acts were incriminated separately, either as separate crimes or as attempts, we would not consider the situation as preparations of new offenses, but as new offenses themselves.

The second situation provided by art. 223 par. 1 lit. D Cpp., regarding the preparation of a crime, was established by the New Criminal Procedure Code, and was not mentioned by the art. 148 par. 1 lit. D of the former Criminal Procedural Code of 1968.

This solution was imposed - the possibility of ordering the preventive arrest in the case of merely preparing to commit a new crime - because in this case the defendant has the intention to commit a new offense and the preventive measure is justified precisely to prevent such a risk of repetition of criminal behavior[1].

If the defendant mentioned in a preliminary statement that he has indeed tried to commit similar acts, it cannot be concluded that this arrest warrant is necessary in the absence of other data. This case of arrest does not take into account the situation in which the defendant also committed other criminal acts before the criminal action was initiated, but only when the criminal activity is prolonged in time, after the moment when there is evidence of the offense and the criminal action is in motion[2].

As the preparation of criminal acts is under discussion, in this second hypothesis of the case for preventive arrest, it would not be necessary to have any criminal prosecution commence. However, under such circumstances, the judicial authorities should use this case with caution, as it is necessary to establish the probability of a criminal offense committed by the defendant on the basis of the data and information presented, which may not be the same as establishing a presumption of guilt.

If the defendant does not commit an intentional crime and no criminal acts are reported, but the criminal investigating authorities have data regarding the risk of committing a new intentional offense, we consider that art. 223 par. 2 C.p.p Instanţa applicable.

Also, in case of committing a non intentional criminal offense after the criminal action has commenced, it should not be possible to order the preventive arrest in the case of the original offense, but only after the criminal action for the new offense is initiated, can the conditions for the admissibility of the arrest measure regarding art. 223 par. 2 C.p.p. be analyzed.

[1] Nicolae Volonciu – Noul Cod de Procedură Penală,editura Hamangiu, București 2014, pag. 506.
[2] M. Udroiu, Porcedură penală, Partea geerală, 2014, pag. 413.

From the procedural point of view, the arrest proposal will be formulated in the case in which the criminal action was already in motion and not in the new case. This should be done precisely in order to comply with the condition provided by art. 223 C.p.p., which refers to the existence of the defendant in question.

The doctrine has showed that[3] it is necessary to prove that the commission of the new crime or the carrying out of preparatory acts that have are not criminalised separately takes place after informing the defendant of his new quality. The need for preventive arrest stems not from committing concurrent offenses but from the unlawful conduct of the defendant who, although subject to judicial proceedings and is accused of committing a crime, is drawn to his attention to the procedural obligations under art. 108 par. 2 C.p.p., chooses to continue to pursue with perseverance an intentionally illicit, dangerous conduct for society.

Thus, the criminal procedural law provides for the possibility of replacing the preventive measure of judicial control with a heavier preventive measure, namely the measure of home arrest or preventive arrest.

However, due to inconsistencies between the legal texts, in the practice of the courts, difficulties have arisen regarding the uniform application of the legal provisions.

Thus, the source of the practical difficulties is the lack of correlation between Article 223 1 lett. D C.p.p. , which provides that the preventive arrest (as well as the replacement of a preventive non-custodial measure with preventive arrest) may be ordered when there is a reasonable suspicion that after the criminal proceedings have been initiated, the defendant intentionally committed a new offense or is preparing to commit an offense and Art. 215 par. 7 C.p.p. It provides that if during the judicial control there is a reasonable suspicion that the defendant intentionally committed a new offense for which the criminal action was initiated, it shall be necessary to replace the judicial control with the house arrest measure or the preventive arrest under the conditions provided by law.

Thus, this provision introduces an additional condition, namely that for the new intentional offense committed that the criminal action should be ordered. The phrase "*under the conditions provided by law*" refers to the general conditions for taking and replacing preventive measures, which, as we have seen above, do not require the prosecution of the criminal action for the new committed act.

As a consequence, we believe that Art. 215 par. 7 C.p.p., is a separate case of replacing the preventive non-custodial measure with a deprivation of liberty, which does not, however, limit the general rule in the matter, provided by art. 242 par. 3 C.p.p. in relation to art. 223 par. 1 and 2 C.p.p..

A different interpretation of these legal provisions would lead to unjust situations in which, in the event of a new intentional offense not covered by Art. 223 par. 2 C.p.p. and without having the criminal action set in motion, against a defendant who has no judicial control to be able to order the replacement of the measure and the taking of the measure of preventive arrest, as opposed to another who is under the control of the judiciary and not receive a replacement of the measure with that of the preventive arrest.

Another difficulty in judicial practice is represented by the way in which the relation between the situation of the preventive arrest, mentioned in art. 223 par. 1 lit. d C.p.p. and that provided by art. 223 par. 2 C.p.p.

According to art. 223 par. 2 C.p.p., the measure of preventive arrest can be taken if the evidence raise a suspicion that the defendant has committed one of the offenses referred to in para. 2 or another offense for which the law provides for a five-year or longer sentence and, on the basis of an assessment of the seriousness of the offense, the manner and circumstances of the offense, the entourage and environment in which the defendant originates, his criminal history and other circumstances, it is noted that his deprivation of liberty is necessary for the removal of the danger for the public order.

For a more accurate analysis, we will look at a case with practical implications.

Thus, there is a criminal case concerning a defendant sent to court under judicial control for committing the offense of disturbing the order and public peace, as stated in art. 371 Criminal Code, an offense not fulfilling the conditions of art. 223 par. 2 C.p.p.

During the measure of judicial control, the defendant carries out a new intentional offense by applying a punch to the injured person.

In regards to the legal classification, the second offence meets the constitutive elements of the offense mentioned by art. 193 par. 1 of the Criminal Code.

Due to the fact that the medical / legal certificate mentioning the existence of traumatic injuries was not issued in a timely manner, the prosecutor can only ask in regards to the original offense, that the measure of judicial control be replaced with the measure of preventive arrest, on the the grounds of art. 242 par. 3 C.p.p. in relation to art. 223 par. 1 lett. d C.p. and if the prosecution of the criminal action was initiated under art. 215 par. 7 C.p.p.

Assuming that this replacement proposal was admitted and that it was ordered to replace the measure of judicial control with the preventive arrest measure, is it possible that, in the second case, regarding the offense of commiting acts of violence mentioned in art. 193 alin 2 Criminal code (legal provision applicable only after the issuing of the medical certificate which stipulates the existence of a certain amount of days of medical care) to be requested in accordance to art. 223 par. 2 C.p.p. in order to arrest the same defendant. It

[3] Nicolae Volonciu, op cit., pag. 507.

would lead to two preventive measures against the same person for committing the same act of striking the injured person.

In our opinion, in order to solve the problem, first it must be pointed out of all that the provisions of Art. 223 para. 1 lit. d C.p.p. and art. 223 par. 2 C.p.p. contain distinct theses of taking or replacing preventive measures.

Thus, the two cases for preventive arrest are not mutually exclusive because they are based on different legal bases.

The first, the one provided by art. 223 par. 1 lit. d. C.p.p., is meant to sanction the conduct of the defendant, who, although aware of the fact that he is under legal invesgation, commits a new offense, in disregarding the norms of cohabitation and the restrictions and exigencies of the initial preventive measure.

The second case of preventive arrest refers to the existence of a danger to public order. The protection of the public order is regarded as a pertinent and sufficient element for the deprivation of liberty of a person, if it is based on facts capable of showing that the release of the person would actually disrupt the public order. The concept of danger to the public order is a prediction, an appreciation of the defendant's future behavior. In some cases, the seriousness of the offense committed may be sufficient to outline the assessment that the defendant is dangerous to public order. In other situations, the criminal record can lead to the conviction that the defendant will commit a new offense.

Hence, unlike the first case of the preventive arrest measure, which sanctions the repetitive illicit conduct of the defendant, the second case seeks to protect society against defendants who present a real and concrete danger to public order.

This interpretation, we consider that it is circumscribed to the purpose of the norms under consideration, and it is not a double application of the preventive measures for the same act, because in its essence, the basis of taking the preventive arrest measure only in the second case, with regard to the first case, is based on the grounds of the misconduct of the defendant.

In support to this legal reasoning, the issue of a case that prevents the prosecutorial endeavour, such as the withdrawal of the criminal complaint by the injured person, may be dealt with.

Starting from this hypothesis, in the case in which the preventive arrest was ordered on the grounds of danger to public order, the measure would be revoked, since it involves a cause that prevented the continuation of the criminal proceedings.

On the other hand, in the case of replacing the judicial control with the measure of preventive arrest, we do not think we are in the case of revoking the preventive measure. As pointed out above, the measure has been replaced due to the defendant's conduct and not because of the legal characteristics of the offense.

## 3. Conclusions

Analyzing the legal provisions regarding the replacement of the measure of judicial control with the preventive arrest, it should be noted that the non-custodial preventive measure can be replaced by the preventive arrest measure if the conditions stipulated by the law are met (Article 223 paragraph 1, 2, C.p.p. ) and following the assessment of the concrete circumstances of the case and of the procedural conduct of a defendant, it is considered that the heavier preventive measure is necessary for achieving the goal provided by art. 202 par. 1 C.p.p..

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# THE PERSONS DEPRIVED OF LIBERTY, AS PASSIVE SUBJECT OF THE CRIMINAL EXECUTION LEGAL RELATIONSHIPS

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**Abstract**

*The study analyzes the behaviour of individuals deprived of their liberty both as an individual phenomenon and in relations established during the execution of custodial sentences. The impact of detention on these people is different, so their reactions are different. Isolation of society, loss or restriction of rights, separation from their families, subjection to a severe life regime, all perceived as a violation of his integrity as a human being.*

*The study also analyzes the conformism/discipline report, taking into account both personal factors and secondary (environmental) factors generating aggressive behaviours, circumstances that affect the psyche of a person deprived of liberty, lowering his tolerance to everything the authorities involve who consider them "malevolent entities" whose purpose is to punish the innocent, to destroy the prisoner's being by being subjected to ill-treatment or by applying disciplinary sanctions.*

*The study also focuses on the relationship between the person deprived of liberty and the restorative justice, the relationship between the offender, the victim, the criminal trial, the criminal sanction, the prison, in order to identify adequate remedies in order to recover the damage caused by the offense, as an alternative to the retributive penal system, focusing on the dialogue, on the negotiation, to enable offenders to assume active responsibility for their actions.*

**Keywords:** *the person deprived of liberty, passive subject, rights, disciplinary liability, reparatory justice*

## 1. Introduction

The passive subject of the legal relationship of execution of the punishment or the other penalties of criminal law is represented by those categories of participants obliged to incur criminal liability.

In the usual language, the person (major or underage individual) executing a custodial sentence is inevitably named *condemned*, and a long period was considered to be so only because the law did not offer variants for the situation of persons in the execution of punishment. However, the new changes in our criminal justice system have imposed a differentiated treatment of these individuals according to the nature of the penal sanction applied: only punishments for the major people and and detention measures for the minor individuals, so that the terms used to indicate belonging to one category or another does not only reflect the teaching differentiation but, above all, the criminal treatment. The Government Decision no.157/10.03.2016 for the approval of the Regulation implementing Law no.254/2013 on the execution of sentences and deprivation of liberty ordered by the court during the criminal trial defines, in art.2, the term *persons deprived of their liberty* as the case may be, detained persons, arrested at home, preventive arrest, interned, convicted, and detained person who is the convicted person in custody or life imprisonment.

By introducing in the new Criminal Code the alternative measures of detention, a distinct legal value was granted to each of the three operations that the court usually carries out in the process of judicial individualization of punishments, namely, the determination of the punishment, its application and the order of its execution[1], distinction from the previous criminal code when the three operations represented a succession of phases that the court underwent in the process of judicial individualization of the punishment, since it could only pronounce punishments.

Therefore, the passive subjects of the criminal enforcement legal relationship are:

- *convicted persons*, major natural persons and legal persons sentenced to custodial or non-custodial sentences, as the case may be. From the point of view of the criminal procedural law nature, the application of the punishment is a procedural solution of conviction issued in solving the criminal action against the defendant, which results also from the provisions of art.404 paragraph 2, sentence I of the Criminal Procedure Code, according to which the court when the court orders the conviction, the device includes the principal punishment applied. Only at the end of this phase, the defendant acquires the status of a convicted person[2].
- *the supervised persons*, the major persons to whom the court applied the measure of giving up the punishment or postponing the punishment, the status of a convicted person is incompatible with the measure of the application of these measures.
- *the underage individuals* against whom only custodial measures (internment into an educational centre or detention centre) and non-custodial measures (civic training, supervision, weekend and daily assistance) can be taken,

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[1] I.Borlan, *Amânarea aplicării pedepsei în teoria și practica dreptului penal,* Universul Juridic Publishing House, Bucharest, 2017, pp.41-45.

[2] I.Borlan, *ibidem,* p.43.

In the opinion of the author Petrache Zidaru[3], the convict, as a matter of law, is:

- is the natural person whose criminal behaviour has led the judiciary to impose his prison sentence;
- is the natural person for whom the prison regime has to appeal to all educational means and all forms of assistance available to society in the purpose of his re-socialisation;
- is the natural person who can only be deprived of his or her liberty and of the rights the restriction of which derives expressly and necessarily from the deprivation of liberty.
- is the natural person by whose conviction the society carries out a social-political act that aims to achieve one or more of the following objectives: the deserved retribution or punishment, the general and individual prevention, the protection of the population, the impossibility to do harm, and social rehabilitation.

## 2. Content

### 2.1. The person deprived of liberty as an individual phenomenon.

Deprivation of liberty is a situation with great resonance both in the life of the person who supports it and in that of his relatives or friends. Every person deprived of liberty leaves behind the individual universe replaced now by the detention room, the educational halls, the walk, the institutionalized life becoming second nature. The penitentiary is a total institution, as defined by Erving Goffman[4] a place where a large number of individuals of a similar status, separated from the rest of society for a considerable period of time carrying together a strictly defined life officially regulated by the institution. The detention impact[5] on a person deprived of his liberty is felt dramatically by limiting the space of movement and the organization of life, by restricting personal relationships, lack of information, authoritarian and strict regime, closed environment and monotonous activities. All these characteristics are perceived by the prisoner as a touch of his integrity as a human being. Most of the individuals deprived of their liberty[6] choose the way to execute the punishment or educational measure, in accordance with the rules imposed by the law and the administration of the detention facility, proving, at least formally, that they are on the road to reintegration, participating in the activities and programs penitentiary, participating in work, everything in order to execute the sentence and leave the penitentiary as soon as possible. Unfortunately, the involving of persons deprived of their liberty only in sports, religious activities, skills discovery, etc., is not sufficient for reintegration into society, even if they end with proposals for reward or obtaining credits. It is that necessary for each type of activity to be selected people with certain attributes that make them suitable for that activity and, even more importantly, that these activities to become useful[7] because the interest is not to keep him busy , but to give them a sense of usefulness, increase their self-esteem and, why not, also gain income from these skills.

Many of the detainees involved in the skills discovery only find out that they possess some abilities they did not even know or, even if they knew, could not practice them (painting, origami). Therefore, it may be more appropriate for activities and programs to be tailored to the specifics of the prison population from the place where they occur, and not vice versa. However, unfortunately, for various reasons, the penitentiary institution can not always provide for some detainees the right re-socialization programs, which would increase their chances of finding a post-release job, e.g. intensive care courses qualification in different trades. The issue of detainees, not necessarily of the young ones, but also of those who are at the age of professional maturity entering the prison without having previously a job or occupation and leave him, sometimes after years, just as skilled how they came, is another one that can increases the risk of relapse after leaving the penitentiary at term or conditional release. A *lege ferenda* proposal would be welcomed in this respect by which legal persons convicted to the penalty of the fine could benefit from the reduction if they organize training and retraining courses for the persons deprived of their liberty. But until such a legislative initiative, prisons are currently facing the prolonged inactivity of prisoners, boredom, lack of lucrative activities, the monotony of activities or the lack of continuity of these activities and programs, because during the summer many of these programs are suspended, caused by staff leave or school holidays, etc., situations that influence the behaviour of people deprived of their liberty, causing them to wish nothing more but waste time.

The pathogenic environment of the penitentiary is often reflected in the incapacity of some of the persons deprived of their liberty to integrate into the requirements of the rules imposed by the law and the internal regulation, claiming their dissatisfaction with everything that represents the penitentiary system (institution, director, staff, etc.) through all sorts of protests, demands, complaints, by resorting to food refusal, as extreme solutions to solve their problems. The discontents may be real but, most often, are the expression of exaggerated ambitions (“to show who he is”) or the belief that he is the victim of permanent

[3] *Drept execuțional penal,* Edit Press Mihaela S.R.L. Publishing House, Bucharest, 1997, p.110.

[4] Renowned american sociologist (1922-1982), which in one of his books , *Asylums*, published in 1961, makes a profound analysis of "total institutions" such as psychiatric hospitals, prisons, military barracks, ships, boarding schools, monasteries, homes for the blinds, sanatoriums, etc.

[5] I.M.Rusu, *Drept execuțional penal,* Hamangiu Publishing House, Bucharest, 2015, p.258.

[6] I.Chiș, *Drept execuțional penal,* Universul Juridic Publishing House, Bucharest, 2013, p.276.

[7] E.g., enrolling in the "Literary Creation" activity of a detainee who had only two classes and who, not after a long time, abandoned his activity.

injustice because the administration of the penitentiary specifically targets him in decision-making (moving to another room, for example). The practices refusal of nourishment and self-injury (cutting on arms with sharp objects, blades, swallowing objects, etc.) are very common amongst detainees in order to capture the attention of staff or in order to get what they want, that is why that's are only \"demonstrative\", a game of refusal of nourishment (sometimes the refusal to eat lasts from one meal to the next) with the intention of impressing, to tease staff, and not with the intention of reaching to suicide, often justifying their behaviour through the existence of psychic illnesses they suffer or by the adverse effects of treatment they receive, making a practice of using the medical condition or invoking amnesia to justify nonconforming behaviour[8].

**2.2. The person deprived of liberty in interpersonal relationships**

The deprivation of liberty environment brings together people from different social backgrounds with different degrees of culture or understanding, and their long-term influence on the structure of the personality of persons deprived of their liberty cannot be ignored. The deprivation of liberty environment brings together people from different social backgrounds with different degrees of culture or understanding, and their long-term influence on the structure of the personality of persons deprived of their liberty cannot be ignored. At the institutional level, the person deprived of liberty is in the middle of two types of relations: a report detainee - the institution of the penitentiary, e.g., a report of *compliance* with the internal regulations, by Law No. 254/2013 on the execution of sentences and detention measures ordered by the court during the criminal trial, the Internal Regulations, the provisions of the director of the place of detention, and a relationship detainees-detainees and detainees - contact person (other persons deprived of liberty or personnel at the place of holding). The strong influence that the deprivation of liberty environment exerts on detainees personality generates and maintains the tensions between these persons, increasing exponentially the opportunities of occurrence of indiscipline acts, both vis-à-vis the staff of the detention facility and the other persons with whom it comes in contact.

The analysis of the conformism/indiscipline ratio should be made taking into account two categories of factors: main and secondary.

*The primary factors* category (personal) includes the person's bio-behavioural characteristics, namely increased verbal and physical aggressiveness, formed in childhood, amplified in adolescence, for the adult being, this behaviour to accompany him all his life, a low self-control (lowering self-esteem, envy, resentment), low levels of education, untreated mental illness, tobacco dependence, alcohol and/or drugs, provocative attitude, especially in the case of interned underage individuals, eager to impress entourage with the obvious intention generated conflicts between them and the staff in the penitentiary, avenging themselves precisely because "they embarrassing him in front of the other interned persons"[9]. The aggressive behaviours also affect relationship detainees- detainees, the violence ranging from verbal forms (offences, ironing) to extreme forms, harassment, corporal injuries, even killings, collective violence, "scores settling" on the background of some conflicts prior to the imprisonment, or caused by the tensions accumulated during detention.

In the *secondary (environmental) factors* category that generating the aggressive behaviours can be included those situations, external circumstances that affect the psyche of a person deprived of liberty, lowering his tolerance to everything that involves authority, and rejecting everything that comes from authority, courts of law, prison administration) which they consider to be "malevolent entities" whose only aims are to punish the innocent, to destroy the detainee by subjecting him to ill-treatment, by limiting his rights as a result of the imposition of regulations, or following the disciplinary sanctions applied.

Considered as the first cause of aggressive behaviour, overcrowding of detention places produces dramatic effects on at least three levels[10]:

a) *at the level of the detainees* there are dissatisfactions regarding the quality of the services to which they are entitled (food, medical assistance), there are acts of indiscipline, aggressions among persons deprived of liberty, as well as self-aggressions, increasing the smuggling among detainees, the feeling of boredom and of monotony;

*at the level of staff* working directly with the inmates increases the psychological overload, there are complaints about the working conditions caused by overtime and uncompensated time or unpaid or caused by the transfers of staff to other units;

b) *at the management level*, the management act is difficult because of the malfunctions in the dynamics of the institution,connected with the increasing demands of detainees in order to respect them the accommodation conditions, the management of the funds meant to carry out the capital repairs of the accommodation spaces, the prison security, to monitoring the incidents, the surveys, the assessments, the responsibilities, the establishing responsibilities takes most of the unit's command.

Psychologically, the changes in family life, such as divorce, the impossibility of seeing their children, the death of a parent, the material difficulties or the age of the relatives, the large distances from their home to the place of detention, the transfer to another

[8] The Closing of the judge of surveillance of deprivation of liberty from Braila Penitentiary nr.315/07.08.2018 (unpublished).
[9] The Closing of the judge of surveillance of deprivation of liberty from Braila Tichilești Detention Center, nr.9/17.05.2018 (unpublished).
[10] Gh.Florian, *Fenomenologie penitenciară,* Oscar Print Publishing House, Bucharest, 2006, p.99.

penitentiary, the rejection of applications intimate visit, inappropriate medical care at the place of detention, disciplinary sanctions, etc., are just as many reasons for depression, accentuation of meaninglessness, of existential void, which sooner or later will turn in crisis of self-aggression or aggressions on other prisoners (hetero-aggressions, on staff or on property of the penitentiary (the destroying of windows, furniture, etc.).

Another form of aggression is instrumental[11], which manifests itself in the form of individual or group conflict, being a desire to stake it is necessary "in the territory" or the desire to have the right to the best bed. The typical expression of the verbal and physical aggression is expressed towards those who are convicted of felonies openly repudiated even carceral environment such as incest, child rape, the murder of children, the parents of his wife. Aggressiveness is manifested through slavery, consisting in the use of the inmates to other prisoners for housework and other activities demeaning.

The paradox is that in a full violence universe and opposition, there is also the normality of interpersonal relationships that functions as a "defense system" against persons deprived of liberty recognized as having non-conforming behaviours that tend to break the cohesion of a group adapted to institutionalized life, sanctioning these attitudes by the vehemently rejected refusal to accommodate such persons in that space for fear of being assimilated to such behaviour.

**2.3. The system of rights of persons deprived of their liberty.**

During the execution of criminal sanctions, the participants in social relations emerging within the framework of the criminal enforcement legal report (the state, through its specialized bodies, and the persons under a criminal or non-custodial sanction) have a special legal status, e.g., a total of rights and specific obligations arising from the particularities of the legal relationship in question. Article 6 of the Law no.253/2013 on the execution of sentences and non-custodial measures provides that non-custodial punishments and non-custodial educational measures ordered by the judicial bodies during the criminal proceedings are enforced under conditions that ensure compliance rights and fundamental freedoms, with the inherent limitations of the nature and content of these punishments and measures.

Regarding persons deprived of their liberty, Article 7 of the Law no.254 / 2013 on the execution of sentences and deprivation of liberty ordered by the court during the criminal trial, in connection with the exercise of rights, extends the scope of correlative rights and obligations beyond those which results from the condition of a person deprived of his liberty, the law stipulating that inmates shall exercise all the civil and political rights except those taken away from them in compliance with the law by the decision sentencing them, as well as those rights that cannot be exercised or are limited inherently by the status of being imprisoned or for reasons related to the safety of the prison facilities. This means that the legal status of the person deprived of liberty (convicted persons serving the prison sentences, persons in a custodial educational measure, the person in remanding custody) reflects a duality of legal relations:

- *criminal execution legal relationships* specific to persons deprived of their liberty because their legal status involves a certain restriction of the rights of individuals but the exercise of rights and freedoms can not be subject to restrictions other than those provided by law,
- and another of *civil law*, as the owner of patrimonial or non-patrimonial rights whose violation allows its holder to obtain the restoration of the right through a civil trial.

I. In terms of the law regarding the execution of the punishments and of the custodial measures, the persons serving a custodial sentence are and remain human beings. Like all human beings, like citizens with the rights consecrated by the Romanian Constitution, the persons deprived of liberty have rights, but also obligations because the penitentiary it operates under the law[12]. At the admission, all prisoners receive information about their rights, duties and disciplinary misconduct, but also about the rewards that can be granted to. If the person sentenced does not speak or understand the Romanian language, the prison administration takes all necessary measures to inform them in their native language.

The institution of the rights of persons serving prison sentences recognizes, in chapter V of Law no.254/2013, between art. 56-80, the right to express their opinions and religious beliefs (art.58), to information (art.59, to confidential and professional record access (art.60), to legal advice (art.62), to correspondence (art.63), to telephone calls (art.65), to online communication (art.66), to exercise and recreation (art.67), to be informed of the death or serious illness of any near relative (art.68), to intimate visit (art.69), to receive visits and goods (art.70), to proper health care (art.71), to a medical examination (art.72), to specialised medical care (art.73), diplomatic assistance for foreign nationals (art.74), to marriage (art.75), to vote (art.76), to rest day (art.77), to work (art.78), to education (art.79), to allocation and accommodation (art.80).

Therefore, as stated in the doctrine[13], we are dealing with a criminal law enforcement report, in which the prison administration has a negative

[11] M.I.Rusu, *op.cit.*,p.267.

[12] I.Chiş, Al.B.Chiş, *op.cit.*, p.359.

[13] A.Ciobanu, T.Manea, E.Lazăr, D.Pârgaru, Legea nr.254/2013 privind executarea pedepselor şi a măsurilor privative de libertate dispuse de organele judiciare în cursul procesului penal, comentată şi adnotată, Hamangiu Publishing House, Bucharest, 2017, p.173.

obligation to do nothing that could undermine the rights of the persons detained, and the positive obligation of to ensure that the rights of persons deprived of their liberty are respected. Persons deprived of their liberty also have the obligation to observe the rules of internal order and to execute the custodial sentence or measure. The compliance of the rights of the persons deprived of their liberty is ensured by the judge of surveillance of deprivation of liberty. Against the measures regarding the exercise of the rights provided by the present law taken by the administration of the penitentiary, the inmates may file a complaint within 10 days from the date when they became aware of the measure, according to art. 56 of Law no.254/2013 regarding the execution of sentences and custodial measures ordered by the court during the criminal trial.

II. From the point of view of the legal relationship of civil law, the person deprived of liberty is the owner of patrimonial or non-patrimonial subjective rights, whose violation allow their holders to obtain the restoration of the right through the civil trial. In a concise formulation, the Civil Code, in Article 25 paragraph 2, defines the *natural person* in the following terms: "The natural person is the human being, viewed individually as the holder of civil rights and obligations".

Every human being is a subject of law. For a person to be able to be part of the legal relationship, she must have legal capacity, that is the general and abstract ability to have rights and obligations. By subject of law, we understand the person who can exercise multiple prerogatives and, in particular, subjective rights. The subject of law is nothing more than the person represented in his legal position, equally designating as both the participant in legal relations - the holder of rights and obligations - and the vocation of the holder to participate in such relations, materialized in the ability to value the rights and obligations that are recognized and imposed. A human being is not necessarily a subject of law, he becomes so only if the positive right attributes that quality[14]. Therefore, a person deprived of liberty may be a party not only in the civil legal relations but also in legal relationships of another nature as a subject of labour law, tax law, inheritance law, etc.
However, the capacity of persons deprived of their liberty to be subject of law and to participate in legal life has not always been recognized in legal systems. A legal deprivation of rights in the middle of the nineteenth century was civil death (deminutio capitis), which usually results from a criminal conviction (life imprisonment) or voluntarily from religious professions (*professio religiosa*). The civilian deaths, living beings, were dead for the world, they were no longer subject of law. The one who has been convicted of hard work or who has dedicated himself to monastic life was considered dead and therefore his inheritance was declared open, the marriage was free and all civil or political rights were lost[15].

The current legal provision regarding the individual are spread in various normative acts, starting with the Constitution of Romania (art.16, art.25, art.49, etc.) provisions that shall be interpreted and applied in accordance with the Universal Declaration of Human Rights , with the pacts and other treaties to which Romania is a party, in the Civil Code, 1st Book, About Persons, art. 25-257, in 2nd Book, About the Family, art.258-534, in Government Emergency Ordinance no.97/2005 on the registration, domicile, residence and identity papers of the Romanian citizens[16], Law no.14/2018 on the approval of Government Emergency Ordinance no.33/2016 for amending and completing some normative acts regarding the civil status documents and the identity documents of the Romanian citizens[17], Law no.272 / 2004 on the protection and promotion of the rights of the child[18].

A premiere in Romanian civil law is Article 58[19] with the marginal title *The rights of personality* , rights which should not be confused with the debt rights or the personal rights (*iura in persona aliena*), whose achievement requires the support of the passive subject, forced to procure an active subject or refrain from anything that they could have done in the absence of its legal commitment, nor with real rights (*iura in recorporali)* or intellectual property rights (*iura in reincorporali*) which confer on their holder prerogatives that are directly exercised over tangible non- tangible goods. According to Article 58 of the Civil Code, any person has the right to life, health, physical and mental integrity, honour and reputation, the right to respect for private life, and the right to his/ her own image. These rights are not transferable. Furthermore, at art. 60, civil law recognizes the right of the individual to dispose of himself, unless he violates the rights and freedoms of others, public order or good morals.

Deprivation of liberty does not mean deprivation of dignity, therefore, as any natural person, the person deprived of liberty enjoys legal protection provided by civil law through the defensive means provided by art.253 of the Civil Code[20], by way of reparation action

[14] O.Ungureanu, C.Munteanu, Drept civil. Persoanele în reglementarea noului cod civil, Ediția a 2 a revizuită și adăugită, Hamangiu Publishing House, Bucharest, 2013, pp.4-6.

[15] ibidem

[16] Published in Official Gazette of Romania, Part I, no.719 of October 12th, 2011.

[17] Published in Official Gazette of Romania, Part I, no.50 of January 21th, 2018.

[18] Published in Official Gazette of Romania, Part I, no.557 of June 23th , 2012.

[19] Superior Council of Magistracy, National Institute of Magistracy, The Conference of the New Civil Code, available online on http://www.inm-lex.ro/NCC/doc/BrosuraNoulCodCivil.pdf, pp.105-109, consulted on 11/27/2018, 06:07AM.

[20] Art.253 Civil code, *Means of defence*: (1) The natural person whose non-patrimonial rights have been violated or threatened may request the court at any time:

brought in the court, in reparation both material and moral damage, the difference between these types of actions is that, while the former is open to the victim from the moment she suffered an unlawful harm to her personality, the repressive action requires proof of guilt. Thus, the petitioner's claim[21] for 150.000 euros from the penitentiary administration was dismissed on the ground that the amount claimed as moral damages for the violation of more detainees' rights cannot be granted by the judge of surveillance of the deprivation of liberty, but only by the court because there is need for adequate evidence to enable the court to find criteria for assessing its extent, since the court's free expression is not sufficient, based on the degree of it perceives the psychic universe of each person.

Protecting the rights of personality often intersect with press freedom and the right to inform the public. The European Court of Human Rights[22] decided that the freedom of the press is so important that it includes a possible dose of exaggeration or even provocation, and that is why it must promote debates instead of the "sensational journalism"[23].We refer to the situation of persons deprived of their liberty who works on public domain of the state and who, without their consent, have been photographed carrying out this activity, the photos accompanying articles in the press concerning their status of being deprived of their liberty or when they are filmed or photographed at the entrance to the buildings of the prosecutor's offices, the courts or the police.

**2.4. Disciplinary liability of persons deprived of their liberty - a form of legal liability specific to the execution of punishments law.**

As we have seen in previous explanations of the content of the criminal execution legal relationships, this content is made up of the totality of the rights and obligations of the subjects involved in the legal relationship of criminal execution. The subjects of the legal relationship always appear as holders of rights and obligations and behave according to the position of each of the right or obligation holder, the current legal doctrine rejecting the idea of the existence of rights without obligations. Upon the inmate's admission to the detention facility, the person deprived of his liberty is informed of his rights and obligations, restrictions or penalties as are prescribed by law to be applied in the event of misconduct and of the remedy against the disciplinary sanction applied.

The disciplinary misconduct is the deed in connection with the execution of the punishment, of the custodial, educational measures or of the preventive arrest which consists in an action (though the law prohibits) or in an inaction (although the law imposes) committed with guilt by the person deprived of liberty, by which he violated the legal norms, the internal order, the orders and the legal provisions given by the management of the place of detention in connection with the execution. The disciplinary offence is, therefore, the necessary and sufficient condition, the only basis of disciplinary liability, which is expressed by the application of disciplinary measures.

Disciplinary liability of the inmates is a form of legal liability, a specific institution for the enforcement of criminal sanctions and measures involving the deprivation of liberty, which derives from the content of the legal relationship of criminal execution and which is achieved by applying of disciplinary measures by the competent bodies (the administration of the place of detention - through the discipline commission for the persons deprived of their liberty) of appropriate sanctions.

Disciplinary liability of persons deprived of their liberty is characterized by the following features:

a) is engaged only in acts which, according to the law, are considered disciplinary misconduct;
b) is engaged only in the case of committed with guilty of the disciplinary misconduct - a conscious act by which the person deprived of liberty is aware that his deed is an act not in accordance with the law, with the internal order or the administrative decisions (e.g., the refusal of a person to comply with binding decisions adopted by the administration of the place of detention or the refusal to undergo non-invasive testing of the body). Law no.254 /2013 on the execution of sentences and deprivation of liberty ordered by the court during the criminal trial classifies the obligations of the persons deprived of their liberty in two categories:

1. *positive obligations*, which imply an action, e.g., to obey. ... to comply ... to comply with the provisions of Art.81, letter a) -l), and

a) prohibiting the commission of the illicit acts, if is imminent;
b) the cessation of violation and banning it for the future, if it last;
c) establishing the unlawfulness of the offence, if the disorder that has occured subsists;
(2) By way of exception to the provisions of paragraph (1), in the case of violation of non-patrimonial rights through exercise of the right to freedom of speech, the court may only order the measures provided for in para. (1) letter b) şi c).
(3) At the same time, the person who has suffered a violation of such rights may require to the court to oblige the perpetrator to carry out any measures deemed necessary by the court to achieve the restoration of the right attained, such as:
a) to order to the perpetrator to publish the criminal sentence on his expense;
b) any other measures deemed necessary for the cessation of the unlawful act or for the repair of the damage caused.
(4) The injured party may also claim damages or, as the case may be, patrimonial reparation for the damage caused to him by the author of the prejudicial act. In these cases, the right to action is subject to extinctive prescription.

[21] The closing of the judge of surveillance of deprivation of libertyof Braila penitentiary no.373/28.09.2018 (unpublished).

[22] The European Court of Human Rights judgment in the case of Toma c.României, (Cererea nr. 42716/02), Ageyevy v. Russia (Cererea no. 7075/10), Godlevskiy v. Russia (Cererea no. 14888/03).

[23] O.Ungureanu, C.Munteanu, *op.cit.*, p.77.

2. *negative obligations*, which imply abstinence, prohibitions, e.g., the obligation not to do, provided in Art.82, letter a)-y): exercise of acts of violence; organizing, supporting, participating in group violence actions that could jeopardize the order, discipline and safety of the penitentiary; introducing into the penitentiary, the production, possession, sale or consumption of narcotics, alcoholic beverages or toxic substances; instigating others to commit disciplinary misconduct, the refusal of a person to comply with binding decisions adopted by the administration of the place of detention, the refusal to undergo non-invasive testing of the body, etc.

c) is strictly personal, and no responsibility for the deed of another person or collective liability;
d) is engaged only once for committing a deed or behaviour, a person deprived of liberty shall never be punished twice for the same deed or behaviour *(ne bis in idem)*;
e) the presence of a causal link between the action and the specific result as well as a harmful result;
f) is a form of independent liability to all other forms of legal liability.

The autonomy of disciplinary responsibility is manifested by the fact that it's triggering is independent of producing any material damage. Disciplinary liability coexists with material liability, criminal liability, etc. Thus, the criminal liability, even material, would be applied in parallel with disciplinary liability, as long the criminal liability includes the constitutive elements of a crime (destruction, physical violence on other persons, the introduction of prohibited goods into the penitentiary, etc.).

In practice, however, there are cases where, although the act seems to fulfil the conditions of disciplinary misconduct, the certain specific circumstances existing at the time of its commission, they lead to the conclusion that, in fact, the author's conduct is not illicit and that liability will be removed. Thus, the deed of the person deprived of his liberty to retain, after testing, the packaging of the rapid test of the use of prohibited substances to prove the test was carried out with the one year test validity period expired, does not constitute the disciplinary misconduct provided by art.82 of the Law no.254/2013, consisting of the stealing or destruction of goods or values from the workplace or belonging to the administration of penitentiary, staff, visitors, as well as goods belonging to other persons, including those convicted, misbehaviour for which it was sanctioned, because, after unsealing and use, both the packaging and the test are no longer goods belonging to the penitentiary since once disposable, they are discarded after use, so that the judge of surveillance. of deprived of liberty admitted the person's deprived of his liberty complaint and the disciplinary sanction was annulled on grounds of illegality[24]. In another situation[25], the *de facto error* was held by the judge of surveillance of deprivation of liberty as a cause of exoneration, situation in which a person of Albanian nationality, arriving by transfer from another penitentiary, even with a few hours before being sanctioned, because, in the courtyard, walking, he kindly offered a cigarette to another prisoner in the refusal of nourishment room, a person who asked him if he could give him a cigarette, but without these two people knowing each other and without the person sanctioned knowing that the person was the refusal room. In so doing, the judge of surveillance of deprivation of liberty admitted the petitioner's complaint and annulled the disciplinary sanction applied for committing the disciplinary misconduct consisting of the introduction into the penitentiary, the procurement, manufacture, possession, exchange, receipt, use or transmission of weapons, explosives, objects and substances which jeopardize the security of the penitentiary, missions or persons, money, medicines, mobile phones, accessories of mobile phones, goods or other values under conditions other than those permitted Article 82, letter j of Law no. 254/2013, motivated by the fact that a detainee arrived a few hours before the incident did not have time to know the architecture of the penitentiary where he was, and the petitioner of Albanian nationality barely understand the Romanian language, was reading and expresses himself hardly in this language.

**2.5.The private person of liberty and restorative justice.**

The concept of restorative justice[26] offers a new way of approaching and understanding all the concepts that criminal law professionals bearing in mind: offence, offender, the victim, criminal trial, criminal sanction, imprisonment, etc. Restorative justice seeks to balance the victim's and the community's problems, as well as the need for the social reintegration of the offender, to assist the victim in the process of recovery and to grant all parties the right to be present and to engage actively in justice, to repair the damages caused by committing the offence, based on an approach involving not only the parties but also the community in general, in close connection with the specialized institutions in the field. Appeared in North America in the 1970s[27], this criminal philosophy is based on

[24] The closing of the judge of surveillance of deprivation of liberty of Braila penitentiary no.261/13.07.2018 (unpublished).
[25] The closing of the judge of surveillance of deprivation of liberty of Braila penitentiary no.332/29.08.2018 (unpublished)
[26] See details on the concept of restorative justice online on https://legeaz.net/dictionar-juridic/justitie-restaurativa. Consulted on 15.08.2018, 11:01 hour.
[27] The term of restorative justice comes from english, which demonstrates the Anglo-Saxon origins of the concept that applied practically for the first time in 1974 when two canadians, Mark Yantzi and Dave Worth, asked a judge in Kitchener, Ontario, to allow them to try a different approach in the justice intervention on two young criminals arrested for the destruction of goods. The idea was to allow the victim and the offender to play the main role in deciding on the most appropriate method of responding to the harm produced. Apud Elena Bedros in the article Conceptul de justiție restaurativă și legătura acestuia cu tendințele moderne de dezvoltare a procesului penal (The concept of

programs aimed at reconciling the victim with the offender and identifying appropriate solutions for repairing the damage caused by committing the offence, developing as an alternative to the retributive criminal justice system.

In 1996, the British criminologist, Tony Marshall[28], gave the world a definition of the concept of restorative justice, a definition recognized as valid for the entire world movement in this field: *restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.*

From the perspective of international documents[29], the interest of the specialists in the implementation of the ideas of restorative justice in the judicial practice of more and more states in the world, as well as the introduction of restorative practices that correspond to high methodological requirements, but which also take into account the particularities of each state, in developing international documents on the basic principles of restorative justice in criminal matters.

One of the basic international documents in the field of restorative justice is ECOSOC Resolution 2002/12 on Basic principles on the use of restorative justice programmes in criminal matters adopted at the 37th plenary session of the United Nations Economic and Social Council (ECOSOC) on 24 July 2002, which in Article 2 of the Resolution of the Resolution defines the restorative process means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles. The same document defines the restorative outcome as a means an agreement reached as a result of a restorative process. Restorative outcomes[30] include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender. The model of restorative justice was one of the topics addressed at United Nations congresses, such as at the Eleventh United Nations Congress on Crime Prevention and Criminal Justice- Bangkok, Thailand, 18-25 April 2005, and the Twelfth UN Congress on Crime Prevention and Criminal Justice- Salvador, Brazil, 12 – 19 April 2010. The works of both congresses focused on the need to reform the criminal justice system and to implement the model of restorative justice as an alternative to the traditional criminal justice system, in order to avoid the negative effects of imprisonment, in order to reduce the workload of courts, emphasizing the need for to reinforce the alternatives to imprisonment, which may consist of community service, restorative justice, electronic surveillance, and the need to support rehabilitation and reintegration programs, including those aimed at correcting criminal behaviour, alongside educational and vocational training for convicts[31]. The approach and interpretation of the concept of restorative justice was consecrated on the European continent[32] as well because *"those who are most vulnerable or who find themselves in particularly exposed situations, such as persons subjected to repeated violence in close relationships, victims of gender-based violence, or persons who fall victim to other types of crimes in a Member State of which they are not nationals or residents, are in need of special support and legal protection".*

Emphasizing, as a priority, that the victims of crime should be protected from secondary and repeat victimisation, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice, Art.12 of *the Directive 2012/29/EU*[33] *of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, provides that member states shall take measures to safeguard the victim from secondary and repeat victimisation, from intimidation and from retaliation, to be applied when providing any restorative justice services, such as the victim's free and informed consent, which may be withdrawn at any time; providing to the victim of the fully and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement; the acknowledgement by the offender the basic facts of the case; any agreement arrived at voluntarily may be taken into account in any further criminal proceedings

restorative justice and its connection with modern trends in the development of criminal trial),p.39,available online on: http://www.legeasiviata.in.ua/archive/2014/6/8.pdf, Consulted on 15.08.2018, 17:51hour.

[28] T.Marshall, Restorative justice: an overview, p.8, available online on: http://www.antoniocasella.eu/restorative/Marshall_1999-b.pdf. Consulted on 15.08.2018, 18:58 hour.

[29] National Institute of Criminology, Restorative justice programmes in the contemporary world (documentary analysis),2005, p.11,available online on http://criminologie.org.ro/wp-content/uploads/2015/08/Programe-de-justitie-restaurativa-in-lumea-contemporana-Studiu.pdf, consulted on16.08.2018, 16:26 hour.

[30] I.M.Rusu, op.cit., p.417.

[31] E.Bedros, Conceptul de justiţie restaurativă şi legătura acestuia cu tendinţele moderne de dezvoltare a procesului penal (The concept of restorative justice and its connection with modern trends in the development of criminal trial), p.39, available online on http://www.legeasiviata.in.ua/archive/2014/6/8.pdf. Consulted on 16.08.2018, 19:17 hour.

[32] Art.2.3.4 The Stockholm programme — an open and secure europe serving and protecting citizens (2010/C 115/01), , document consulted on 17.08.2018, 09:00 hour, available online: https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex:52010XG0504(01).

[33] Published in Official Journal of the European Union L 315/14.11.2012, available online on http://data.europa.eu/eli/dir/2012/29/oj.

and the discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest. In this spirit, as the terminology of "restorative justice" proliferates across the globe[34], emphasizing the benefits of restorative justice, as well as the limitations that characterize traditional approaches to criminal justice, considering the provisions of the Directive 2012/29/EU, *Recommendation CM/Rec(2018)8* concerning restorative justice in criminal matters[35] updated the list of international documents and agreements taken into account and placed greater emphasis on restorative justice principles and the recent developments in research evidence, adding timely to the growing number of international instruments working on the use and evolution of justice restorative. The Recommendation reflects the view that restorative justice should be regulated only to the extent necessary and that restorative justice services should be given independence and autonomy in performing their duties. Also, the Recommendation ask the member States to develop the capacity to deliver restorative justice in all geographical areas in their jurisdictions, with respect to all offences, and at all stages of their criminal justice processes.

In the Romanian criminal justice system, most part of the Directive 2012/29/EU has already been transposed, in particular through the provisions of the Criminal Procedure Code, and Law no. 211/2004[36] on certain measures to ensure the protection of victims of the offence.

But there are also a number of provisions of the directive that require adaptation to internal legislation by creating a legislative framework to modify and supplement, e.g., Law no.211/2004 as well as Law no.192/2006[37] on mediation and organization of mediator profession. By the Law no.97/2018[38] on certain measures for the protection of victims of crime, have been transposed into our national legislation art.3 paragraph (3), art.4 paragraph (1) letter i) and j), art.5, par. (1) and (3), Article 12 (1) (c) and Article 19 (2) of Directive 2012/29 / EU to ensure that victims are treated with respect and to allows them to take informed decisions about their rights as well as their participation in the mediation procedure. These provisions must be correlated with the provisions of the of Criminal Code Procedure, which in Article 16, paragraph 1, letter g (concluding a mediation agreement is one of the cases preventing the to initiate both the prosecution and the trial by a court in criminal proceedings, art.23 para.1 mediation and recognition of civil claims), art.81, par.1, lit.i (right of the injured party to appeal to a mediator), art.83 para.1 letter g (the right of the defendant to call a mediator) art.108 paragraph 4 (communication of rights and obligations), art. 111 paragraph 1, lit.b (hearing of the injured party), art.313 paragraph 3 (mediation is one of the cases of suspension of criminal prosecution), art. 318 paragraph 4 (submission by the prosecutor to the court of the agreement for the recognition of guilt- guilty plea, accompanied by the transaction or the mediation agreement criminal prosecution), art. 486 (solving the civil action) recognize both the injured party and the defendant the right to appeal to a mediator in the cases provided by the law. By forming the "triad victim-criminal-community"[39], the new criminal philosophy differs from the traditional justice in that the restorative justice focuses on reparation of the damage caused by the offence, while the traditional one focuses on punishing a crime; then, restorative justice is characterized by dialogue and negotiation between the parties, while traditional justice is based on the principle of contradictoriality, and, thirdly, restorative justice requires community members or organizations to play an active role, to assume responsibility for both sanctioning and social reintegration of offenders, while for traditional justice, the "community" is represented by the state[40]. The mediation in the criminal proceeding as an alternative method of resolving conflicts applies both to the criminal and to the civil side of the criminal trial. In the criminal area of the trial, the mediation provisions apply only to cases of offences for which, according by the law, the withdrawal of the previous complaint or reconciliation removes the criminal liability[41]. The law does not limit, in relation to the type of offense committed, the possibility call a mediator for solving of the civil aspect of the case, thus recognizing the right to call a mediator for solving the civil aspect

[34] Commentary to Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States, available online on https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808cdc8a, consulted on 26.02.2019, 18:35 hour.

[35] Adopted by the Commitee of Ministers on 3 October 2018 at the 1326th meeting of the Ministers' Deputies.

[36] Published in Official Gazette of Romania, Part I, no.505 June 4th 2004.

[37] Published in Official Gazette of Romania, Part I, no.441 May 22th 2006, with subsequent amendments.

[38] Published in Official Gazette of Romania, Part I, no.376 May 2nd 2018.

[39] M.I.Rusu, op.cit., p.416.

[40] K. Daly, Revisiting the Relationship between Retributive and Restorative Justice, p.6, To appear in Restorative Justice: From Philosophy to Practice, edited by Heather Strang and John Braithwaite, Australian National University. Aldershot:Dartmouth(2000), consulted on 16.08.2018, 10:53 AM, available online on https://www.griffith.edu.au/data/assets/pdf_file/0028/223759/2001-Daly-Revisiting-the-relationship-pre-print.pdf,

[41] Art.II para.2, thesis II by the Law no.97/2018 on certain measures for the protection of victims of crime, the conclusion of a mediation agreement in the criminal area, according to the present law, might take place until the court notification has been read . By the Decision no.397/June15th 2016, the Constitutional Court of Romania, called to decide over the unconstitutionality of the provisions of art.16 par. (1) letter g) of the final thesis of the Criminal Procedure Code and of art.67 of the Law no.192/2006 on the mediation and organization of the profession of mediator, admitted the exception of unconstitutionality and established that these provisions are constitutional insofar as the mediation agreement with regard to the offences for which reconciliation can take place until the court notification has been read.

of any criminal case. However, the exercise of this right may be restricted in certain situations, such as the taking of a preventive measure against the defendant which implies, inter alia, the prohibition of approaching and communicating directly with the injured person or the reasonable suspicion that the defendant is trying to achieve a understands fraudulently with it. However, the parties to the criminal conflict, both on the criminal and the civil side, may givespecial empowerment to another person to conclude the mediation contract, thus allowing the possibility of avoiding direct contact between the the subjects of the offence[42.]

## 3. Conclusions

The execution of criminal penalties involving deprivation of liberty is not just a mere administrative problem, but a legal issue governed by law. It has been said at some point that the detainee will be resocialized only if he really wants it, true indeed, if we look at the criminal persistence reflected in a long list of crimes committed by some of the persons deprived of liberty. During the execution of punishments and detention measures, most of the persons deprived of their liberty choose the way of complying with the requirements of the law and those of the administration of the place of detention, at least formally proving that they are on the road to reintegration.

Reintegration into society means not only returning to the free world, but also the assumption of the result of the crime by repairing the harm produced as a result of its commission, as well as changing the mentality regarding the importance of the social values to be defended.

The issue of maximum actuality remains that of the risk of recidivism due to the lack of a job. The lack of a professional qualification, the lack of studies, the lack of interest of persons deprived of their liberty from the activities carried out at the place of detention, and the habit of persons deprived of their liberty to live in crime (theft, robbery, deception, etc.) several causes that dramatically reduce the chances of community integration, with the risk of transforming the person deprived of liberty into a state-maintained ("scholar") state.

Taking recovery measures for prisoners under the custody of the penitentiary system is an essential prerequisite for successful social intervention to facilitate social reintegration and prevent relapse. The purpose of preventive measures and the formative function of educational measures and custodial sentences is highlighted as a priority and contributes significantly to increasing community safety by improving education, psychological assistance and social assistance provided to people deprived of their liberty and by raising awareness and raising awareness of social reintegration issues of persons deprived of their liberty. The expected outcome is to prepare people deprived of their liberty from an educational, psychological and social perspective, for socio-professional reintegration or, as the case may be, to take them into a post-detention assistance.

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[42] N.Volonciu (Scientific coordinator), A.S.Uzlău (coordinator author), R.Moroșanu, C.Voicu, et.alii,Codul de procedură penală comentat, Hamangiu Publishing House, București, 2017, p.236.

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# ASPECTS REGARDING THE APPLICATION OF THE PRINCIPLE OF CONTINUITY IN THE JUDGING STAGE IN THE LIGHT OF THE EUROPEAN CONVENTIONALITY BLOCK

**Rodica Aida POPA***

**Abstract**

*The principle of continuity, as a result of the principle of immediacy in the criminal trial, is one of the important principles of the Romanian criminal trial, the content of which is given by the rule of the uniqueness of the panel of judges, which must remain the same. The continuity of the court panel is a guarantee of a fair trial, since the trial at the trial stage provides the parties with the faith that before the same panel of judges, composed of the appropriate number of judges, provided under the law, for the cases deducted from the judgment, fulfilling the requirements of immutability , independence, impartiality, responsibility and professional competence, the hearing of the parties, administration of evidence, discussion of applications, and then debates take place, giving expression to the lawfulness of criminal proceedings.*

*The European Convention for the Protection of Human Rights and Fundamental Freedoms, subject to art. 6 § 1, as well as the case-law of the European Contentious Court has established concrete criteria for the application of the principle of continuity of the panel of judges, as a result of the principle of immediacy.*

*In our study we aim to make a brief analysis of the jurisprudence of the European Court of Human Rights on how to apply the continuity of the panel of judges as well as the limitations in the cases concerning Romania and other member states of the Council of Europe in report to the national regulatory standards, namely the Romanian Criminal Procedure Code and Art. 11 of Law no. 304/2004 republished, on judicial organization.*

*We consider that the observance of the principle of continuity of the panel of judges in the court stage gives it content, and on its violations only the courts have the power to decide, since sanctioning the violation of the provisions regarding the composition of the panel of judges is absolute nullity.*

**Keywords:** *the principle of immediacy, the principle of continuity, the composition of the panel of judges, the absolute nullity, the interpretation of the application of the principle of continuity only by the courts.*

## Introduction

The trial stage in the criminal proceedings in Romania, as regulated by the Criminal Procedure Code in force, is experiencing a new vision on the part of the legislator, relative to the European vision, in the sense that new procedural safeguards, which provide the parties with confidence in a fair trial, have been introduced.

Moreover, the trial stage also relates to the requirements of the new realities, since the participants in the criminal proceedings have acquired a thorough knowledge of their rights and obligations, in the context of increasing the level of legal education and culture, which requires the awareness of the accountability of all the parties involved in the criminal proceedings.

A trial in the criminal proceedings in Romania, as provided in the Criminal Procedure Code in force, falls within a process in which the participants have foreseeable, predictable, clear and qualitative provisions, giving effectiveness to the rights and obligations, compatible with the European legal area, with respect to other trial-related provisions in the European legal system, whether continental or common law.

In other words, the trial regulation, as a stage of the criminal proceedings in Romania, by the principles governing it, namely the principles of legality, adversariality, immediacy, continuity, oral proceedings, finding the truth, the procedure itself, either simplified or ordinary, with its stages, offer procedural safeguards for all participants, with respect to the president of the panel of judges, explaining to the defendant what the accusation is, informing the defendant of his/her right not to make any statement, advising him/her that everything he/she says can be used against him/her, as well as the right to ask questions to the co-defendants, the injured person, the other parties, the witnesses, the experts, and to explain during the course of the inquiry, when deemed necessary, the filing of applications, pleas, requests for the taking of evidence and presenting the proof of evidence, by the lawyers, the parties, the injured person, as main litigant and other litigants.

In this context, one of the criminal procedural safeguards of the criminal proceedings in the trial stage is the observance of the principle of continuity of the panel of judges, which is an effect of the principle of immediacy, and it can be said that the two principles together superpose and ensure consistency, both in terms of the observance of the law and of all legal instruments, the manner of use of the agreed evidence,

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the proceedings and of the perception of the participants in the stages of the criminal proceedings, as well as the effectiveness thereof.

Our study aims to address aspects related to the application of the principle of continuity in the trial stage in view of the European conventionality block, on the one hand, by presenting some cases from the European Court of Human Rights case law in which Romania itself was convicted for the non-observance of the principle of immediacy, having in effect the principle of continuity in its essential component, the uniqueness of the panel of judges, and of other cases in the case law of the court and, on the other hand, in addition to the content to be taken into account in complying with such principle, as regulated by the Criminal Procedure Code and by Law No. 304/2004 on judicial organization, as amended, and the subsequent development of the national case law, especially that of the High Court of Cassation and Justice.

In our opinion, the importance of such an approach will lead to the establishment of a method for analysing concrete situations when there is a change in the composition of the panel of judges and the application of the criteria for verifying the relevant legal provisions, both in terms of national regulation and of the case law of the European Court of Human Rights, the conduct to be observed by the panel of judges, when there is a change in its composition, by replacing the judge, in the case of one-judge panels, or one or two judges, in the case of multi-judge panels, which will confer a strong practical character, in ensuring the observance of the continuity principle.

Such a method will give effectiveness to the convergence of the application of the national law, as regulated in the Code of Criminal Procedure in force, harmonized with the European norms, with the development of the case law of the European Court of Human Rights, in terms of the principle of immediacy and, implicitly, of the principle of continuity, in view of ensuring a fair trial, as provided by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

It should also be emphasized that the principle of continuity, as a result of the principle of immediacy in the Romanian criminal proceedings, is experiencing a doctrinal approach,[1] which has guided the national case law in complying with the legal provisions in the matter, however, we consider that the national case law in the application of the principle of continuity has significantly contributed to giving concrete meaning to this principle, being important to present in our study how this principle was applied.

## Content

The Romanian Criminal Procedure Code in force regulates the principle of immediacy in Article 351 (1),[2] and the principle of continuity in the content of codified provisions, i.e. Article 354 (2) and (3) and Article 388 (6),[3] as well as in Article 11 of Law No. 304/2004 on judicial organization, republished, as amended.[4]

As regards both the principles of immediacy and continuity, as is apparent from the very content of the procedural rules mentioned above, it follows that the court must be established according to the law, i.e. the composition of the panel is legal when it remains unchanged after the proceedings start.

Should there be set another hearing during the one in which the proceedings occurred, and the court have a different composition at such subsequent hearing and continue the trial in such a composition, without ordering the resumption of the proceedings, the court disregards the provisions of Article 354 (2) and (3) of the Criminal Procedure Code.

Another situation is when the court decision is signed by a judge whose name is not mentioned in the introductory part as being part of the panel.[5]

The European Court of Human Rights has ruled in two cases in which it condemned Romania for breaching Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Thus, in the first case, Beraru vs Romania, the judgment of which was delivered on 18 March 2014,[6] the European Court of Human Rights held that there had been a violation of Article 6§1 taken together with Article 6§3 (b), (c) and (d) of the Convention, the respondent State having to pay to the applicant EUR 4,000 in respect of non-pecuniary damage, plus any tax that may be chargeable, and EUR 3,000 in respect of costs, plus any tax that may be chargeable, within 3 months from the date on which the judgment becomes final, converted into the currency of the respondent State at the rate applicable on the date of settlement.

In the recitals of the judgment of the European Court, it presented its arguments in §63-84. In essence, it was considered that... The principle of immediacy is an important guarantee in criminal proceedings in which the observations made by the court about the demeanour and credibility of a witness may have important consequences for the accused. Therefore, a

[1] Nicolae Volonciu, Andreea Simona Uzlău et al, Criminal Procedure Code - commented text, 3rd Edition, revised and supplemented, Hamangiu Publishing House, 2017, pp. 1058-1059.

[2] Article 351 (1) of the Criminal Procedure Code states that "The case shall be tried before a court established according to the law and shall be conducted in hearings, observing the principles of oral proceedings, immediacy and adversariality."

[3] Article 354 (2) and 3 of the Criminal Procedure Code provides that. "(2) The panel of judges shall remain the same throughout the trial. When this is not possible, the panel may change until the proceedings begin. (3) After the beginning of the proceedings, any change in the composition of the panel shall lead to the resumption of the proceedings."

[4] Article 11 of the Law No. 304/2004 on judicial organization, republished, as amended: "The trial shall be conducted in accordance with the principles of random distribution of cases and continuity, except in cases where the judge cannot participate in the trial for objective reasons."

[5] HCCJ, Criminal Chamber, Judgment No. 5964 of 17 December 2003, available on wwwscj.ro.

[6] The Judgment in Beraru v. Romania of 18 March 2014 was published in the Official Gazette, Part I, No. 944 of 23.12.2014.

change in the composition of the trial court after the hearing of an important witness should normally lead to the rehearing of that witness (see P.K. v. Finland (dec.), No. 37442/97, 9 July 2002). 64;§65. In the instant case the Court notes that the single judge had heard all of the applicant's co-defendants and the witnesses in February and March 2002. After the appointment of the second judge the co-defendants and witnesses previously heard were not heard again. §66. The Court accepts that while the second judge was appointed in May 2003, 5 months after the proceedings commenced, the first judge, who heard most of the evidence alone, remained the same throughout the proceedings. It also accepts that the second judge had at his disposal the transcripts of the hearings at which the witnesses and the co-accused had been heard. However, noting that the applicant's conviction was based solely on evidence not directly heard by the second judge, the Court considers that the availability of those transcripts cannot compensate for the lack of immediacy in the proceedings. §67. Furthermore, the Court is aware that the possibility exists that a higher or the highest court might, in some circumstances, make reparation for defects in the first-instance proceedings (see De Cubber v. Belgium, 26 October 1984, §33, Series A No. 86). In the present case the Court notes that the court of last resort not only upheld the judgment of the first-instance court, but also based its decision on the evidence adduced before the court of first instance without a direct hearing of it." The European Court examined the change in the panel in the light of its consequences for the fairness of the proceedings as a whole, noting that in the present case the applicant's lawyers were unable to gain direct access to the case file until a late stage; they were not initially provided with a copy of the indictment. Moreover, they could not obtain either a copy of the transcripts of the recordings of the tapped phone calls or a taped copy of the tapped phone calls used as evidence in the file. In this respect, the applicant's lawyers submitted numerous requests to the domestic courts for access to the file. The Court also notes that the lack of access to the file, which caused difficulties in the preparation of the defence, was exactly the reason advanced by the applicant's lawyers for seeking to withdraw their representation of the applicant.

(§71).. The Court observes that the recordings played an important role in the body of evidence assessed by the courts. Thus, at the beginning of the proceedings the first-instance court considered a technical expert report on the recordings as absolutely necessary and ordered that such a report be produced. Furthermore, the first-instance court based its reasoning on the transcripts of the recordings, concluding that they "leave little room for doubt" as regards the accused's guilt, while acknowledging that the statements given by the other co-accused were not totally reliable, as they could "be considered subjective". (§78). Despite the importance of the recordings in the assessment of evidence the first-instance court changed its initial position concerning the necessity of a technical report in order to establish the authenticity of the recordings. At the end of the proceedings it considered the report as superfluous and revised its decision to adduce this evidence. (§79). In addition, despite the INEC submitting a technical report stating that there were doubts about the authenticity of the recordings before the delivery of its judgment, the first-instance court relied on the transcripts instead of re-opening the proceedings in order to allow the parties to submit their observations on the report. (§80). The Court noted that not only did the domestic courts base their decision on recordings of contested authenticity, but they did not reply to the applicant's submissions that he had not been presented with the transcripts and therefore was not aware of their content. (§81). The Court noted that none of the defects noted at the pre-trial and first-instance trial stage were subsequently remedied by the appeal court. Despite having jurisdiction to review all aspects of a case on questions of both fact and law, both the Bucharest Court of Appeal and the High Court of Cassation and Justice merely reiterated the prosecutor's findings, and did not address the repeated complaints made by the defendants concerning various defects in the trial. (§82). In view of the above findings, the Court concluded that the proceedings in question, taken as a whole, did not satisfy the requirements of a fair trial, considering that there had been a violation of Article 6§1 taken together with Article 6§3 (b), (c) and (d) of the Convention. (§83-84).

In the second case, Cutean v. Romania, the judgment of which was delivered on 2 December 2014,[7] the European Court of Human Rights held that there had been a violation of Article (6) of the Convention, the respondent State having to pay to the applicant EUR 2,400, plus any tax that may be chargeable, in respect of non-pecuniary damage, EUR 1,953, plus any tax that may be chargeable, in respect of costs and expenses, into a bank account indicated by the applicant, within three months from the date on which the judgment becomes final.

In the recitals of the judgment, in essence, the European Court of Human Rights held that an important aspect of fair criminal proceedings is the ability for the accused to be confronted with the witnesses in the presence of the judge who ultimately decides the case. The principle of immediacy is an important guarantee in criminal proceedings in which the observations made by the court about the demeanour and credibility of a witness may have important consequences for the accused (see Beraru v. Romania, No. 40107/04, §64, 18 March 2014). The Court considers that, given the high stakes of criminal proceedings, the aforementioned considerations also apply as regards the direct hearing of the accused

[7] The Judgment in Cutean v. Romania of 2 December 2014 was published in the Official Gazette, Part I, No. 261 of 20.04.2015.

himself by the judge who ultimately decides the case. (§60). The Court recalls that according to the principle of immediacy, in a criminal case the decision should be reached by judges who have been present throughout the proceedings and evidence-gathering process (see Mellors v. the United Kingdom (dec.), No. 57836/00, 30 January 2003). However, this cannot be deemed to constitute a prohibition of any change in the composition of a court during the course of a case (see P.K. v. Finland, cited above). Very clear administrative or procedural factors may arise rendering a judge's continued participation in a case impossible. Measures can be taken to ensure that the judges who continue hearing the case have the appropriate understanding of the evidence and arguments, for example, by making transcripts available, where the credibility of the witness concerned is not in issue, or by arranging for a rehearing of the relevant arguments or of important witnesses before the newly composed court (see Mellors, cited above; and P.K. v. Finland, cited above). (§61). The Court notes that it is undisputed that the original panel of judges examining the applicant's case had changed during the course of the proceedings before the first-instance court. In addition, the judge who convicted the applicant had not heard him or the witnesses directly. Moreover, the appellate courts that upheld the applicant's conviction also failed to hear him or the witnesses directly. (§63). The Court notes that none of the judges in the initial panel who had heard the applicant and the witnesses at the first level of jurisdiction had stayed on to continue with the examination of the case (contrast and compare with P.K. v. Finland, cited above; and Beraru, cited above, §66). (§64). The Court observes that there is no evidence in the file suggesting that the first-instance court's composition was changed in order to affect the outcome of the case to the applicant's detriment – or for any other improper motives – or that the Bucharest District 1 Court's single judge lacked independence or impartiality and also notes that the District Court judge had at his disposal the transcripts of the hearings at which the witnesses and the applicant had been heard. However, the Court also notes that the applicant's and the witnesses' statements constituted relevant evidence for his conviction that was not directly heard by the District Court single judge. Consequently, the Court considers that the availability of statement transcripts cannot compensate for the lack of immediacy in the proceedings. (§70). Furthermore, the Court is aware that the possibility exists that a higher or the highest court might, in some circumstances, make reparation for deficiencies in the first-instance proceedings (see Beraru, cited above, §67). In the present case the Court notes that the courts of last resort not only upheld the judgment of the first-instance court, but also based their decisions on the evidence adduced before the court of first instance without a direct hearing of it. (§71). The Court therefore concludes that the change of the first-instance court's panel of judges and the subsequent failure of the appellate courts to hear the applicant and the witnesses was tantamount to depriving the applicant of a fair trial. (§72). It follows that there has been a violation of Article 6 of the Convention.(§73).

In the case of Cerovsek and Bozicnik v. Slovenia, delivered by the European Court of Human Rights on 7 March 2017, which became final on 7 June 2017,[8] it was held that there had been a violation of Article 6§1 of the Convention, the respondent State having to pay to the applicant EUR 5,000, plus any tax that may be chargeable, in respect of non-pecuniary damage, EUR 2,500, plus any tax that may be chargeable, in respect of costs and expenses, within three months from the date on which the judgment becomes final.

In the recitals of the judgment, in essence, the European Court of Human Rights held that it was called upon to determine whether the applicants had a fair trial despite the fact that the reasons for the verdicts, that is their conviction and sentence, were not given by the judge who had pronounced them but by other judges, who had not participated in the trial. (§38). The court notes that the present case concerns a trial before a professional judge sitting as a single judge (see paragraph 6 above) and, secondly, that the applicants' situation was a departure from the procedure envisaged in the Slovenian Criminal Procedure Act. Indeed, pursuant to that Act, the judge who conducts the trial and who deals directly with the evidence is supposed to give the verdict and provide written reasons relating to the relevant factual and legal aspects of it, if so requested by the parties (see paragraphs 22 to 24 above). The situation in the present case, referred to by the Government as being of an exceptional nature (see paragraph 35 above), arose because the judge who had examined all the evidence produced during the trial had retired after pronouncing her verdict, without providing written grounds. (§39). In the present case, the aforementioned purpose of the requirement to give reasons could not be achieved since the judge who conducted the trial, A.K., did not set down the reasons that had persuaded her to reach her decision on the issue of the applicants' guilt and their sentence. Furthermore, there is no indication in the records of the hearing that she gave any reasons orally (see paragraph 11 above). The written grounds given by Judges D.K.M. and M.B. (see paragraphs 14 and 15 above), which were put together post hoc some three years later, and, as appears from the evidence before the Court, had no input from Judge A.K., could not compensate for that deficiency. (§41). In addition, the Court is mindful of the two judges' lack of involvement in the evidence-gathering process. It observes that Judges D.K.M. and M.B. did not participate in the trials in any way and drew up their grounds solely on the basis of the written case files. By contrast, Judge A.K.'s verdict was not based on documents only. In particular, Judge A.K. heard the applicants during the trial, examined a number of

[8] In the Hudoc database of the European Court of Human Rights.

witnesses and must have formed an opinion as to their credibility. She must also have made an assessment of the elements of the alleged offences, including the subjective element, namely the applicants' intention to commit them, for which the direct hearing of the applicants was particularly relevant (see paragraphs 7 and 8 above, and Cutean v. Romania, No. 53150/12, §66, 5 February 2014). (§42). Therefore, as recognised through the principle of the immediacy in criminal proceedings (see Cutean, cited above, §60 and §61, and P.K. v. Finland (dec.), No. 37442/97, 9 July 2002; see also the Slovenian Constitutional Court's decision of 11 October 2006 cited in paragraph 28 above), Judge A.K.'s observation of the demeanour of the witnesses and the applicants and her assessment of their credibility must have constituted an important, if not decisive, element in the establishment of the facts on which the applicants' convictions were based. In the Court's view, she should, for precisely that reason, address her observations in the written grounds justifying the verdicts. Indeed, under domestic law, such observations should form one of the essential components of written judgments (see section 364(7) of the Criminal Procedure Act, cited in paragraph 24 above). (§43). As to the question of whether Judge A.K.'s retirement, which was allegedly the reason for her failure to provide written grounds, gave rise to exceptional circumstances that justified a departure from the standard domestic procedure (see paragraph 35 above), the Court observes that the date of her retirement must have been known to Judge A.K. in advance. It should therefore in principle have been possible to take measures either for her to finish the applicants' cases alone or to involve another judge at an early stage in the proceedings. Moreover, it notes that the case was not a particularly complex one and that the applicants gave notice of their intention to appeal as soon as the verdict was pronounced (see paragraph 12 above). That means that Judge A.K. was immediately aware that she would have to provide written grounds. The Court therefore cannot agree with the Government that there were good reasons to depart from the procedure to which the accused were entitled under domestic law. Furthermore, it is particularly striking that despite a statutory time-limit of thirty days, the written grounds were not provided for about three years after the pronouncement of the verdicts, during which time the case files were lost and had to be reconstituted (see paragraphs 13 and 23 above). Those factors raise further concerns about the way the applicants' cases were handled by the domestic courts. (§44). Lastly, the Court is aware that there is a possibility that a higher or the highest court might, in some circumstances, make reparation for defects in first-instance proceedings (see De Cubber v. Belgium, 26 October 1984, §33, Series A No. 86). However, it notes that in the present case the courts at higher levels of jurisdiction upheld the first-instance court's judgment without directly hearing any of the evidence (see paragraphs 17, 19, 21, 27 and 42 above, and, mutatis mutandis, Beraru v. Romania, No. 40107/04, §71, 18 March 2014). It therefore cannot be said that the deficiency at issue in the present case was remedied by the appellate courts. (§46). In conclusion, the Court considers that the applicants' right to a fair trial was breached because of the failure of the judge who conducted their trial to provide written grounds for her verdict and because of the absence of any appropriate measures compensating for that deficiency. (§47). There has accordingly been a violation of Article 6 of the Convention. (§48).

The case law of the European Court of Human Rights has highlighted the importance of correlating the principle of immediacy with that of continuity, when hearing the defendant and adducing evidence, by hearing witnesses before the legally established panel of judges.

The Court has highlighted the fact that the panel may change during a trial, but it is significant that the new member(s) of the panel must become aware of the consequences of such change, the procedural safeguards and the reiteration of the requests for re-taking evidence, applications, pleas and confrontations that participants have in the criminal proceedings.

Thus, it is essential that the new judges have access not only to the written statements of the parties and witnesses, but also, in order to form an opinion on the charges, it is necessary to re-take the evidence, directly, to allow the possibility of discussion on other evidence, when required by law.

At the same time, it is important for the grounds of the decision rendered to be drawn up by the judge participating in the inquiry, the proceedings and the defendant's final address, as the arguments to be set out are also based on the oral arguments brought in the criminal proceedings, in what regards its content staged in front of the court, forming a complete and direct opinion on the whole case, and also answering the incriminating or exculpatory criticisms.

Therefore, we consider that beyond the above-mentioned legal requirements provided by the Criminal Procedure Code and Law No. 304/2004 on the judicial organization, as amended, it is necessary that in every case brought before the courts, the panel of judges formed as provided by law to have in place its own verification mechanism also based on the criteria set forth by the ECHR, the consequences involved by the occurrence of a cause for a change in the composition of the panel of judges, inclusively with the re-taking of means of evidence, the re-discussion of applications, the possibility to reiterate the conclusions of an expert report, for the judges to form an opinion on the factual base and the typical character conditions of the charges held against the defendants.

If, after entering the proceedings, one or more judges join the initial panels of judges, the proceedings must be repeated in a subsequent hearing during the trial stage, as otherwise the sanction of non-compliance with the principle of continuity of the judge panels is

the absolute nullity of the judgment given, according to Article 281 (1) (a) of the Criminal Procedure Code.

Following a change in the composition of the panel of judges, the discussion on the scope of the cases of Beraru and Cutean v. Romania should be mandatorily requested, ex officio or by any party or the prosecutor, in the presence of the new judge(s), which is equivalent to the direct application of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the specific consequences in such case in relation to the evidence taken, the conclusions of the parties and of the prosecutor, leading to the observance of the principles of immediacy and continuity, as well as to a fair trial, in terms of the effectiveness of the procedural safeguards of the parties.

In examining the case law of the 5-judge panel of the High Court of Cassation and Justice, during the appeal, following the judgments delivered in the cases of Beraru and Cutean v. Romania, we found observance of the continuity of the 5-judge panel at the time of allowing the evidence, taking the evidence and delivering the judgment, ensuring the observance of the above-mentioned principles, but also of the criteria stated in the two cases.

Thus, by way of example, by the decision rendered by the 5-judge panel of the High Court of Cassation and Justice on 15 December 2014 in the case No. 1768/1/2014,[9] the panel of judges composed of L.D.S., as president, and the judges Fl.D., L.T.R., S.L.M. and I.A.I., partially allowed the applications for evidence filed by the civil party appellant respondent A, by the defendant appellant respondents B., C., D., E., F., G., H and I., also postponing the discussion of an application for change of legal classification in respect of one of the defendant appellant respondents, postponing the case until 26 February 2015.

During the hearing mentioned above, the panel of judges consisting of the above mentioned judges took the evidence allowed, heard the arguments in the proceedings, and the decision was postponed until 10 February 2015.

On 10 February 2015, the 5-judge panel consisting of the same judges, L.D.S., as president, and the judges of Fl.D., L.T.R., S.L.M. and I.A.I., delivered the Criminal Judgment No. 22 in case No. 1768/1/2014.

In another case, the 5-judge panel of the High Court of Cassation and Justice consisting of I.M.M., as president, and the judges Fl.D., L.T.R, S.D.E. and I.A.I., during the hearing of 15 December 2014 in the case No. 2678/1/2014, having regard to the provisions of the hearing decision of 24 November 2014, in observance with Article 119 (2) of the Criminal Procedure Code, Article 120 (1) (d) of the Criminal Procedure Code, Article 121 (3) of the Criminal Procedure Code and Article 381 of the Criminal Procedure Code, continued the inquiry by interviewing the witnesses A., B., C., D. and E., their statements being recorded and attached to the case file (pages 127-140 of the case in the appeal stage). When asked, the lawyers of the defendant respondents, the representative of the appellant civil party F. and the representative of the Ministry G. answered that they had no other applications to file during such hearing and requested for a new hearing to be set in order to continue the inquiry.

The High Court of Cassation and Justice, with a view to continuing the inquiry, set another hearing for 26 January 2015, when the allowed witnesses, H., I., J., K., L. and M., would be summoned.

During the aforementioned hearing, the 5-judge panel, in the same composition, interviewed the allowed witnesses, in attendance, discussed an application filed by the lawyer of the defendant respondent and allowed the sending of a letter requested to the mentioned institution regarding specific information and, for the continuation of the inquiry, set another hearing on 27 February 2015 and ordered the summoning of the allowed defence witnesses: N., O. and P.

Subsequently, the evidence was taken during the hearings of 27 February and 9 March 2015, and at the latter hearing the proceedings were recorded and the delivery of the judgment was postponed until 23 March 2015, the 5-judge panel having the same composition.

On 23 March 2015, the 5-judge panel, in the same composition mentioned above, delivered the Criminal Judgment No. 40 in the case No. 26787/1/2014 pending before the High Court of Cassation and Justice, the 5-judge panel.[10]

## Conclusions

By examining the principles of immediacy and continuity together in their effective application in criminal cases in our study, the connection between them and the impact of their non-observance on the procedural safeguards of the participants in the criminal proceedings is revealed.

The presentation of the applicability of the two principles in the light of the case law of the European Court of Human Rights has been able to ensure compliance by the domestic courts, the finding of actual and different violations, as well as the criteria that proves to be necessary in their examination when they have not been observed, impacting the fair trial, as presented by the ECHR.

The consequences and the manner in which the judgments delivered by the European Court of Human Rights have been applied in the subsequent case law of the Supreme Court in the given matter are in a position to ensure the establishment of a mechanism for

[9] Criminal Judgment No. 22 delivered on 10 February 2015 by the High Court of Cassation and Justice, the 5-judges panel, in the case No. 1768/1/2014, not published.

[10] Criminal Judgment No. 40 delivered on 23 March 2015 by the High Court of Cassation and Justice, the 5-judges panel, not published.

verifying the provided criteria in ensuring compliance with the procedural safeguards of the parties.

We believe that further research into the application of the two principles in the criminal cases pending before the Supreme Court should continue in order to verify the concrete and different aspects of the specific application so as to assess the stability of the mechanism for verifying the incidence of the case law of the ECHR and to increase the quality of the trials, both at the first instance and during the appeal.

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# EUROPEAN AND CANADIAN PROVISIONS ON KEEPING CONTACT BETWEEN THE PERSON DEPRIVED OF HIS LIBERTY AND HIS FAMILY, DIFFERENCES AND SIMILARITIES

**Iulia POPESCU**[*]

**Abstract**

*Every democratic society seeks to create a stable environment for its members, trying to identify the needs of citizens, in all aspects, creating legal norms to ensure the proper functioning of society as a whole is one of the needs. The family as an institution, but also as a form of people's approach, requires maintaining a balance in the family relations, a desideratum pursued by both society and its members. Situations where a family member is deprived of liberty following a final court decision raise various questions about the family situation and the links between the family and the person in custody. The European states, as well as Canada, have recognized the importance of the family in the life of a person deprived of liberty by adopting rules in the field of penitentiary that contribute to the desideratum of the proper functioning of the family. But these rules also present, carefully scrutinized.*

**Keywords:** *family, convicted, Canada, European states, rules*

## Introduction

Man and the satisfaction of his needs have always been objectives pursued by each democratic society for its members, both in identifying needs and in meeting them.

The testimony of the efforts made by the European states and not only, in the attempt to establish as general rules, the rights considered as fundamental and on which the EU Member States report in the creation of the general framework of the rights of their citizens, stands "THE FUNDAMENTAL RIGHTS OF A EUROPEAN UNION" proclaimed by the European Commission, the European Parliament and the Council of the European Union on 7 December 2000 at the Nice European Council[1].

Since the Preamble to the Charter, the direction that the European states want to embrace, namely "the peoples of Europe, establishing an ever closer union among them, have decided to share a peaceful future based on common values", the common values representing even the fundamental rights in the Charter, which concern inter alia the right to live, respect for private and family life, marriage and the founding of a family, family life and freedom and the principle of non-discrimination in accordance with Union law and international law established by international conventions to which the Union or all the Member States are parties, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms and the constitutions of the Member States.

The existence of the principle of non-discrimination shows the equal treatment that the European Union, through its states, applies to its citizens with regard to the rights they enjoy, irrespective of the legal situation in which they are in the state of liberty or imprisonment.

The need for behavioral recovery of prisoners has far greater valences than just in respect of whom are personally need to be pursued and the impact of their actions on their families and society in general.

Just as society in its essence is constantly moving and evolving, the legal and behavioral norms must follow its course through periodic changes and improvements in order to shape its citizens' behavior to create a climate of order and safety.

It is true that in most cases the state of affairs determines the normative changes, but trying to identify the norms with the best and obvious results in different legal systems can lead to the creation of a new and adapted idea that will result in beneficial changes in the field under consideration.

The rationale for choosing Canadian legislation alongside the European one as regards the existence of the rights of detainees to stay in touch with the family was based on the recognition of the Canadian system with extensive democratic valences, from which new elements could be identified to ensure respect for the rights of individuals incarcerated, as well as identifying good practices in a non-European state. The study of the European and Canadian legal provisions relating to keeping contact between the person deprived of his liberty and his family in identifying the differences and similarities between them could support the need to recover the imprisoned persons and to maintain their families united.

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[1] https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12012P/TXT&from=PT

## European Provisions

**I.** On 1 September 2015, 1 483 126 people were imprisoned in the prisons on the territory of Europe[2] according to the Annual Penal Statistics Center, but according to the same source, the number of imprisoned persons increased to 2016.

The presence of so many incarcerated persons as well as the tendency to increase their number arises the interest of companies in identifying the situations and conditions that favor the increase of crime in order to counter this phenomenon as well as the negative consequences generated for the society in its whole as well as on each individual individual.

Man is a social being (Aristotle, Politics)[3], for which his isolation as a result of committing antisocial deeds, though necessary, produces in himself confused feelings that can seriously affect him sometimes without possibility of recovery.

At European level, over the years, there has been identified the need to establish rules that directly address the situation of imprisoned persons, in relation to their large number, and the fact that after the incarcerated there are many more people who are subject to conditions of suffering as a result of the incarceration of a family member.

Thus, on January 11, 2006, at the 952nd Meeting of Delegates Ministers, the Committee of Ministers adopted the RECOMMENDATION OF THE COMMITTEE OF MINISTERS OF THE MEMBER STATES, REGARDING THE EUROPEAN PENALTY RULES OF REC (2006) 2[4].

In addition to the general principles, rules on health, order and safety etc., and conditions of detention have been established, being inserted in Art. 24 even in Title II, where the detainees were allowed to keep in touch with the outside.

According to art. 24 detainees will be allowed to communicate, as often as possible, by mail, telephone or other means of communication with their families, third parties and representatives of outside bodies, and receive visits from such persons, so that any restriction or oversight of the communication or visits, however, allow a minimum acceptable contact level.

At point 4 of art. 24 states that "*The arrangements for making visits should allow detainees to maintain and develop their relations with their families as normally as possible*", which shows the recognition of the importance of family life in the prisoner's life and vice versa, as also confirmed by the following of the same art. *6. The detainee should be immediately informed of the death or serious illness of a close relative. 7. Whenever possible, the detainee should be allowed to leave the prison either under escort or free to visit a sick relative, attend funeral or other humanitarian reasons. 8. Detainees should be allowed to immediately notify their families of imprisonment or transfer to another prison as well as of serious illness or injury. 9. Even if the detainee requests or not, the authorities will immediately inform the detained spouse of the detainee / detainee or close relative or a person previously designated by the prisoner of death, illness or serious injury or transfer of the detainee to a detainee, another penitentiary or a hospital".*

Conscious of the natural differences between men and women, in full compliance with the principles of equality before the law, the European states have included special rules on the situation of women and children in REC (2006) 2 Recommendation on detention conditions.

Thus, Article 34 provides that *1. In addition to the specific provisions of these rules, the authorities must respect the needs of women in detention, paying particular attention to physical, occupational, social and psychological needs, when making decisions that affects the aspects of their detention. 2. Particular efforts must be made to allow access to special services to those with special needs, such as those who have suffered physical, mental or sexual violence. 3. Detainees will be allowed to give birth outside the penitentiary, but if a child is born in the penitentiary, the prison management will provide the necessary support and facilities.*

The Member States' interest in specifically regulating the right of women to benefit from private, physical, occupational, social and psychological needs does not constitute a violation of the principle of equal treatment between men and women under the Charter of Fundamental Rights of the European Union, from the physiological and anatomical point of view, the two genres are different and implicitly have different needs in certain situations.

The regulation of the possibility of the child's birth within the penitentiary can only be seen as a normality situation that was required to be mentioned, given the human condition.

It is worth noting that the normative act contains special provisions regarding the small children, specifying in the art. 36 that "*Small children may remain in prison with a detained parent only if it is in their best interest. They will not be considered "inmates". 2. When a young child can stay in the penitentiary with one of the parents, there must be a nursery with qualified staff, where the child can stay when the parent participates in an activity that is not allowed for small children. 36. 3. A special infrastructure must be set up to protect young children.*

The normative text is intended to keep the child with one of the parents, not necessarily with the mother, as can be seen from par. 1 and 2 of art. 36, where it is mentioned that a small child can stay in the penitentiary with one of the parents if it is in his / her best interest.

[2] https://www.coe.int/en/web/prison/space- Council of Europe Annual Penal Statistics SPACE I – Prison Populations Survey 2015 UPDATED ON 25TH APRIL 2017

[3] https://www.scribd.com/doc/146325879/Man - human being

[4] https://rm.coe.int/16804c8d9a

Under such circumstances a nursery with qualified staff must be provided.

This provision is of particular importance, once again applying the principle of equality between men and women, in this case between father and mother, as is the role of both parents in the child's life.

However, some cases call for the need to regulate certain categories of persons, in particular juveniles, so that in Art. 35 of Recommendation Rec (2006) 2 provides for special conditions applicable to persons under the age of 18. *"In exceptional cases where children under the age of 18 are imprisoned in an adult penitentiary, the authorities will ensure that in besides the services available to all inmates, detained children will have access to social, psychological and educational services, religious education and recreational programs or their equivalent available to children in the community. 2. All child prisoners enrolled in the compulsory education process will have access to it. 3. Additional assistance will be provided to the prison-released children. 4. In exceptional cases where children are imprisoned in an adult penitentiary, they shall be accommodated in a separate area from that visited by adults except in cases where this is not in the interest of the child.*

The special treatment applicable to minors in providing access to social, psychological and educational services, religious education and recreational programs can only be regarded as a necessary norm for their harmonious development despite the special situation in which they are at the time of execution punishment.

The execution of punishments must not interfere with the compulsory schooling stages, but instead the penitentiary system must make efforts to maximize the time spent by the juvenile in custody for its education and re-socialization.

The child's superior interest should be the primary motivation in everything that concerns the minor both in the penitentiary and after the release from the penitentiary, given the fragile balance generated as well as the possible family deficiencies.

The additional assistance mentioned in the normative act should be considered more than merely counseling but should consist in the effective monitoring of children who have been identified with more serious behavioral problems as well as those from families where there is no sound morally or material support.

The special situation of life in the penitentiary has demonstrated the need for direct regulations of the way of life and the execution of the punishment, as well as the ongoing transformation of the way in which the existing society must be approached at the level of a penitentiary.

Even at the end of REC (2006) 2, it is stated that *"European Prison Rules need to be reviewed regularly"*, recognizing the need for frequent changes in how to address the situation of people deprived of their liberty.

Continued concern over the situation of people deprived of their liberty following the execution of a prison sentence led to the European Parliament's elaboration of resolutions on prison systems and prison conditions.

European Parliament resolution of 5 October 2017 on prison systems and prison conditions (2015/2062 (INI)) (2018 / C 346/14) The European Parliament[5] (hereinafter referred to as the Resolution) contains guidance to Member States on the link between detainees and their families, as well as the situation of imprisoned women or imprisoned minors.

Thus, in paragraph 26 of the Resolution, it is proposed that Member States pay particular attention to the needs of women in prisons during pregnancy but also after they have given birth by providing adequate facilities for skilled and specialized breastfeeding and care, reiterating that it is necessary to analyze the application of alternative models that take into account the living conditions of prison children, considering that automatic separation of the mother of a child creates major emotional disturbances in children and can be considered as an additional punishment affecting both the mother and the child.

By their very nature, women are created to give birth, but also nurture the newborn, being essential for the baby's harmonious development of close proximity to the mother and the nutrition she provides by breastfeeding.

The mother's ability to keep her child along with her during the execution of the punishment must first be seen as a necessity for the well-being of the child and ensuring a normal development, the sanction being applied only to the mother in the execution of a punishment, not to the newborn.

At the same time, the possibility of keeping the child by the mother can also benefit from its behavior, leading to the adoption of appropriate behavior to social norms and thus creating the premises of release from the prison depending on the circumstances of each case.

Paragraph 28 of the Resolution demonstrates that family life in detainees' lives is of particular value and states must be encouraged to create the conditions necessary to keep in touch with the family.

Member States are therefore encouraged to ensure that detainees have regular contacts with their families and friends, giving them the possibility to execute their sentences in establishments near their homes and by promoting visits, phone calls and the use of electronic communications, subject to authorization to the judge and under the supervision of the prison administration, in order to maintain family ties.

The law maker, through these recommendations, does not lose sight of the fact that the notion of a family

[5] https://eur-lex.europa.eu/legal content/RO/TXT/PDF/?uri=OJ:C:2018:334:FULL, Official Journal of the European Union C343 Year 61 27 September 2018 European Parliament Resolution of 5 October 2017 on prison systems and prison conditions (2015/2062 (INI)) 2018 / C 346/14, pag 94".

should not be seen in the strict sense, but in its broad sense, concluding that it was intended to create the possibility for detainees to keep in touch with persons with whom they did not necessarily have a blood link or as a result of the conclusion of civil acts.

This approach is quite natural, as reality confirms that the notion of family is in a continuous transformation or rather a complement, in such a way that the limitation of the access of detainees to certain persons, whom civil law qualifies as part of the notion of "family," would prevent them from being able to keep in touch with people with whom they developed strong relationships but who can not fit into the "classical" family notion.

However, the way to set up legal rules is to give people the opportunity to exercise their rights in accordance with law and good morals but without creating unnecessary constraints and not resulting from the consequences of committing crimes, a lack of attention or legal indifference.

Also in support of maintaining the connection between the detainee and the family, paragraph 29 of the resolution states that the policy of placing detainees in prisons dispersed in the territory is condemned, as this is an additional punishment for their families, some of which may even constitute an infringement of Article 8 of the European Convention on Human Rights (right to respect for private and family life).

Points 30-37 continue to provide guidance to Member States on the situation of minors in prisons.

Thus, it is reiterated the importance of ensuring that children are treated in prison taking into account their superior interest, by separating adults from the mainstream, in order not to be exposed to the risks of abuse and violence or negative behavioral patterns, trying not to be deprived of specific care that such a vulnerable group needs, including during transfers of detainees, giving them the right to maintain contact with the family, unless there is a judgment to the contrary, and mentioning the need to create special teenage centers.

Life in the penitentiary is more difficult as minors do not have a life experience to help them identify hazards, so that without markers they become safe victims in the hands of "life-spanning" adults.

Each child should receive care, protection and all the necessary personal assistance - social, educational, vocational, psychological, medical and physical - which it may need depending on age, gender and personality, encouraging Member States to promote centers closed-school education to provide pedagogical and psychological support to minors, rather than resorting to deprivation of liberty.

Regular and meaningful contacts with parents, family and friends are encouraged through visits and correspondence, both to help the child not to feel ashamed, but also to identify possible harmful family environments in order to be able to act on them and subsequently release the minor and reintegration into the family, identifying problems and finding solutions.

It is reiterated the importance of paying full attention to minors in terms of their emotional and physical needs, and it is necessary to apply programs to prepare them in advance to return to their communities, to manage relationships with their families, in those situations where problems in the support family have been found, identifying opportunities for tuition and employment, as well as socio-economic status.

It has not been forgotten that there are situations where children whose parents are in custody are discriminated against by other members of society simply because they have their parents in custody, so that these children have to be monitored to strengthen social integration and build a fair and inclusive society.

This resolution recognizes the right of children to maintain direct contact with their detained parent and, at the same time, reiterates the right of the inmate to be a parent, considering, in this regard, that prisons should be provided with adequate childcare facilities, where they should be supervised by well-trained guards, social workers and volunteers from NGOs who can help children and their families during their visits to prisons.

In other words, the detainees' right to keep in touch with the family and to be present at important moments in the education of their children is recognized, thus protecting the interests of minors, but also the right of the family to keep in touch with the person imprisoned.

It is natural to think of this, especially since the family, especially children, should not be punished for the deeds of their parents, nor should they be subjected to the loss of a parent by being imprisoned and away from the family.

Another recommendation made by the European Parliament in the above-mentioned resolution is concerning detained persons in a Member State other than the State of residence which encounters more difficulties in maintaining contact with their families and it is necessary to have electronic communication facilities with families, to give them opportunities, even if less, to keep in touch with the family.

## Canadian Provisions

**II.** At Canadian level, the regulation of the fundamental rights and freedoms of persons is found in the Canadian Charter of Rights and Freedoms of 1982, which mentions fundamental rights, democratic rights, movement rights, legal rights and the right to equality for Canadian citizens.

It is worth noting that the protection of the rights mentioned in the Charter is ensured only in cases of violation of rights by state institutions, not in cases where citizens' rights are violated by other individuals or private institutions[6].

[6] https://www.chrc-ccdp.gc.ca/eng/content/human-rights-in-canada

Canada being a constitutional monarchy, consisting of 10 provinces, according to the Correctional Law and conditional release[7], a proper regime for the execution of sentences, so that detainees serving a prison sentence of 2 years or more are held in federal penitentiaries, while those serving prison sentences of less than 2 years remain in state detention centers.

The rights of detainees are also provided under the Correctional and Exempting Law[8], which includes the right of the imprisoned persons to keep in touch with children, the right to leave the penitentiary under escort or [9] to temporarily leave the penitentiary without escort, and the right to family visits without the use of barriers.

At the same time, in 1995, the Canadian Correctional Service, an institution responsible for overseeing the execution of punishment by the detainee and ensuring its re-socialization, implemented the Mother-Child Program, which allowed children under 4 years of age to remain with their mothers in the penitentiary permanently, while for those aged 4-6 the program provided the possibility of spending a half-hour program in their mother's company.

According to art. 71 of the Correctional and Exemplary Law, detained persons have the right to keep contact with the society, to receive visits and to make correspondence with family, friends, and other persons outside the penitentiary.

At the same time, the same normative act in art. 77 provides the particular rules applicable to imprisoned women as regards the application of specific programs for women as well as working groups with other women.

As a novelty and peculiarity of the Canadian system to European regulations, there is a system of volunteers in Canada that engages in the social recovery of detained persons, facilitating the keeping of links between detainees and their families as well as between parental detainees and their children.

The right to be visited by the family allows detainees to spend time with them for up to 72 hours inside the penitentiary.

The Canadian Correctional Service[10] plays a key role in the Canadian enforcement system, which, from the time the person is placed in prison (in the case of those serving the sentence in federal prisons), draws up a correctional plan based on the information provided by the detainee, police officers, courts, detainees' family and other detainees, as appropriate.

It can be noticed that in the Canadian system, the attempted remodeling behavior of the incarcerated individual is based on his individual supervision, both during and after punishment, for the purpose of liberating a balanced person into society that can reintegrate into system and in public life.

While there is a right in the Canadian state's legislation to the detainees' right to visit, correspondence and contact with family and close relatives, it is worth mentioning that the attempt to resocialize the detainee, both in society and in the family, relies heavily on oversight institutional behavior of the detainee, both by specialists and by volunteers, than on the support of family presence and contact.

What also needs to be mentioned is that the detainees' supervision system includes special provisions for female prisoners for the purpose of including them into programs and activities specific to the female nature.

A peculiarity in the Canadian law system is given by the existence of the population and the category of aborigines, which led to the introduction in the Correctional Law and conditional release of certain articles for this category, so that in Articles 70-84 the notion of aboriginal (as indian, inuit or metis) as well as the aboriginal community is defined.

It is foreseen that between the Minister of Public Security and the aboriginal communities, agreements can be concluded to provide specific corrective services to aboriginal detainees, such as the creation of special programs addressing the needs of aboriginal detainees.

At the same time, the legal rules regulate the fact that in those situations where an aboriginal detainee executes a sentence in federal jails and he demands transfer to a community prison, he may be granted this right.

In order to identify the needs of the aboriginal persons who were imprisoned, the National Aboriginal Advisory Commission was established, which advises the Community Correctional Service to identify the needs of aboriginal persons.

## Conclusion.

The attempt of the society to maintain a balance between its protection against the antisocial acts committed by the offenders who were later incarcerated and the need to reform those persons and to maintain their connection with their families and the outside environment of prison life is not easy to achieve.

However, the attempt continues to identify the needs of imprisoned persons and their families in different forms, either as a result of maintaining family-owned contact at a level that can bring behavioral and developmental benefits to those involved (the European system) or through continuous monitoring of the prisoner, both during and after the execution of the punishment (Canadian system), using the institution of volunteering, can only be necessary to maintain a functioning society, benefiting both the detainee and

[7] https://laws.justice.gc.ca/eng/acts/C-44.6/page-9.html#h-30.
[8] https://laws-lois.justice.gc.ca/eng/acts/C-44.6/page-9.html#h-31.
[9] https://laws-lois.justice.gc.ca/eng/acts/C-44.6/Corrections and Conditional Release Act, S.C. 1992,.
[10] https://www.csc-scc.gc.ca/correctional-process/002001-1000-eng.shtml.

the family in particular, as well as for the society of which the detainee and his family are in general.

From the analysis of the systems that were at the bottom of this paper, it can be concluded that a mixture of the two types could be beneficial, as maintaining the link between the detainee and the family can only have beneficial effects (in those situations where no disruptive elements are identified at the family level), the more so as the family should not be penalized for the offense committed by its member and isolated from it, but also the supervision of the detainee during the execution of the punishment and more, after the release, in order to ensure that he understood the consequences of his actions and changed, can only be necessary for the protection of the society and, why not, the person of the detainee.

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# THE LEGAL CONSEQUENCES OF THE CONSTITUTIONAL COURT'S DECISIONS IN THE CONTEXT OF THE LEGALITY PRINCIPLE OF THE CRIMINAL PROCEDURE

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**Abstract**

*The principle of legality of the criminal procedure is the established general rule according to which the criminal trial is carried out under the provisions stipulated by the law. In order to fully understand the application of the fundamental principle of legality of the criminal proceeding, it is necessary to clarify, on the one hand, the notion of "criminal procedural law" - a term that does not have a legal definition and, on the other hand, it is necessary to analyze the evolution of the concept referring to the source of criminal procedural law, in the current conventional context, as well as in the context of the Constitutional Court's jurisprudence. Ensuring the application of the criminal process' lawfulness is firstly achieved by the legislator's fulfillment of the obligation to clearly regulate the rules of conducting the criminal proceedings and other judicial proceedings in connection with a criminal case. However, the actual reality proves the existence of numerous legal provisions declared unconstitutional, the Constitutional Court's decisions being binding for both the legislator and the judicial bodies. Thus, the purpose of the research is to identify the consequence of the legislator's lack of intervention so that the stipulations declared unconstitutional would agree with the Constitution's provisions if it grants valences of some sources of law to the decisions of the Constitutional Court, if it transforms the Constitutional Court into a positive lawmaker or it just assigns the entire task of guaranteeing of the criminal process' lawfulness to the judicial bodies. In fact, although the nullity is the main procedural guarantee of the legality of the criminal trial, the consequences of the Constitutional Court's decisions raise many problems of unitary interpretation and application of the law even in this area, thus questioning the legality of the criminal process.*

**Keywords:** *the legality of the criminal trial, criminal procedural law, the effects of the Constitutional Court's decisions, sources of criminal procedural law, absolute and relative nullity*

## 1. Introduction

The legality of the criminal process is the fundamental principle governing the conduct of the entire criminal process, its incidence sights all phases of the criminal process: prosecution, preliminary chamber, judgment and enforcement of judgments.

The fundamental principle of legality is generally enshrined in the Romanian Constitution, in art. 1 para. (5) showing that, in Romania, the observance of the Constitution, its supremacy and the laws is compulsory, and in particular, as regards the criminal proceedings, in art. 2 of the Code of Criminal Procedure, according to which the criminal proceedings are carried out in accordance with the provisions prescribed by the law.

Starting from the general framework of the principle of legality of the criminal process, although the existence of a clear and predictable law-as a source of law, constitutes an imperative in this area, the notion of criminal procedural law does not know a legal definition, being imposed a detailed analysis of it in the context of the case-law of the Constitutional Court and the European Court of Human Rights.

In order to respect the principle of legality of the criminal process, it is mainly the legislature's task to lay down legal rules governing the conduct of the criminal proceedings, but, as any regulation of an activity, the law cannot capture in detail all the issues that will arise during the criminal process.

It also equates to the lack of a text of law and the assumption that there is a written law, but which does not meet the quality conditions.

In contrast to the field of criminal law when the lack of legal provision constitutes an impediment to the criminal liability of a person, the criminal process will not stop in the event of a lack of regulation of a particular procedural situation.

The inability of the legislator to provide in a text of law all situations which may be encountered in the conduct of the criminal proceedings or their respective regulatory provisions, leads to the exercise of obligations imposed on constitutional authorities or judicial bodies, precisely in order to comply with the principle of legality.

Thus, the exclusive competence to legislating, mainly attributed to the Parliament, is not discretionary, but is subject to scrutiny of the constitutionality of the Constitutional Court of Law. However, that intervention should not confer on the Constitutional Court legislative powers when the legislature has not fulfilled that obligation.

Despite the latter aspect, new rules of general binding criminal law have been established through the recent case-law of the Constitutional Court.

It remains to be determined whether, in those circumstances, the decisions of the Constitutional

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Court should be included in the notion of criminal procedural law, which is required to be analysed in the light of the case-law of the European Court of Human Rights, according to which the autonomous notion of ' law ' also includes jurisprudence, or if the decisions of the Constitutional Court acquire the nature of criminal procedural law sources.

The binding nature of the decisions of the Constitutional Court requires the adoption of one of the abovementioned solutions, although at this time, in the national legal order, in the concept of law, is not also included the compulsory case-law, and the doctrine is reserved in classifying the decisions of the Constitutional Tribunal as the sources of criminal procedural law.

The latter approach should be announced in the context of the evolution of the case-law of the Constitutional Tribunal, especially in the field of interpretative decisions, which, in certain specific cases, bear the valences of a true regulation.

In this legal context, the hardest task lies with the judicial bodies, as the main actors of the criminal process, who have an obligation to interpret the law in accordance with the principle of legality, to comply with the decisions of the Constitutional Court or, in the absence of the total laws or other rules of criminal procedural law, application of the analogue supplement.

It is therefore necessary to identify the legal pathways for carrying out the criminal liability activity of the persons who committed offences, by reconciling an imperfect law with the effects of the decisions of the Constitutional Court, when they appear nuances in fulfilling the obligations and observance of the legal competences of each of the two powers, the criminal process will be carried out in all cases, imperative under the principle of legality.

## 2. Criminal Procedural law

### 2.1. The notion of law

As a consequence of the fact that the conduct of the criminal proceedings is governed by the adage, '*the nulum judicium sine lege*', 'the repressive Courts must work only in the cases, in the form and, in the forms prescribed by law, avoiding and refusing any other process that does not bear the seal of legality, even if it were, in cases, more comfortable, propor and more rational. On the other hand, that principle requires the legislator to make a full and wise bundle of rules to ensure the proper conduct of the repressive action within the reach of repressive justice.'[1]

In applying the principle of legality, the conduct of the criminal process must take place in accordance with the provisions laid down by law, so the existence of a law and the application and compliance with the legal provisions is required.

There is no regulated definition of the notion of 'criminal procedural law', but relevant in this respect are the provisions of art. 173 of the Penal Code defining the notion of ' criminal law ' as any criminal provision contained in organic laws and emergency ordinances or other normative acts which, at the time of their adoption, had the power of law.

On the one hand, the determination of the meaning of 'criminal law' is only a starting point for the identification of the framework for applying the principle of legality of the criminal process, since the provisions of art. 173 of the Penal Code concern substantive rules of criminal law, and the conduct of the criminal proceedings takes place on the basis of procedural criminal law rules, in the latter case, in relation to the principle of legality of the criminal process, the notion of law being interpreted *lato sensu*. The difference between substantive and procedural law rules has been highlighted by the fact that, 'all the rules of law confering such a rights will constitute substantive rules, contrary to all the rules of their content, do not indicate only how the rights granted will be exercised and the formalities after which the entire activity leading to the realisation of the repressive justice will be carried out shall be rules of formal law (procedural provisions).'[2]

On the other hand, the conduct of the criminal process and other judicial proceedings involves the competition of both the judicial authorities and other parties or other persons in achieving its purpose, which implies the undertaking of numerous activities governed by secondary legislation, such as government decisions, orders or internal organisation regulations. The verification of compliance with the principle of legality of the criminal process is not limited to fully respecting only the provisions of the laws, but also by analysing the lower-level acts, without the power of law, but which come to detail the rules of procedural law compliance with the legal limits.

In this respect, in the literature of specialty[3] it has been shown that the compliance with the principle of legality is checked against all the rules governing an act, and not only in relation to a certain provision of law.

In the case-law of the Constitutional Court [4] as regards the notion of 'law', it was noted that the notion of law 'has several meanings according to the distinction between the formal or organic and material criteria.'

[1] I. Tanoviceanu, *Treaty of Law and Criminal Procedure*, vol. IV, Second edition of the course of law and criminal Procedure, reviewed and supplemented by V. Dongoroz and. A., typography, "The Judicial Courier", Bucharest, 1924, p. 35;

[2] *Idem*, p. 25;

[3] N. Volonciu, *Treaty of Criminal Procedure*, Vol. I, Peideia P.H., Bucharest, 1998, p. 83; V. Dongoroz etc., *New Criminal Procedure Code and previous Criminal Procedure Code*, Political P.H., Bucharest, 1969, apud. M. Udroiu, in M. Udroiu (coord.), *Code of Criminal Procedure. Commentary on articles*, ed. 2, C. H. Beck P.H., Bucharest, 2017, p. 6;

[4] Decision No. 146 of 25 March 2004 a Constitutional Court, Published in the Official Gazette of Romania, Part I, Nr. 416 of 10 May 2004;

Thus, a distinction is made between the existence of a law text according to the formal citerium (*lex scripta*) and the quality of the law – in relation to the substantive criterion (*lex certa*).

The formal criterion shall be assessed on the basis of the issuing body and the procedure to be complied with in the adoption of the law. According to art. 61 para. (1) the second sentence of the Constitution, the Parliament is (...) the only legislature of the country, further the provisions of art. 76, 77 and 78, stipulating that the law adopted by Parliament is subject to promulgation by the President of Romania and enters into force three days after its publication in the Official Gazette of Romania, part I, if no further date is foreseen in its content.

As regards the government's Ordinances, The Court held[5] that, 'by drafting such normative acts, the administrative body exercises a competence by award which, by its nature, falls within the legislative competence of Parliament. Therefore, the ordinance is not a law in a formal sense, but an administrative act of the law, assimilated to it by the effects that it produces, while respecting the substantive criterion.'

Next, the analysis of the existence of a law from the point of view of the substantive criterion relates to the subject matter of the norm, namely the nature of regulated social relations. These conditions add to the clarity and accessibility of the text of law, the European Court of Human Rights, in its case-law[6] showing that there is not enough the existence of a procedural legal rule contained in laws, ordinances, Government emergency ordinances, in international conventions and treaties to which Romania is part or other acts regulating a particular activity, but the notion of law incorporates the right of origin both legislative and jurisprudential and involves some qualitative conditions, inter alia those of accessibility and predictability.

For the full understanding of the substantive nature of the law, the relevant considerations are the recitals of decision No. 600 of 9th of November 2005 of the Constitutional Court[7] by which, concerning the concept of 'law', the Court held that, 'by definition, the law, as a legal act of power, is unilateral, giving expression exclusively to the will of the legislature, whose content and form are determined by the need to regulate a particular area of social relations and its specificities. '

The condition of accessibility of the law is fulfilled through the provision of art. 10 of Law No. 24 of 27 March 2000 to the fact that, with a view to their entry into force, the laws and other normative acts adopted by Parliament, the ordinances and judgments of the Government, the normative acts of the autonomous administrative authorities, as well as the orders, the instructions and other normative acts issued by the Central public administration bodies shall be published in the Official Gazette of Romania, part I.

It is therefore necessary to give the person the opportunity to acknowledge the content of the legal norm. By publishing it in the Official Gazette of Romania, the law fulfils the the requirement of accessibility, in the same vein as the European Court of Human Rights in in the cause Rotaru v. Romania, judgment of 29 March 2000, paragraph 54.

As far as secondary legislation is concerned, the condition of accessibility is achieved by bringing it to public knowledge, for example, by publishing on the websites of the institutions, and that the fulfilment of that condition is established in concrete, in relation to each subject and the circumstances of the case.

The predictability of the law provision presupposes that it must be sufficiently clear and precise to be applied.

In this respect, according to art. 7 para. (4) of Law No. 24 of 27 March 2000 on the rules of legislative technique for the drafting of normative acts, the legislative text must be formulated clearly, fluently and intelligible, without syntactic difficulties and obscure or equivocal passages. No affective load terms are used. The form and aesthetics of the expression must not prejudice the legal style, accuracy and clarity of the provisions.

With regard to the accessibility and predictability of the law, the Constitutional Court noted[8] that 'one of the requirements of the principle of compliance with laws relates to the quality of normative acts and that, in principle, any normative act must fulfil certain qualitative conditions, including predictability, which presupposes that it must be sufficiently clear and precise to be applied. Thus, the wording with sufficient precision of the normative act allows the persons concerned, who may, if necessary, appeal to the advice of a specialist, to provide a reasonable measure, in the circumstances of the case, of the consequences which may result from an determined act . Concerning the same law-quality requirements, the guarantee of the principle of legality, the European Court of Human Rights, by judgments of 4 May 2000, 25 January 2007, 24 May 2007 and 5 January 2010, rendered in the cases Rotaru v. Romania ( Paragraph 52), Sissanis v. Romania (paragraph 66), Dragotoniu and Militaru-Pidhorni v. Romania (paragraph 34) and Beyeler v. Italy (paragraph 109), made it compulsory to ensure these laws quality standards as guarantee of the principle of legality laid down in article 7 of the

[5] *Ibidem;*

[6] ECHR, judgment in Dragotoniu and Militaru-Pidhorni v. Romania, 24 May 2007, paragraph 34 and 35; ECHR, judgment in Cantoni v French, 15 November 1996, paragraph 29; Judgment of the ECHR, Coëme and Others v. Belgium, 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, paragraph 145, ECHR 2000-VII and E.K. v. Turkey, No. 28496/95, paragraph 51, 7 February 2002;

[7] Decision No. 600 of November 9, 2005 of the Constitutional Court, Published in the Official Gazette Nr. 1060, Part I, of 26 November 2005;

[8] Decision no. 1 of the 10th of January 2014 of the Constitutional Court, Publised in The Official Gazzette of Romania, Part I, no. 123 of the 19th of February 2014;

Convention for the Protection of Human rights and fundamental freedoms.

Thus, by judgment in Sissanis v. Romania (paragraph 66), the European Court held that the phrase <prescribed by the law>requires the contested measure to have a basis in national law, but also seeks the quality of the law in question: it should indeed be accessible to the vigilante and predictability in relation to its effects.

It was also held that, in order for the law to satisfy the requirement of predictability, it must state with sufficient clarity the extent and modalities of the exercise of the discretion of the authorities in that field, taking into account the aimed legitimate purpose to provide the person with adequate protection against the arbitrary.

In addition, it has been held that it cannot be regarded as <law> merely a rule set out with sufficient precision, in order to enable the citizen to control his conduct, by appealing in need of expert advice on the matter, he must be able to provide, to a reasonable extent, to the circumstances of the case, the consequences which may result from a particular act. '

Moreover, the European Court of Human Rights has shown[9] that the significance of the notion of predictability depends largely on the context of the text, the area it covers, and the number and quality of its recipients.

The predictability of the law does not preclude the person concerned from having to resort to good advice in order to assess, at a reasonable level in the circumstances of the case, the consequences that might arise from a certain action[10]. This usually happens with professionals, accustomed to proving a great prudence in the exercise of their profession. It can also be expected from them to pay particular attention to the assessment of the risks involved[11].

Consequently, as a normative legal act, in general, is defined both by form and by content, the law in a broad sense, thus including assimilated acts, is the result of combining the formal criterion with that material.[12]

### 2.2. International conventions and treaties

The conventions and international treaties to which Romania is a party are included in the notion of 'law' in this regard being the provisions of art. 11 of the Romanian Constitution, which establishes that the treaties ratified by Parliament, according to the law, form part of national law, and if a treaty to which Romania is to become a party contains provisions contrary to the Constitution, the ratification can take place only after the revision of the Constitution.

Also, according to the provisions of art. 20 of the Constitution, the constitutional provisions on citizens' rights and freedoms will be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the pacts and other treaties to which Romania is a party. If there are inconsistencies between the pacts and the treaties on fundamental human rights, to which Romania is a party, and domestic laws, they have priority over international regulations, unless the constitution or national laws Contain more favourable provisions.

### 2.3. Compulsory case-law

Decisions given in the appeal in the interest of the law and the decisions rendered by the Panel on the untying of legal matters have binding force for the courts from the date of publication of decisions in the Official Gazette of Romania.

According to art. 474 para. (4) of the Code of Criminal Procedure, the unlinking of the matters of legal proceedings is compulsory for the courts from the date of publication of the decision in the Official Gazette of Romania, part I.

Also, as regards the decisions of the High Court of Cassation and Justice, pronounced by the panel for the untying of legal matters in criminal matters, according to art. 477 para. (3) of the Code of Criminal Procedure, the unlinking of matters of law is compulsory for courts from the date of publication of the decision in the Official Gazette of Romania, part I.

However, the judiciary cannot enter the field of legislative power.

In this respect, the Constitutional Court has held[13] that it has no power to engage in the field of law-making and criminal policy of the State, any contrary attitude constituting an interference with the jurisdiction of that constitutional authority. The Court acknowledges that, in that area, the legislature enjoys a rather large margin of discretion, given that it is in a position which allows it to assess, according to a number of criteria, the need for a particular criminal policy.

Therefore, on the basis of the principle of separation of powers in the state, the High Court of Cassation and Justice has no competence in the field of law.

This issue is relevant in the present case, given that the decisions of the High Court of Cassation and Justice on appeal in the interests of the law or for the untying of matters of law in criminal matters may also concern a question of procedural low. The High Court of Cassation and Justice has held[14] in this regard the following: 'the question of which the untying is subject

[9] ECHR, Groppera Radio AG and Others v. Switzerland of 28 March 1990, paragraph 68;
[10] ECHR, Tolstoy Miloslavsky v. The United Kingdom of Great Britain, July 13, 1995, paragraph 37;
[11] ECHR, Cantoni v. France, 22 June 2000, paragraph 29;
[12] Decision no. 146 of 25 March 2004 of the Constitutional Court, Published in the Official Gazette of Romania, Part I, no. 416 of May 10, 2004;
[13] Decision no. 405 of 15 June 2016 of the Constitutional Court, Published in the Official Gazette, Part I, no.517 of 08 July 2016; Decision no.629 of 4 November 2014 of the Constitutional Court, Published in the Official Gazette of Romania, Part I, no.932 of 21 December 2014;
[14] Decision No. 7 of 17 April 2015 of the Panel for the untying of matters of law in criminal matters of the High Court of Cassation and Justice, Published in the Official Gazette of Romania, Part I, No. 359 of 25 May 2015;

to the examination of the high Courts of Cassation and Justice must, as a rule, concern a matter of substantive law which depends on the substantive settlement of the case, which may only, as an exception, concern a procedural problem, i.e. to the extent that the solution given to it is significantly passed on to the settlement of the fund.'

Regarding the absence of the law of a judgment of the High Court given on appeal in the interests of the law or for the untying of matters of law, it was stated that[15] că the 'Decision No 2 of April 14, 2014 of the Supreme Court is not a normative act, in the meaning given to this notions of law no. 24/2000, republished, with subsequent amendments and additions, which in art. 11, makes a limitative enumeration of issuers of such acts, which does not include the High Court of Cassation and Justice by judgments given in the uniform interpretation and application of the law.

On the other hand, the judgments of the High Court on appeal in the interest of the law or for the untying of matters of law cannot be regarded as statutory laws, in the meaning of art. 173, the final sentence of the Penal Code, and, in the light of the fact that it does not regulate social defence relationships, does not establish rules of conduct and rules of crimination or which relate to criminal liability, its bases and limitations, but reflects only a interpretation of such provisions contained in normative acts drawn up and adopted in accordance with the legislative technical procedure applicable to the matter. In the same context, accepting the idea that the interpretative solutions rendered by the Supreme Court by prior judgments for the untying of matters of law and decisions given in appeal in the interest of the law are included in the sphere of criminal law would amount to a violation of the principle of separation of powers in the state by the judicial authority taking over the powers of the legislative power with the consequence of verifying the constitutionality of those judgments by the Court of Constitutional law. '

**2.4. Case-law**

In the Romanian criminal law, jurisprudence does not constitute a source of law, in this regard being also the decision no. 23 of 20 January 2016 of the Constitutional Court[16], whereby the Constitutional Court held that, in the continental system, the case-law does not constitute a source of law so that the meaning of a rule can be clarified in that way, because, in such a case, the judge would become a lawgiver.

However, this view must be nuanced with the case-law of the European Court of Human Rights[17], according to which the notion of ' law ', within the meaning of the EU Convention for the Protection of human rights and fundamental freedoms, incorporates the right of origin both legislative and jurisprudential.

In order for the case-law to equate to the acceptance of the European Court of Human Rights with a law, it must undergo a stage of crystallization leading to the existence of a constant jurisprudence, formed over a large period of time, so as to enable the citizen to reasonably expect a certain interpretation of the rules, taking into account the developments in practice.

The analysis of jurisprudence as a source of law, in the light of the jurisprudence of the European Court of Human Rights, was made on the occasion of establishing the existence of a more favourable criminal law as a result of decision No. 2/2014 of the High Court of Cassation and Justice (by which it was decided that in the application of article 5 of the Penal Code, the limitation of criminal liability is an autonomous institution for the institution of the penalty) and subsequently to the decision of the Constitutional Court No. 265/2014 (by which it has been held that the provisions of article 5 of the Penal Code are constitutional in so far as they do not allow the combination of the provisions of successive laws in the establishment and enforcement of more favourable criminal law).

Thus, the High Court of Cassation and Justice recalled[18] that ' it has been held in principle by the Strasbourg court that the notion <law>in the light of the European Convention encompass the right of origin both legislative and jurisprudential, but decision No. 2 of 14 April 2014 handed down by the High Court of Cassation and Justice-the Assembly for the untying of matters of law in criminal matters, does not subdue to this notion, constituting only a stage in the complex process of crystallization of a case of jurisprudences consistent with the determination and enforcement of more favourable criminal law after the entry into force on 1 February 2014 of the new Penal Code, adopted by Law No. 286/2009.

In other words, a single judgment, either in the untying of a matter of law by the Supreme Court, in accomplishing its powers of interpretation and uniform application of the law, does not amount to the European Court's acceptance of a law, a concept which implies

[15] Decision No. 21/2014 of the High Court of Cassation and Justice-the panel for the untying of matters of law in Criminal Matters, Published in the Official Gazette of Romania, Part I No. 829 of 13 November 2014, *which established that the provisions of article 5 para. 1 of the Penal Code must be interpreted, including the limitation of criminal liability, in the sense that the more favourable criminal law is applicable to offences committed before 1 February 2014 which have not yet been definitively judged, in accordance with decision No. 265/2014 of the Constitutional Court;*

[16] Decision No. 23 of 20 January 2016 of the Constitutional Court, Published in the Official Gazette of Romania, Part I, no 240 of 31 March 2016;

[17] ECHR, Kokkinakis v. Greece of 25 May 1993; ECHR, judgment of S.W. and C.R. v. The United Kingdom of 22 November 1995; ECHR, judgment in Cantoni v. Franceadin 15 November 1996; ECHR, judgment of the E.K. v Turciadin 7 February 2002; ECHR, judgment in Pessino v Franceadin October 10, 2006);

[18] Decision no. 21/2014 of the High Court of Cassation and Justice - The Criminal Law Enforcement Unit, Published in the Official Gazette, Part I no. 829 of November 13, 2014;

the existence of a constant jurisprudential guidance, formed over a long period of time.

However, the requirement of consistent case-law has not been met with regard to the determination and application of milder criminal law by national courts after 1 February 2014, given the very short period of time, only three months, pending the publication of the Constitutional Court's Decision no. 265 of May 6, 2014, and the different interpretations made in judicial practice for the purpose of assessing criminal law more favorably either globally or autonomously, especially as there was no unitary view of the latter in the latter as autonomous of different criminal law institutions.

In those circumstances, it cannot be the shaping of a constant case-law either in the application of the more favourable criminal laws in matters of criminal prescription in the period of only 20 days following the publication on 30 April 2014 of the judgment of the Supreme Court of Untying this issue of law until the end of its effects on 20 May 2014, when the interpretation in accordance with the Constitution of the provisions of art. 5 of the Penal Code became of immediate application and general compulsory. '

In the light of the case-law of the European Court of Human Rights, as has been mentioned above, the autonomous notion of ' legislation ' also includes jurisprudence, but this case-law must be constant. The decision-making function for the courts serves precisely to remove the doubts that may exist with regard to the interpretation of the rules, taking into account the developments in the daily practice, provided that the result is coherent with the substance of the offence and clearly foreseeable [19].

Consequently, it can reasonably be argued that a jurisprudential rule, as it is respected by the majority of the internal courts, is clear and accessible and that its application in the present case is foreseeable[20], it can be considered, 'law' within the meaning of Jurisprudence of the European Court of Human Rights.

## 3. Deciziile Curţii Constituţionale și efectul general obligatoriu al acestora

According to the provisions of art. 147 para. (4) of the Constitution of Romania, from the date of publication, the decisions of the Constitutional Court are generally binding and have power only for the future. The Court[21] has ruled, with a value of principle, that the compulsory force accompanying the judicial Acts, so also the decisions of the Constitutional Court, attache not only to the device, but also to the considerations which it supports. Thus, it was noted that both the recitals and the device of its decisions are generally binding and are imposed with the same force on all the subjects of law.

Although its decisions are generally binding, the Constitutional Court has no competence in the field of law-making. According to art. 2 para. (3) of Law No. 47/1992, the Constitutional Court shall only pronounce on the constitutionality of the acts in respect of which it was seised, without being able to amend or supplement the provisions subject to scrutiny. In its case-law[22], it held that Parliament is free to decide on the state's criminal policy, any opposite attitude constituting an interference with the jurisdiction of that constitutional authority. While, in principle, Parliament enjoys exclusive competence in regulating measures relating to the State's criminal policy, that competence is not absolute in the sense of excluding the exercise of constitutionality control over the measures adopted.

The principle of legality is naturally complemented by the principle of separation of powers in the state, the Constitutional Court having no legislative powers.

It must not be understood from that conclusion that the decisions analysing the constitutionality of a legal provision do not affect the rule of law. As previously mentioned, they are compulsory from the date of publication in the Official Gazette of Romania, and the application and interpretation of the provisions laid down by law must be carried out only in accordance with those which are made by simple decisions or interpretative finding of unconstitutionality.

Therefore, their contribution, in our particular case, in criminal procedural matters, in compliance with the limits of the principle of legality, shall be retreated to the legal provisions analysed, already existing, by excluding the non-constitutional norm from the Legal order or by granting the constitutional meaning.

Although this aspect proves to be clearly established, the general binding effect of the decisions of the Constitutional Tribunal continues to exist by imposing rules of law on the nature of criminal procedural law.

The establishment of a rule of criminal procedural conduct both by the recitals of decisions rejecting the exceptions of unconstitutionality and by the removal of unconstitutional legal rules in force, but especially by the imperative stipulation of a certain positive conduct exceeding the scope of the rule which formed the subject-matter of the exception of unconstitutionality – the aspect encountered in the interpretative decisions,

[19] ECHR, the decision of S.W. v. the United Kingdom of Great Britain, 22 November 1995, Series A no. 335-B, p. 41, paragraph 36;

[20] ECHR, Lupas and others v. Romania of 14 December 2006, paragraph 69;

[21] Decision of the Plenum of the Constitutional Court no. 1/1995 regarding the mandatory of its decisions under the constitutionality control, Published in the Official Gazette of Romania, Part I, no. 16 of 26 January 1995; Decision no. 1.415 of November 4, 2009 of the Constitutional Court,, Published in the Official Gazette of Romania, Part I, no. 796 of 23 November 2009 and Decision no. 414 of April 14, 2010 of the Constitutional Court, Published in the Official Gazette of Romania, Part I, no. 291 of May 4, 2010;

[22] Decision no. 405 of 15 June 2016 of the Constitutional Court, Published in the Official Gazette, Part I, no. 517 of July 8, 2016; Decision no. 629 of 4 November 2014 of the Constitutional Court, Published in the Official Gazette of Romania, Part I, no. 932 of December 21, 2014;

gives to the decisions of the Constitutional Court the nature of sourses of procedural, criminal law[23].

This is the direct consequence of the general binding effect of the decisions of the Constitutional Court and the failure of the legislature to agree unconstitutional provisions with the provisions of the Constitution, within 45 days after publication of the decision, thus creating a legislative void.

However, the passiveness of the legislature does not take effect in the event of decisions rejecting unconstitutionality exceptions-when the legal rules continue to enjoy the presumption of constitutionality.

The provisions of art. 147 para. (4) of the Constitution of Romania, which establishes the binding of the general effect, do not distinguish between decisions which reveal the unconstitutionality of a legal provision and decisions rejecting unconstitutionality exceptions. A well-known rule of interpretation is that „where the law does not distinguish, neither should we distinguish „(*ubi lex non distinguist, nec nos distinguere debemus*). Perfectly applicable in the present case, all the decisions of the Constitutional Tribunal, without distinguishing whether or not the unconstitutionality of a law or ordinance or a provision of a law or ordinance have been established, are general mandatory.

In the case of decisions establishing the unconstitutionality of a text by law, by virtue of the negative legislature, the Constitutional Court excludes the rules contrary to constitutional provisions from the legal order and is fully justified the effect generally binding *erga omnes*, without the possibility of a text being both unconstitutional and constitutional in the light of the subjects of law.

The general binding effects of erga omnes are a natural consequence of the constitutional provision found in art. 147 para. (1) stating that the provisions of the laws and ordinances in force and those of the regulations, as established as unconstitutional, cease to be legal effects at 45 days after the publication of the decision of the Constitutional Court if, in this The Parliament or the Government, as the case may be, do not agree the unconstitutional provisions with the provisions of the Constitution. During that period, the provisions established as unconstitutional are suspended by law.

As regards the decisions rejecting unconstitutionality exceptions, there is obviously no such effect of the suspension of law and, subsequently, the termination of legal effects. By the time the finding of its unconstitutionality is found, any rule is presumed to conform to the provisions of the fundamental law. However, as previously mentioned, the Romanian Constitution confers a generally binding effect on all decisions of the Constitutional Court. As a symmetry of the consequences of the finding of the unconstitutionality of legal provisions, the general binding effect is manifested in the case of decisions rejecting the exception of unconstitutionality by maintaining the obligation of application, in the rules of law considered constitutional within the limits of the control carried out. [24]

However, in that case, the determination of the framework of the binding general effect must be carried out in accordance with the authority of the court ruling of the judicial decision, the general binding effect being significantly diminished.

Therefore, we note that the rules on Civil Procedure, which are compatible with the nature of the proceedings before the Constitutional Tribunal, confer on the authority of the judgment, including the decision rejecting the exception of unconstitutionality, but only in Relation to a new exception of unconstitutionality raised by the same parties, in the same case and relating to the same legal provisions, for the same reasons. As such, the generally binding effect, is limited in this case, to the question cut with the authority of work judged. The analysis of the Constitutional Court is circumscribing the criticality and factual and legal situation existing in the case in which the exception was lifted. At the same time, the interpretation of the provisions of art. 29 para. (3) of Law No. 47/1992 on the organisation and functioning of the Constitutional Court, it is apparent that the provisions which have not been found unconstitutional by an earlier decision of the Constitutional Court may be subject to the exception. Therefore, the general binding effect of the decisions establishing the constitutionality of the legal provisions criticized should not be absoluted. Under no circumstances will such a decision be able to be opposed to the power of work judged in another case or even in the same procedural framework, but for other reasons.

By Decision No. 169/1991[25] The Constitutional Court held that, the same parties and for the same reasons cannot reiterate the exception of unconstitutionality, since the authority of the work on trial would be infringed. But in another process the exception can be reiterated, thus enabling the Constitutional Court to reanalyze the same issue of unconstitutionality, as a result of invoking new grounds or of intervening other new elements, which amend the case-law of the court. ' The consequence of the elements of differentiation of law and of fact between the cases in which the exceptions of unconstitutionality are raised, the general binding effect of the decision establishing the constitutionality of a legal provision will operate only *inter partes*.

However, although a decision rejecting the exception of unconstitutionality enjoys the authority of the Court of Justice, that aspect is recognised only in respect of the considerations which support and explain the solution adopted (decisive considerations), As well as (...) of those who have been debated in the process

[23] F. Streteanu, D. Nițu, *Criminal Law. General Part, Vol. I*, Universul Juridic P.H., Bucharest, 2014, p. 75;
[24] I. Morar, M. Constantinescu, *The Constitutional Court of Romania*, Albatros P.H., Bucharest, 1997, p. 162;
[25] Published in the Official Gazette of Romania, Part I, no.151 of 12 April 2000;

(decision-making considerations). The Working authority shall not concern the indifferent considerations, which may be lacking in the content of the reasoning, without it leading to the lack of foundation of the judgment.' [26]

Therefore, we do not exclude *de plano* the possibility of establishing in the recitals of decisions rejecting exceptions to non-constitutionality of general procedural law rules, and not strictly limited to the cause of the judgment, which, at the same time, constitutes decisive considerations supporting the given solution and thus the general binding effect imposed on all legal subjects.

In the case of interpretative decisions, the Constitutional Court establishes the constitutional interpetation of a text of law, thus saving the legal provision from its wholly removal from the legal order.

However, there are precedents when the constitutionality control has been adopted by the interpretative powers of judicial bodies, but also of positive legislating powers. By imposing a constitutional interpretation mechanism, the Constitutional Court excludes from application a certain procedural rule of law in a given interpretation or may determine its constitutional meaning even by effectively adding to the text of law of new rules of law, in order to confer to the rule a constitutional meaning.

If the limitation of the application of a text of law capable of several interpretations, by establishing its constitutional meaning, falls within the exercise of the powers of the Constitutional Tribunal's negative legislature, the same cannot be stated in establishing constitutional interpretation by adding new rules of law. In the latter case, the nature of the legal source of the decisions of the Constitutional Tribunal is evident.

## 4. Effects of Constitutional Court decisions in criminal proceedings – sources of criminal procedural law on invalidity

'The first consequence of the principle of legality is absolute and legal invalidity (Ope Legis), of all acts carried out not in conformity with or contrary to the positive rules of Criminal Procedure law.'[27]

The Constitutional Court noted [28] that, 'the nulities of procedural and legal acts occupy an important place in the sphere of collateral ensuring the effectiveness of the principle of legality of the criminal process and the principle of the finding of truth, being designed to remove infringements of the procedural rules which intervened on the occasion of the establishment of a procedural act or of the proceeding to the fulfilment of a legal act and the negative consequences which those infringements have caused in the criminal proceedings.'

The matter of nullity has been reformed by the current regulation, being limited in cases of absolute nullity, with the excluding from the absolute nulities of non-compliance with the provisions on referral to the court, the conducting of the investigation of social responsibility for minors, material competence and the quality of the person of the Court superior to the competent legal authority, as well as the material competence and the quality of the person of the criminal prosecution body and the attenuated sanctioning thereof by the establishment of deadlines to which it may be invoked, as a consequence of the regulation of the preliminary chamber. As regards the exclusion from absolute nulities of infringements of the provisions relating to substantive jurisdiction and the quality of the person of the criminal prosecution body, in the doctrine[29] it was shown that it seeks to avoid exceeding the duration of the reasonable grounds for resolving the cases, the possible harm caused by the conduct of judicial research.

Furthermore, as regards the relative nulities, the relevant is to eliminate the possibility of the judge or court to invoke, on its own motion, the relative nulities and to take them into account at any stage of the process, except in breach of the rules of Material competence or the quality of the person, where the judgment was carried out by a court superior to the competent legal authority and the irregularity of the procedure for the citation of a party.

In the absence of a clearly defined purpose by the legislator and on the basis of the fundamental principle of legality, the Constitutional Court has penalised some of the amendments adopted in matters of nullity, in that regard by stating[30] regarding the provisions of art. 281 para. (1) lit. (b) of the Code of Criminal Procedure, that the legislative solution contained in those provisions, which does not govern in the category of absolute nulities, breaches of the provisions relating to material competence and the quality of the person of the Criminal prosecution is unconstitutional.

The consequence of the decision of the Constitutional Court, definitive and generally binding, is to sanction the absolute nulity of non-compliance with the provisions regulating the substantive competence and the quality of the person of the criminal prosecution body . Although it can be argued that the decision of the Constitutional Court has not been dictated by procedural law, but has established the constitutional meaning of the provisions of art. 281 para. (1) lit. b) of the Code of Criminal Procedure, we

[26] The Decision no. 554 of the 19th of September 2017 of the Constitutional Court, Published in The Official Gazette of Romania, Part I, no. 1013 of the 21 of December 2017;

[27] I. Tanoviceanu, *op.cit.*, p. 35;

[28] The Decision no. 554 of the 19th of September 2017 of the Constitutional Court, Published in The Official Gazette of Romania, Part I, no. 1013 of the 21 of December 2017;

[29] C. Ghigheci, The principles of the criminal trial in The Criminal Procedure Code, Universul Juridic P.H., Bucharest 2014, p.37;

[30] Decision no. 302/04 May 2017 of The Constitutional Court, Published in The Official Gazette of Romania, Part I, no. 556 of the 17 of July 2017;

cannot omit the fact that the provisions of art. 281 para. (1) lit. (b) of The Code of Criminal Procedure have a clear and strictly delimited content to the material competence and the quality of the person of the Superior Court, and is evident the intention of the legislator to express the removal from the absolute nulity of the infringement of the rules on material competence and the quality of the person of the criminal prosecution body.

An interpretative decision is likely to intervene if the legal norm has several interpretations, one of which is unconstitutional, the Constitutional Court rescuing the provision of law from its inapplicability by preserving the constitutional meaning.

In the present case, we note that the provisions of art. 281 para. (1) lit. b) of the Code of Criminal Procedure, only by an interpretation per a contrario, exclude from the category of absolute nulities the infringements of the provisions relating to material competence and the quality of the person of the criminal prosecution body. Although the latter interpretation was penalised by decision No. 302/04.05.2017 of the Constitutional Court, the direct effect is to establish a new case of absolute nullity, unregulated by law, so of a new rule of criminal procedural law.

Also, by Decision No. 554/2017 the Constitutional Court[31] upheld the exception of unconstitutionality and found that the legislative solution contained in the provisions of art. 282 para. (2) of the Code of Criminal Procedure, which does not allow for the invocation of the relative nullity, is unconstitutional. According to art. 282 para. (2) of the Code of Criminal Procedure, the relative nulity may be invoked by the prosecutor, the suspect, the defendant, the other parties or the injured person, where there is a procedural interest in the breach of the legal provision violated. In that case, the exclusion of the possibility of the judge and the Court of Justice to invoke the relative nulity is apparent from the logical interpretation – per a contrario of the provision which formed the subject-matter of the exception of unconstitutionality.

Both as a result of the fact that in the case of interpretative decisions the legal provision does not cease to have legal effects at 45 days after the publication of the decision of the Constitutional Court if, within that period, the Parliament or the Government, as the case may be, do not put in agreement the unconstitutional provisions to the provisions of the Constitution, but it continues to produce effects in the constitutional sense established and as a result of the general binding effect, by Decision No. 554/19.09. 2017 the Constitutional Tribunal, shall be granted directly to the judge and to the Court of Justice to invoke the relative nulity, although this is not governed by law.

In other words, the Constitutional Court does not remove from application a provision of a law, on the basis of its duties as a negative legislature, is not confined to preserving the constitutional meaning of the legal norm, but penalises the lack of regulation by the establishment of new rules of criminal procedural law, thus constituting a genuine source of law.

It should be pointed out that the object of the exception of unconstitutionality may only form a provision of a law, and not its absence, by decisions given to the Constitutional Court not having jurisdiction to amend or supplement the provisions subject to Control.

Moreover, with regard to the establishment of the constitutional meaning, it should be noted that the reasoning per a contrario, by itself, does not give the legal norm more meanings, but on the contrary, limits the applicability of a provision, without extended to unforeseen cases of law.[32]

Although an intrinsic issue of constitutionality is not identified in the aforementioned legal provisions, but only a lack of regulation, and the intervention of the Constitutional Court does not find it justified, we nevertheless consider that the solutions arranged on the merits of the case are in total agreement with the principle of legality of the criminal process, although the legislative powers are the legal power and the interpretation and enforcement of the law is incumbent upon judicial bodies.

In this context, the granting of the character of the source of criminal procedural law to the decisions of the Constitutional Court proves to be an imperative, in this way, the conduct of the criminal process taking place predictably, the consequence that according to art. 147 para. (4) of the Constitution of Romania, from the date of publication in the Official Gazette of Romania, the decisions of the Constitutional Court are generally binding.

That assertion is fully valid in the cases analysed, the sanction which arises in the event of non-compliance with the provisions relating to the jurisdiction of the material and the quality of the person of the criminal prosecution body and the possibility of the judge or the Court of Justice to invoke the relative nulity of its own motion.

However, the task of integrating and applying the new rule of criminal procedural law established by the decisions of the Constitutional Tribunal in the conduct of the criminal proceedings lies with the judicial bodies, without there being any rules for the application of the mandatory character .

Thus, the provisions of art. 281 para. (3) and (4) of the Code of Criminal Procedure, lay down deadlines in which or until absolute nulity can be invoked, depending on the time of the process in which it intervenes.

[31] The Decision no. 554/19 September 2017 of the Constitutional Court, Published in the Official Gazette of Romania, Part I, no.1013/21.December 2017;

[32] I. Neagu, *A Criminal Procedure Treaty, General part, second edition*, Universul Juridic P.H., Bucharest,2010, p. 57;

It is concluded from the economy of the rules of nullity that the legislature expressly limited the possibility of invoking absolute nullity in the criminal prosecution phase after the preliminary chamber procedure was concluded. According to art. 281 para. (4) lit. (a) the Code of Criminal Procedure breaches of the provisions sanctioned with absolute nullity which may intervene in the criminal prosecution phase (set out in article 281 para. (1) lit. e) and F):

The presence of the suspect or defendant, when his participation is obligatory according to the law; the assisting by the lawyer of the suspect or defendant and the other parties, where the assistance is obligatory must therefore be invoked until the procedure is concluded in the preliminary chamber, if the infringement intervened during the criminal prosecution or in the preliminary chamber procedure.

On the other hand, the cases of absolute nullity which may interfere with the preliminary chamber and Judgment (referred to in article 281 para. (1) lit. A)-D): Composition of the trial panel; the substantive competence and personal competence of the courts, when the judgment was carried out by a court lower than the competent legal authority; advertising of the court hearing; the prosecutor's participation, when his participation is compulsory according to the law may be invoked in any state of the process.

Although the decision of the Constitutional Court No. 302/04.05.2017 concerns the provisions of art. 281 para. (1) lit. (b) of the Code of Criminal Procedure, the infringement of which may be invoked in any state of the criminal proceedings, in determining the period up to which the infringement of the provisions relating to material competence may be invoked and the quality of the person of the Prosecution cannot omit the rationale of the limitation of the allegation of absolute nulliity according to the procedural phase in which the infringement took place.

At the same time, the provisions of art. 282 para. (2) and (3) of the Code of Criminal Procedure, govern the deadlines to which the relative nulity may be invoked, without there being a legal provision at present to stipulate whether the judge or court is bound by those deadlines following the decision of the Constitutional Court No 554/19.09. 2017 through which was directly awarded to the judge, namely the Court of Justice, to invoke the relative nulity.

We are therefore witnessing the creation of a vicious circle in which the decisions of the Constitutional Court become sources of criminal procedural law by establishing rules of law, in the case of a legislative loophole inconsistent with constitutional principles, rules such as cover the legislative void but which generate new legislative loopholes by the lack of legal rules governing the application of the new rules of criminal procedural law.

In this situation, it is up to the judicial bodies to interpret the law by analogy or application of the analogue supplement, without being able to invoke the lack of legal provision in the conduct of the criminal proceedings. 'The activity leading to the realisation of justice repressive must necessarily follow its course and reach the end. The law of Criminal Procedure disciplines this activity, but in the course of its conduct may arise exceptional situations, which have escaped the legislature's provision and are therefore not governed by the law. The silence of the law does not dispense with the interpreter to settle the new situations, so the repressive activity would remain suspended and condemned to abandon.

While the interpretation of the substantive criminal law when it finds that the law is silent, absolses and terminates the prosecution, the interpreter of criminal procedural law, has to make the law speak even when it is silent, because it owes the action repressive to the end.'[33]

In this respect, in the doctrine it was shown that 'then, when the gaps in the criminal Procedure Law cannot be fulfilled by an extensive interpretation, it will necessarily have to resort to the analogue supplement.

For this it will be sought in the law of Criminal Procedure if there is no express provision regulating in another matter a situation or a similar report. If there is such a provision then the completion of the gap by analogy may be accepted if we encounter the same conditions as they make interpretation possible by analogy.'[34]

Application of the interpretation to the case in question, in relation to the reason for the imposition of the deadlines for invoking absolute nullity, namely the limitation of the possibility to invoke infringements of the provisions sanctioned with absolute nullity in the follow-up phase following the preliminary chamber procedure, invoking the infringement of the provisions relating to material competence and the quality of the person of the criminal prosecution body will not be able to take place in any state of the process, but only until conclusion of the procedure in the preliminary chamber, according to art. 281 para. (4) lit. A) of the Code of Criminal Procedure.

Things are different for the time limit by which the judge or court may invoke the relative nulleness. In this respect, the recitals of Decision No. 554/2017 of the Constitutional Court, which also enjoys the general binding effect, which has established that the possibility of a relative nullity is required 'in the light of the outcome of the procedure in the preliminary chamber concerning the determination of the legality of the administration of evidence and the conduct of procedural acts by the prosecution authorities, has a direct influence on the conduct of the judgment on the merits, which may be decisive for the determination of guilt/innocence of the defendant (...) and as regards the role of the court at the trial stage of the criminal proceedings, the court considers that such a legislative solution — which does not allow, as a rule, the claim

[33] I. Tanoviceanu, *op.cit.*, p. 49;
[34] *Idem*, p. 50;

of relative invalidity of its own motion — cannot be justified only by the philosophy of the restriction of the active role of the court and, in general, by rethinking the system of criminal proceedings, in the sense of its approximation, in certain respects, by the adversial system. In this respect, the Court notes that, unlike the adversial system, in which the judge bears responsibility, in principle, solely on the correctness of the conduct of the proceedings, the task of establishing the facts and the guilt of the jurors, in the Romanian criminal process the court also assumes responsibility for these essential elements, which constitute the purpose of the process —-the determination of the offence and the guilt. '

Therefore, the possibility for the judge and the court to take account of its own motion of the relative nullity is required on the basis of the principle of finding the truth and for the full clarification of the circumstances of the case.

However, that judgment is not attained in the event of limitation of the possibility of relying on the relative nullity by the court under the conditions of art. 282 para. (2) and (3) of the Code of Criminal Procedure, namely in the course or immediately after the act or at the latest until the closure of the preliminary chamber procedure, if the infringement intervened during the prosecution or in this proceeding, until the first period of judgment with the legal procedure fulfilled, if the infringement intervened in the course of prosecution, when the court was seised of an agreement to recognise the guilt, until the next period of judgment with the full procedure, if the infringement intervened during the judgment.

Without identifying, in this case, express provisions regulating a similar situation or report and fully agreeing with the rules of compulsory procedural law laid down in the decision of the Constitutional Court, the judicial bodies will appeal to the systematic interpretation consisting, 'in the clarification of the meaning of a legal rule by linking it with other provisions belonging to the same branch of law.'[35]. Therefore, 'from all the methods of interpretation will be used with priority in interpreting the rules of criminal Procedure all those methods that allow to the interpreter to converge towards the fundamental principles of Criminal procedure. Also between two methods of which one leads to a solution in accordance with these principles will be given priority to the latter. '[36]

Consequently, by a systematic interpretation it can be concluded that the judge of the preliminary chamber will be able to invoke the relative nullity when it is necessary to find out the truth and to resolve the case until the closure the preliminary chamber procedure, including in the procedure governed by the provisions of art. 347 of the Code on Criminal proceedings, to resolve the appeal against the conclusion of the preliminary chamber. As regards the court, I conclude that, on the basis of the same arguments, the court will be able to invoke the relative nullity in any state of the criminal proceedings, that interpretation being consistent with the principle of legality of the criminal process and the finding of the truth.

## 5. Conclusions

The law constitutes the foundation of the principle of legality, and its observance is imperative in conducting the criminal proceedings. As an activity governed by law, but which also knows legislative loopholes and is not permitted to abandon the law, it is necessary to exclude equivalence between criminal procedural law and the source of criminal procedural law, with a wider area of existence.

The extensive interpretation of the notion of criminal procedural law encompasses both primary and secondary legislation, which comes to detail the rules of law, within the limits and conditions imposed by them. However, the rules of criminal procedural law are not confined to the law lato sensu, with the obligation to comply with compulsory jurisprudence, including the decisions of the Constitutional Court and the compulsory interpretation of the legal norms by Judicial bodies.

The establishment, mainly of the notion of criminal procedural law, led to the exclusion of the possibility of granting this nature to the decisions of the Constitutional Tribunal and their attribution of the nature of the source of criminal procedural law. Although the autonomous sense of the notion of law encompasses the concept of the European Court of Human Rights and the case-law, a single decision, even with a generally binding effect, does not satisfy the conditions for a consistent and crystallized practice over a long time. Therefore, I conclude that the decisions of the Constitutional Court do not fall within the notion of criminal procedural law, this possibility remaining open to the constant and lengthy case-law subsequently developed on the basis of the general binding effect of Constitutional Court decisions.

The affirmation of the nature of the criminal procedural law, the decisions of the Constitutional Tribunal, even in the absence of legislative intervention to implement the rules not conforming to the constitutional principles, are supported by the mandatory general effect of those stated by the constitutional authority.

Both the judicial bodies and all other participants in the criminal proceedings will also be held equally in compliance with the rules of criminal procedural law established by the decisions of the Constitutional Tribunal, which are governed by the principle of Fundamental nature of the general legality of the Romanian Constitution.

[35] I. Neagu, *op.cit*., p. 56;
[36] I.Tanoviceanu, *op. cit.*, p. 46;

The impact of the lack of provision of a text of law or of sanctioning it through the decisions of the Constitutional Tribunal and the establishment of new rules of criminal procedural law conveys to judicial bodies the task of identifying the most optimal solutions in conducting the criminal process in agreement with the principle of legality. The interpretation by analogy or application of the analogue supplement is not contrary to the principle of legality, as the basis for any interpretation is the fundamental principles of the criminal process, including that of legality.

However, sanctioning the legislative void through the intervention of the Constitutional Court and its complacement by new rules of law lacking rules of application and integration as a whole of the regulation of the criminal process, in addition to the fact that it establishes as a responsibility of the Judicial bodies a much too large burden, lacking predictability in the conduct of the criminal process.

The evolution of the case-law of the Constitutional Tribunal remains an open topic, with the aim of crystallizing or not its character as a source of criminal procedural law. Likewise, the passiveness of the legislature in fulfilling the obligation to agree unconstitutional provisions with the provisions of the Constitution requires a thorough analysis in order to justify the full transmission to the judicial bodies of the duty to comply with the principle of legality, although in this respect the main task lies with the legislator by providing for legal rules

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# ENFORCEMENT OF THE RIGHT OF DEFENSE IN THE CRIMINAL TRIAL

**Alina-Marilena ŢUCĂ***

**Abstract**

*One of the fundamental principles of the criminal trial is the principle of enforcing the right of defense, being not only an expression of the rule of law, but also a necessary condition for the efficient course of justice. The right of defense is a complex right, comprising all the possibilities provided by the legislator to the parties and subjects in the criminal proceedings, in order to defend their interests, and is expressed under three general aspects: the possibility of the parties to defend themselves in person during the criminal trial; the obligation of the judicial bodies to consider ex-officio aspects also favorable to the parties involved in the criminal trial; the possibility and sometimes the obligation to provide legal assistance during the criminal trial. The right of defense is a fundamental right, guaranteed by the Constitution, by the Criminal Procedure Code and by the international treaties. Any violation of the right of defense implies various penalties, including the most important sanction provided by the Criminal Procedure Code, respectively the absolute nullity of the acts taken in violation of this right, including the nullity of the decision pronounced under these conditions and retrial of the case.*

**Keywords:** *the rigt of defense, defense in person, defense through attorney, penalties applied if the right of defense is not respected.*

## 1. Introduction

Enforcement of the right of defense represents a fundamental principle of the criminal trial and, at the same time, an essential component of the right to a fair trial and a balance is maintained between the individual interests of the people participating to the criminal trial and the general interest of the society to hold criminally liable all the persons who perpetrated a criminal offence if this right is respected.

Taking into consideration the importance of this right in the course of justice, through this study we intend to present the modalities through which this right is established both by the Romanian legislator and by the main international regulations, to underline the fact that it is a complex right, integrating all the possibilities granted by the legislator to the parties and main subjects in the proceedings in order to defend their interests. Thus, the national legislator underlined the importance of the right of defense, both by stipulating this right among the fundamental rights established by the Romanian Constitution and by a detailed presentation of this right in the Criminal Procedure Code. A special importance was equally assigned to the principle of enforcing the right of defense at the European level, eloquently stipulating the actual dimensions of this right, considering the fact that this principle represents an essential condition for the effective course of justice.

At the same time, in this study we will present the means through which this right can be exercised, as well as the guarantees provided by the legislator for the respect of this right and the penalties applied if this right is violated.

Taking into consideration the fact that the course of justice in a state of law can only take place by respecting the legitimate rights and interests of a person, through this study we intend to illustrate that the right of defense is not an additional institution, but it represents an essential and necessary right for any act of justice. Far from being exhaustive, this study can represent a supporting element for certain legal or practical clarifications related to enforcing the right of defense.

## 2. The right of defense- definition and regulation

The criminal trial represents "the activity regulated by the law, performed by the competent bodies, with the participation of the parties and of other persons, in order to promptly and completely establish the acts which represent offences, thus any person perpetrating an offence could be punished according to their guilt and no innocent person could be held criminally liable."[1]

Based on this definition, it results that a person who perpetrated an offense is held criminally liable by the judicial bodies only after a criminal trial.

This criminal trial is governed by certain general rules, by certain fundamental principles, which reflect the overall conception of the entire regulation.

One of the fundamental principles of the criminal trial is the principle of enforcing the right of defense, being not only an expression of the rule of law, but also a necessary condition for the efficient course of justice. The right of defense in the criminal trial represents an essential component of the right to a fair trial and a balance is maintained between the individual interests of the people participating to the criminal trial and the general interest of the society to hold criminally liable

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[1] Ion Neagu, *Tratat de procedură penală, Partea generală, Ediţia a-II-a, Editura Universul Juridic, Bucureşti 2010, p.19-20.*

all the persons who perpetrated a criminal offence if this right is respected. The right to defense can be defined as "all the fair trial guarantees granted by the law to the parties or to the main subjects in the proceedings within a criminal procedure or criminal trial, in order to efficiently defend their legitimate rights and interests"[2].

Taking into consideration the importance of this right in the course of justice, it was established through several international law regulations. Thus, the Universal Declaration of Human Rights[3] defines the main rights of the human being, which also include several procedural rights: the right to a fair trial, the right to defense, the right to be a subject of law, the right to an effective remedy. Despite the fact that the Declaration is not an international treaty, implying legal consequences if its provisions are violated, it became a reference document for the States and its provisions were subsequently included in various international treaties. Article 11 point 1 of this document mentions that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial **at which he has had all the guarantees necessary for his defense**." This underlines the particular importance of the right of defense in a fair trial.

Another extremely important international document, expressly establishing the right of defense of any person, is the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights[4], which, in Article 6 point 3, specifies the fact that "everyone charged with a criminal offence has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b) to have adequate time and facilities for the preparation of his defense;
c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

We notice the fact that this Convention establishes a detailed regulation of the right of defense, capable to highlight its considerable importance within a fair trial, specific to any democratic society. The text of law mentioned establishes both the right of an accused person charged with a criminal offence to defend himself in person during the proceedings against him (defense which implies several guarantees: information in a language which he understands, possibility to examine or have examined witnesses on his behalf under the same conditions as witnesses against him), as well as his right to be defended through legal assistance of his own choosing, or if he has not sufficient means to pay for legal assistance, to be given it free, under certain conditions, however, without being an exhaustive enumeration of the guarantees which have to be provided to a person charged with a criminal offence during the criminal proceedings, since the texts mentions the fact that **"everyone charged with a criminal offence has the following minimum rights"**, and then the rights are enumerated. All these rights cannot be separately treated, but they represent all together an essential component of the right to a fair trial.

At the same time, the Charter of the Fundamental Rights of the European Union[5] reinstates the important of the right of defense, the document expressly establishing, in Article 48 paragraph 2, the importance of guaranteeing this right, stating that "respect for the rights of the defense of anyone who has been charged shall be guaranteed." Article 47, paragraphs 2 and 3 also establish this right, the Charter specifying that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

As previously mentioned, a special importance was given to the principle of guaranteeing the right of defense at the European level, eloquently shaping the actual dimensions of this right, considering the fact that this principle represents an essential condition for the effective course of justice.

The importance of this right is equally underlined at the national level by the Romanian legislation and the Constitution of Romania has a special place reserved for the right of defense. Thus, Article 24 of the above mentioned regulation specifies the fact that the right of defense is guaranteed and the parties are

[2] Mihail Udroiu, Procedură penală, Partea Generală, Ediţia 5, Editura C.H.Beck, Bucureşti 2018, p. 42.
[3] Passed on 16 December 1948, by the third session of the General UN Assembly.
[4] This act represents a catalogue of fundamental rights, elaborated by the Council of Europe, signed on 4 November in Rome and enforced on 3 September 1953. The convention was ratified by almost all the Member States of the Council of Europe and Romania ratified this act through Law 30 in 1994.
[5] The Charter of the Fundamental Rights of the European Union was proclaimed by the European Commission, the European Parliament and the Council of the European Union, on 7 December 2002, within the European Council in Nice, being enforced on 01 December 2009, along with the Treaty of Lisbon.

entitled to be assisted by an attorney, of their own choosing or appointed by the court.[6]

The Criminal Procedure Code specifies, at its turn, the enforcement of the right of defense among the basic rules of the criminal trial." Thus, article 10, called "right of defense", specifies that:

1. The parties and the main subjects in the proceedings have the right to defend themselves in person or to be assisted by an attorney.
2. The parties, main subjects in the proceedings and the attorney have the right to be given the time and facilities necessary for the preparation of the defense.
3. The suspect has the right to be informed promptly, and before being heard, of the offense the criminal investigation is looking into and the legal classification of the offense. The accused person has the right to be informed promptly of the offense brought against them by the prosecution, and the legal classification of the offense.
4. Before being heard, the suspect and accused person must be informed that they have the right to make no statements whatsoever.
5. The judicial bodies are under an obligation to ensure full and effective exercise by the parties and main subjects in the proceedings of their right to defense throughout the criminal trial.
6. The right of defense shall be exercised in good faith, according to the goal for which the law recognizes it.

The specification of these rights is not exhaustive and there are other dispositions in the Criminal Procedure Code aimed to guarantee an effective defense during the criminal trial (the right to examine the case file, the right to bring evidence, the right to be informed about his rights, the right to make requests, to claim exceptions). We can notice that the rights specified by article 10 from the Criminal Procedure Code actually represent a transposition in the national law of the dispositions under Article 6 from the European Convention on Human Rights, with the mention that part of the rights specified by Article 6 were also extended to other parties and main subjects in the proceedings, apart from the person charged with a criminal offence.

## 3. Content of the right of defense

As regards to the content of the right of defense, as established by the Criminal Procedure Code, as well as by the European Convention on Human Rights, we notice that it is not only reduced to the legal assistance from an attorney, as "The right of defense does not have to be confused with the existence of the attorney"[7]. The right of defense is a complex right, comprising all the possibilities provided by the legislator to the parties and subjects in the criminal proceedings, in order to defend their interests. Thus, the doctrine specifies the fact that the right of defense is expressed under three general aspects: "the possibility of the parties to defend themselves in person during the criminal trial; the obligation of the judicial bodies to consider ex-officio aspects also favorable to the parties involved in the criminal trial; the possibility and sometimes the obligation to provide legal assistance during the criminal trial."[8]

### 3.1. Defense in person

Both Article 6 paragraph 3 from the European Convention on Human Rights and article 10 from the Criminal Procedure Code establish the right of everyone charged with a criminal offence to defend himself in person and the article from the Romanian Criminal Procedure Code also extends this right to the other parties and to the victim. However, the text from the Convention does not mention the conditions of exercising this right, leaving the contracting states the choice of the means allowing its effective performance and the Court has to examine if these means comply with the requirements of a fair trial.[9] Furthermore, the case-law of the European Court of Human Rights[10] indicated that it is necessary to guarantee "not only rights that are theoretical or illusory, but rights that are practical and effective (…) this is particularly so of the right of the defense in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive". Thus, the possibility of the parties and main subjects in the proceedings, to defend themselves in person in the criminal trial, is guaranteed by the national legislation, by establishing certain wide fair trial rights and guarantees in the Criminal Procedure Code.

In order to guarantee a concrete and effective defense, several specific rights are recognized for the suspect and for the accused person. Thus, articles 78 and 83 from the Criminal Procedure Code specify the main rights of the suspect, respectively of the accused person, among which:

a) **the right not to make any statements whatsoever** during criminal proceedings, and their attention shall be drawn to the fact that their refusal to make any statements shall not cause them to suffer any unfavorable consequences, and that any statement they do make may be used as evidence against them.

[6] Such a regulation is also mentioned by Law no. 304/2004, on the judicial organization, whose article 15 specifies that "the right of defense is guaranteed. Throughout the entire criminal trial, the parties have the right to be represented, or, as applicable, assisted by an attorney, of their own choosing or appointed by the court, pursuant to the law."

[7] V. Dongoroz, S. Kahane, G. Antoniu, C. Bulai, N. Iliescu, R. Stănoiu*, Explicaţii teoretice ale Codului de procedură penală român, Partea generală, vol. I, ediţia a-2-a*, Editura Academiei, Ed. All Beck, Bucureşti, 2003, p. 49

[8] Ion Neagu, op. cit.p. 102-103

[9] Corneliu Bîrsan, Convenţia europeană a drepturilor omului. Comentariu pe articole, Ediţia 2, Editura C.H.Beck, Buureşti 2010, p.551.

[10] See ECHR, judgment from 13 May 1980, case of Artico v. Italy, paragraph 33.

The right is also mentioned by article 10 paragraph 4 Criminal Procedure Code, which specifies the fact that, before being heard, the suspect and accused person must be informed that they have the right to make no statements whatsoever, as well as by article 99 paragraph 2 Criminal Procedure Code, which specifies that the suspect or accused person has the right not to contribute to their own incrimination and by article 118 Criminal Procedure Code, according to which the witness statement given by a person who had the capacity of suspect or accused person before such testimony or subsequently acquired the capacity of suspect or accused person in the same case, may not be used against them.

Thus, these legal dispositions establish the right to remain silent and the right not to contribute to their own incrimination, right in relation to which the European Court of Human Rights constantly ruled that "even if Article 6 from the European Convention does not expressly mention the right of an accused person to remain silent about the offences held against him and not to contribute to his own incrimination, there represent generally recognized regulations, center of the notion of fair trial, established by Article 6 (...)."[11]

b) **right to be informed,** promptly and before being heard, about the offense the criminal investigation is looking into and the legal classification of the offense.

This right is also provided by article 10 paragraph 3 Criminal Procedure Code, according to which the suspect and the accused person have the right to be informed promptly and before being heard of the offense the criminal investigation is looking into and the charge for that offense, as well as by article 307 and article 309 paragraph 2 Criminal Procedure Code.

The above mentioned dispositions from the national law actually represent a transposition of the Directive 2012/13/EU, on the right to information in criminal proceedings[12], Directive which mentions, in its preamble in points 27 and 28 that "(27) Persons accused of having committed a criminal offence should be given all the information on the accusation necessary to enable them to prepare their defense and to safeguard the fairness of the proceedings. (28) The information provided to suspects or accused persons about the criminal act they are suspected or accused of having committed should be given promptly, and at the latest before their first official interview by the police or another competent authority, and without prejudicing the course of ongoing investigations. A description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspected or accused of having committed and the possible legal classification of the alleged offence should be given in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given, to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defense."[13]

At the same time, this right is also established by paragraph 3, letter a from the European Convention on Human Rights, according to which the accused person has the right to be informed about the reason of his arrest and of any charge against him. In its case-law, the Court ruled that, in the criminal matter, "a precise and complete information about the offense the criminal investigation is looking into and the charge for that offense has to be interpreted in the light of the general right to a fair trial, guaranteed by article 6 paragraph 1 from the Convention."[14]

c) the right to consult the case file

This represents an essential component for the exercise of the right of defense in the criminal trial, as the suspect or the accused person could not build a precise and effective defense unless they have the right to study the case.

Thus, the case-file of the European Court[15] established that access to the case file and use of notes, including, if necessary, the possibility of obtaining copies of relevant documents, represent important guarantees of the fair trial. The failure to afford such access has weighed, in the Court's assessment, in favor of the finding that the principle of equality of arms has been breached.

The right to access the case file is equally explicitly specified by Directive 2012/13/EU, on the right to information in criminal proceedings (directive transposed in the national law, mainly through the dispositions of article 94 Criminal Procedure Code), which specifies in Article 7 that : "(1) Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers. (2) Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defense. (3) Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defense and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material

[11] N. Volonciu (coordinator), A. Simona Uzlău, R. Moroşanu, V. Văduva, D. Atasiei, C. Ghighenci, C. Voicu, G. Tudor, T.V. Gheorghe, C.M. Chiriţă, *Noul Cod de procedură penală comentat*, Editura Hamangiu, Bucureşti, 2014, p. 31

[12] Published in the Official Journal of the European Union, no. L142 dated 01 June 2012

[13] See also Article 6 from the same Directive

[14] C. Bîrsan, op. cit.p. 544.

[15] Case Matyjek v. Poland, no. 38184/03, points 59 and 63 and Judgment of 15 January 2008, in case Luboch v. Poland, no. 37469/05, points 64 and 68.

evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered. By way of derogation from paragraphs (2) and (3), provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review".

As it can be noticed from the above mentioned text, the right to consult the case file does not appear as being an absolute right, as its exercise can be limited if it could prejudice an investigation, however, its limitation has to be concretely motivated by the judicial bodies (not in generic terms) and it has to be necessary and proportional to the purpose aimed, as equally provided by article 53 from the Constitution of Romania.[16] Similarly, there are the dispositions of article 94 paragraph 4 Criminal Procedure Code, according to which, during the criminal investigation, the prosecutor can restrict, on a motivated basis, the consultation of the case file if this could prejudice the ongoing investigation, but, after the initiation of the criminal action, such restriction may be ordered for up to 10 days. However, in all the cases, the attorney cannot be restricted the right to consult the statements of the party or subject in the proceedings he represents and within the procedures taking place before the judge of rights and liberties, concerning deprivation or restrictive measures of rights, the attorney of the accused person has the right to be informed about the entire material from the criminal investigation case file. During the court proceedings, article 356 paragraph 1 Criminal Procedure Code specifies that the accused person can have the right to be informed of the actions under the case file, without establishing limitations of this right.

d) **the right to propose the production of evidence,** within the conditions of the law, to raise exceptions and make submissions**.**

Article 6, paragraph 3 letter d from the European Convention on Human Rights specifies the possibility of the accused person to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The right of the accused person to propose the production of evidence in the criminal trail is also established through the fact that article 306 paragraphs 3 and 4 Criminal Procedure Code specifies that the criminal investigation bodies have the obligation to collect and present evidence both in favor and against the suspect or accused person, as well as the obligation to rule, by reasoned order, on the request to produce evidence. At the same time, throughout the trial, the court shall produce evidence at the request of the parties or main subjects in the proceedings and the accused person has the right to challenge including the evidence administered during the criminal investigation and to obtain their new production.

Moreover, in its case-law[17], the European Court specified that an important aspect of fair criminal proceedings is the ability for the accused person to be confronted with the witnesses in presence of the judge who immediately decides the case. At the same time, it ruled that Article 6 paragraph 3 letter d establishes the right that, before an accused person is declared guilty, all the prosecution evidence has to be presented in principle before him, in public pronouncement, for a contradictory debate. However, this principle is not applied without exceptions, as the evidence can only be accepted under the reserve of the right of defense. As general rule, the accused person has to be provided with an adequate and sufficient possibility to challenge the prosecution's testimony and to examine witnesses against him, when they take the stand or afterwards. Two requirements result from this principle based on ECHR case-law: the first – the absence of a witness must be supported by a serious motive; the second – when a conviction is fully or considerably based on the depositions of a person, to whom the accused person was not able to ask questions or he could not request the examination, during the processing stage or during the debates, the right of defense can be restricted in a manner which is incompatible with the guarantees specified under Article 6.[18]

e) **the right to benefit free of charge from an interpreter**, when he does not understand, does not speak well or cannot communicate in Romanian language
f) **the right to use a mediator,** in the cases provided by the law
g) the right to be examined in the presence of his attorney, before ordering a custodial measure against the suspect or accused person.

Thus, article 209 paragraph 5 Criminal Procedure Code specifies that taking in custody may only be order after hearing the suspect or the accused person, in the presence of an attorney of his own choosing or an attorney appointed by court. At the same time, article 225 paragraph 4 Criminal Procedure Code specifies that the pre-trial arrest proposal shall only be made in the presence of the accused person, excepting the cases he is unjustifiably absent, he is missing, he avoids

[16] Pursuant to article 53 paragraph 2, Restriction can only be ordered if it is necessary in a democratic society. The measure has to be proportional to the situation which determined it, to be non-discriminatory applied and without harming the existence of the right or freedom.
[17] Judgment of 18 March 2014, in case Beraru v. Romania, request no. 40107/04, point 64
[18] Judgment of 09 July 2013, in case Bobeş v. Romania, request no. 29752/05, points 36, 37.

coming to court or cannot be brought before the judge due to health condition, force majeure or a state of necessity, the same guarantee being also established by the legislator for the house arrest measure[19] or for a restrictive measure, respectively the judicial control or the judicial control on bail.[20]

h) the right to be present at the trial

The judicial bodies have to order the summon of the suspect or of the accused person, in order to be present at the trial, as provided by the dispositions of article 353 paragraph 1 Criminal Procedure Code. For the persons deprived of liberty, their presence at the trial and summon at each trial term are mandatory. This right is also established through Directive 2016/343/EU, which, in Article 8, specifies that: "(1) Member States shall ensure that suspects and accused persons have the right to be present at their trial. (2) Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that: a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State. (3) A decision which has been taken in accordance with paragraph 2 may be enforced against the person concerned. (4) Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but it is not possible to comply with the conditions laid down in paragraph 2 of this Article because a suspect or accused person cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced. In that case, Member States shall ensure that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9. (5) This Article shall be without prejudice to national rules that provide that the judge or the competent court can exclude a suspect or accused person temporarily from the trial where necessary in the interests of securing the proper conduct of the criminal proceedings, provided that the rights of the defense are complied with (…).

i) communication of the copy of the indictment,

Pursuant to article 344 paragraph 2 Criminal Procedure Code, the certified copy of the indictment and, as applicable, a certified translation thereof, shall be communicated to the accused person at their place of detention or, as the case may be, the address where they live or the address where they requested to receive the procedural acts and the accused person shall also be informed of the object of the Preliminary Chamber procedure, their right to retain an attorney and the time within which, as of the communication date, they can file motions and exceptions in writing concerning the lawfulness of evidence gathering and conduct of criminal investigations by the criminal investigation bodies.

j) **during the debates, the accused person takes stand** in order to express opinions about the evidence produced in the case, as well as about the charges and individualization of the punishment.

At the same time, before ending the debates, the accused person takes his last stand, procedure during which he cannot be asked questions, in particular in view of exercising a proper defense. If new acts or circumstances are revealed, essential in order to settle the case, the court shall order that the court investigation shall be retaken. He can produce defenses both on the criminal side and on the civil side, challenging the allegations of the prosecutor or of the victim/party in civil claim.

k) **the accused party has the right to file the legal remedies** established by the legislator, respectively the ordinary legal remedies or, in certain cases, the extraordinary legal remedies.

During the ruling of the ordinary legal remedy of appeal (regardless if it is filed or not by the accused person), he has the right to file requests and raise exceptions, to request new evidence in defense, to debate all the appeal motifs filed in his defense or the motifs raised by the prosecutor, the victim or by other parties.

The suspect and the accused persons are not the only parties for whom the legislator established a series or rights and guarantees in view of concretely exercising the right of defense. Part of the rights established for them are also established under the same conditions for the other parties and for the victim. Thus, pursuant to the dispositions of article 81 Criminal Procedure Code, the victim has the right to consult the case file, to be summoned, to be present at the trial, to file evidence, to ask questions to the accused person, to witnesses, to expert, the right to use a mediator, to benefit from an interpreter, to be send in a language he understands the translation of any non-arraignment decisions, as well as other rights provided by the law (to file the legal remedies provided by the law, to make submissions during the debates about the evidence processed and about their lawfulness). At the same time, pursuant to the dispositions of articles 85 and 87 Criminal Procedure Code, the civil party and the party with civil liability benefit from the same rights, with the mention that for the party with civil liability, the rights

[19] Article 219 paragraph 5 Criminal Procedure Code specifies that the Judge of Rights and Liberties shall hear the accused person when the latter is present.

[20] Article 212 paragraph 3 Criminal Procedure Code, the measure of judicial control can only be taken after hearing the accused person, in the presence of an attorney of his own choosing or an attorney appointed by court. These dispositions being also applicable for the judicial control on bail, provided by article 216 paragraph 3 Criminal Procedure Code.

shall be used within the limits and for the purposes of settling the civil claim.

Another component of the right of defense is also represented by the "obligation of the judicial bodies to consider, ex-officio, aspects favorable for the parties. This obligation actually represents an aspect for the manifestation of the active role played by the judicial bodies. If the parties do not act in order to valorize the evidence supporting their interests, the judicial bodies shall process such evidence ex-officio."[21]

### 3.2. Defense through attorney

As mentioned above, the content of the right of defense also includes the legal assistance of the parties by an attorney. This right is established by the Criminal Procedure Code through article 10 paragraph 1 Criminal Procedure Code, according to which the parties and main subjects in the proceedings have the right to defend themselves in person or to be assisted by an attorney, as well as through other provisions from the same Code.[22]

Considering the importance of this form of exercising the right of defense during the criminal trial, this right is also expressly provided through article 6, paragraph 3, letter c, which specifies that any accused person has the right to be assisted by an attorney of his own choosing and, in certain conditions, he has the right to be assisted, free of charge, by an attorney appointed by the court.

Similarly, Directive no. 2013/48/EU[23], on the right of access to a lawyer in criminal proceedings, specifies in its preamble the fact that Member States should ensure that suspects or accused persons have the right of access to a lawyer without undue delay and in any event, they should be granted access to a lawyer during the criminal proceedings before a court, if they have not waived this right.

Directive no. 2016/1919/EU[24] establishes, through Article 4, the rights of suspects or accused persons, who lack sufficient resources to pay for the assistance of a lawyer, have the right to legal aid when the interests of justice so require.

Therefore, legal aid represents a fundamental guarantee of the right of defense and implicitly one of the fundamental components of a fair trial, being provided by a person with legal qualification. Thus, article 1 from Law 51/1995[25] specifies that the profession of lawyer is free and independent, with autonomous organization and functioning, and the lawyer profession is only practiced by lawyers registered in the bar table where they belong, bar member of the National Association of Romanian Bars. At the same time, the activity of the lawyer is reiterated, among others, through legal consultations and requests, legal aid and representation before the courts, criminal investigation bodies (article 3 from Law 51/1995). Thus, it can be noticed that the lawyer profession can only be exercised by observing the law, being conditioned by the observance of certain requirements. Through the Decision no. 15/RIL/2015, the High Court of Cassation and Justice, ruling in appeal in the interest of the law, indicated that the legal aid granted to an accused party in the criminal trail by a person who did not acquire the lawyer quality within the conditions of Law no. 51/1995, *is the equivalent of his lack of defense.*

The right to be assisted by a lawyer invariably also implies an efficient communication between the lawyer and the person he defends and if such communication is not possible, the right to legal assistance is devoid of substance. Thus, the judicial bodies have the positive obligation to assure the effectiveness of this communication, as well as its confidentiality.

Directive 2013/48/EU, on the right of access to a lawyer, specifies in its preamble the importance of assuring the contact between the attorney and his client, and, through Article 4, it establishes that Member States shall respect the confidentiality of communication between suspects or accused parties and their lawyer and such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law. The obligation to respect confidentiality not only implies that Member States should refrain from interfering with or accessing such communication, but also that, where suspects or accused persons are deprived of liberty or otherwise find themselves in a place under the control of the State, Member States should ensure that arrangements for communication uphold and protect confidentiality (Article 33 from the preamble of Directive 2013/48/EU).

ECHR case-law[26] established that the right to be assisted by a lawyer does not only mean the assurance of the contact between the lawyer and the accused person, but it also implies a more complex matter, respectively the accused person has to be able to obtain the whole range of services specifically associated with legal assistance: discussion of the case, organization of the defense, collection of evidence, preparation for questioning.

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[21] I. Neagu, op. cit. p. 104.

[22] Article 81 paragraph 1, letter h, specifies that the victim has the right to be assisted or represented by an attorney; article 83 paragraph 1 letter c specifies that the accused person has the right to have an attorney of his own choosing and, if he cannot afford one, in cases of mandatory legal assistance, the right to have an attorney appointed by court, the same right being also established for the suspect through the dispositions of article 78 Criminal Procedure Code, according to which the suspect has the rights provided by the law for the accused person, unless otherwise provided by the law.

[23] Published in the Official Journal of the European Union no. L 294 date 06 November 2013, p. 1-12.

[24] Published in the Official Journal of the European Union no. L 297 date 04 November 2016, p. 1-8.

[25] Published in the Official Journal, no. 113 date 06 March 2001

[26] Case Dayanan v. Turkey, judgment of 13 October 2009.

If the legal assistance is mandatory, the simple appointment of the lawyer by the court is not sufficient to consider that the right of defense was respected, but the judicial bodies have the positive obligation to assure that the lawyer appointed by the court studied the case file and performs a practical and effective defense, as provided by ECHR case-law, not being sufficient to guarantee some theoretical or illusory rights, as we indicated above. At the same time, the judicial bodies have to oversee that the lawyer does not find himself in an incompatibility case, through certain qualities or functions exercised.

However, the right to legal assistance is not an absolute right, namely the legal assistance of a lawyer appointed by court is not mandatory in all cases, the rule established by the Romanian legislation stating that the legal assistance is mainly facultative. Nevertheless, there are certain cases when the judicial bodies have to take the necessary measures in order to assure legal assistance, cases which considered the assistance by a lawyer of certain persons/main subjects in the proceedings who find themselves in a more fragile position, position which has to be protected by assuring an efficient defense in a criminal trial. The mandatory legal assistance is established by the legislator in two separate texts of law, first of all for the suspect or accused person and secondly for the victim, civil party and party with civil liability.

**3.2.1. Mandatory legal assistance of suspect or accused person.**

The suspect or accused person has the right to be assisted by one or several lawyers, during all the stages of the criminal trial, as soon as starting the criminal investigation *in personam*, as well as in the preliminary chamber stage or during the ruling, including during the legal remedies.

Article 90 from the Criminal Procedure Code specifies the cases when the legal assistance of the suspect or accused person is mandatory, the enumeration is not limitative as there are also special cases which impose the obligation to assure this assistance. Pursuant to the text of law, the legal assistance is mandatory when:

a) the suspect/accused person is underage;

During the criminal investigation, the legal assistance is mandatory up to the date when he turns 18 years and during the course of trial throughout the entire ruling procedure (both in the court of first instance and in appeal) if he was still underage when he committed the offence (article 507 paragraph 3 Criminal Procedure Code).

b) he is admitted to a detention center or educational center;
c) he is detained or arrested (pre-trial detention or house arrest), even if in another case;
d) the safety measure of medical admission was ordered for the suspect/accused person, even if in another case;
e) in other cases established under the law;

The cases when the legislator establishes the need to assure legal assistance by a lawyer can be therein included: if the accused party wants to sign an agreement for the admission of guilt during the criminal investigation, within the procedures regarding the ordering, extension, duly cessation of preventive measures (judicial control, judicial control on bail, pre-trial arrest, house arrest; in the procedures related to the ex-officio debate of the lawfulness and substantiation of the preventive measures; in the procedure to settle the appeal against the court resolutions through which the judge of rights and freedoms, the preliminary chamber judge or the court rule on the preventive measures; in the procedure ordering the provisional medical admission, in the procedure for ordering, confirmation, replacement or cessation the provisional processual measures compelling to medical treatment or medical admission, sustained before the preliminary chamber judge following the ruling of not to refer the case to a trial court, if it is requested to replace the punishment by fine with the imprisonment punishment.

f) when the judicial bodies believe that the suspect or accused person could not prepare their defense on their own

These cases can include the elderly, the foreign citizens who do not know the procedural dispositions of the Romanian law, the persons suffering from mental or physical disabilities which may affect the preparation of their defense. At the same time, when assessing the possibility of a person to defend himself in person, the elements considered shall also include the complexity of the case, the criminal participation, the existence of a high number of offences.

g) During the preliminary chamber procedure and during the course of trial, in cases where the law establishes life detention or an imprisonment punishment exceeding 5 years for the offence perpetrated.

This case of mandatory legal assistance is also incident when the defendant is a legal entity.[27] The punishment provided by the law means the punishment stipulated by the text of law, incriminating the act perpetrated under consumed form, not considering the circumstances for the aggravation or mitigation of the penalty (article 187 Criminal Code). When assessing the incidence or non-incidence of this case of mandatory legal assistance, the court shall take into consideration the classification of the acts through the indictment, and if it will order the change into a charge for which the legislator provides a punishment exceeding 5 years, the legal assistance shall become mandatory since the order of the court to change the charge.

**3.2.2. Mandatory legal assistance for the victim, civil party or party with civil liability.**

Article 93 Criminal Procedure Code mentions, through paragraphs (4) and (5), the cases when the legal

[27] See also Decision no. 21/HP/2016 of the High Court of Cassation and Justice

assistance is mandatory for these persons: when the victim or the civil party lacks mental competence or has limited mental competence or when, for various reasons, the victim, civil party or party with civil liability cannot prepare their defense in person.

Law no. 678/2001[28] establishes another case of legal assistance for the victim, during all the stages of the criminal trial, respectively when they are a victim of human trafficking.

## 4. Penalties applied if the right of defense is not respected.

The violation of legal dispositions concerning the mandatory legal assistance of the suspect, accused person, civil party or party with civil liability is punished with the absolute nullity, as stipulated by article 281 paragraph 1 letter e Criminal Procedure Code. We notice the fact that the text of law mentioned does not punish by absolute nullity the violation of the dispositions concerning the obligation to assure legal assistance to the victim, thus, despite the fact that we do not understand the reason for which the legislator made this distraction between the civil party and the victim, if the right to mandatory legal assistance of the victim is breached, another type of nullity shall intervene, respectively, the relative nullity if the conditions stipulated by article 282 Criminal Procedure Code[29] are met.

At the same time, if a case is tried in absence of the suspect or accused party, despite the fact that their presence was mandatory (i.e., they were under detention), the absolute nullity of the acts performed in violation of such dispositions shall nevertheless intervene.

The violation of the legal dispositions concerning the mandatory legal assistance for the suspect, accused person or other parties, as well as of dispositions concerning the absence of the suspect/accused person, when their presence was mandatory, can be invoked up to the completion of the preliminary chamber procedure, if such violation occurred during the criminal investigation stage or the preliminary chamber. The preliminary chamber judge shall exclude the evidence obtained in violation of the mentioned dispositions, or he will integrally return the case to the prosecutor, where he establishes that the overall criminal investigation was harmed by such violation. Nullity can be invoked in any stage of the trial, if the violation occurred in course of the trial or if the court was referred with an agreement for the admission of guilt, regardless of the moment when it intervened.

The absolute nullity of the decision and the case shall be retried also where the accused persons were assisted by the same lawyer, despite the fact that his interests were contradictory, because the court has the obligation to highlight the contrariety of interests and to provide them with the possibility to hire another lawyer for one of the accused persons, or to appoint an attorney by the court, if they do not have the possibility to hire another lawyer who could provide legal assistance along with the lawyer of their own choosing.

At the same time, if the right of a person to be present at the trial was breached, namely the person was not duly summoned, or, when, despite being duly summoned, the party could appear in person or inform the court thereupon, the court shall admit the appeal of the person, it shall reverse the ruling pronounced under these conditions and it will order the retrial of the case by the court whose ruling was quashed (article 421, point 2, letter a Criminal Procedure Code).

Another guarantee to exercise the right of defense is the possibility provided to the parties by the legislator to file an extraordinary legal remedy. Thus, if the ruling in appeal took place without duly summoning a person, or, when, despite being duly summoned, the party could appear in person or inform the court thereupon, or where the ruling in appeal took place without the participation of the accused person, although their presence was mandatory, or when the court did not hear the accused person, although the hearing was possible according to the law, these parties can file challenge for annulment, the decision pronounced in violation of these rights (essential components of the rights of defense) shall be quashed and a retrial of the appeal or of the quashed case shall take place.

Another guarantee established by the legislator if a person was convicted in absence, without being summoned at the trial and without being otherwise officially informed thereupon, or, despite being informed about the trial, the person was justifiably absent from the ruling of the case and could not inform the court thereupon, is represented by the possibility to reopen the criminal trial and subsequently quashing the decision pronounced under these conditions.

The right to respect the confidentiality of conversations between the lawyer and the client is also guaranteed through article 139 paragraph 4 Criminal Procedure Code, according to which the relationship between the lawyer and a person assisted or represented by them may be subject to electronic surveillance only when there is information that the lawyer perpetrates or prepares the perpetration of any of the offences mentioned under article 139 paragraph 2 Criminal Procedure Code. If, by error, the conversations between the lawyer and suspect/accused person he defends were intercepted, the evidence obtained this way cannot be used in any criminal trial and shall be destroyed forthwith by the prosecutor.

[28] Published in the OFFICIAL JOURNAL no. 783, of 11 December 2001.

[29] Pursuant to article 282 paragraph 2 Criminal Code, "The violation of any legal dispositions except for the dispositions stipulated by article 281 shall cause the nullification of an act when failure to comply with the legal requirement caused farm to the rights of the persons or main subjects in criminal proceedings, which can only be removed by nullifying the act ."

## 5. Conclusions

As already mentioned above, the right of defense is a fundamental right, guaranteed by the Constitution, by the Criminal Procedure Code and by the international treaties. The practical means to exercise the right of defense are largely stipulated by the Criminal Procedure Code.

Guaranteeing the right of defense represents a fundamental principle of the criminal trial and, at the same time, an essential component of a fair trial. Therefore, the legislator established various guarantees and legal means in order to assure the observance of this right. By recognizing this right, the legislator also established certain obligations for the judicial bodies (the obligation to have a lawyer appointed by court, if the legal assistance is mandatory, the obligation to verify if there are incompatibilities between the appointed lawyer and the person he represents, the obligation to rule on the requests of the persons/their lawyers, the obligation to assure that the lawyer studied the case file and performs a prompt and effective defense).

Any violation of the right of defense implies, as we mentioned above, various penalties, including the most important sanction provided by the Criminal Procedure Code, respectively the absolute nullity of the acts taken in violation of this right, including the nullity of the decision pronounced under these conditions and retrial of the case.

The right of defense is not an additional institution, but it represents an essential and necessary right for any act of justice, because the respect of this right creates a balance between the individual interests of persons participating to the criminal trial and the general interest of the society to hold criminally liable anyone who committed a criminal offense. By respecting this right, the suspect, the victim, the parties are capable of highlighting all the circumstances of the act under investigation, thus no innocent person is held criminally liable and any person who committed an offence is punished pursuant to the law.

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# DEFICIENCIES IN ENACTING ARTICLE 44 OF ROMANIAN LAW NO.111/1996 REGARDING THE SAFE DEPLOYMENT, REGULATION, AUTHORIZATION AND CONTROL OF NUCLEAR ACTIVITIES

**Sorin-Alexandru VERNEA***

**Abstract**

*In this paper, the author analyses the main practical issues that can be discussed when enacting the provisions of article 44 of Romanian Law no.111/1996 regarding the safe deployment regulation, authorization and control of nuclear activities.*

*The paper is structured in two parts. The first aims at pointing out the particularities of the incrimination discussed, by reference to its constitutive content, and the second part adapts the mechanism of the Romanian Constitutional Court Decision no.405/2016 to the provision analyzed, in order to comply with the regulation of art.73, paragraph 3, letter h of the Romanian Constitution.*

*The author concludes that the only effective way to prevent the deficiencies previously discussed is the intervention of the legislator, reason for which a de lege ferenda proposal has been made.*

**Keywords:** *nuclear activities, crimes against the nuclear regime, crimes against environment, incomplete provisions, organic law, deficient incrimination*

## 1. Introduction

Human activities involving nuclear materials require a high degree of responsibility of the state for environmental protection both nationally and internationally. As stated in legal literature[1], nuclear energy is the most important discovery of man in the 20th century, but also the worst weapon against the creator itself.

In Romania, the special legislation in the field of nuclear activities is Law no.111/1996 regarding the safe deployment, regulation, authorization and control of nuclear activities[2]. **Article 2 of the quoted act establishes the area of regulation of the law in question in the following way:** "The provisions of this law shall apply to the following activities and sources of radiation: a) research, design, possession, placing, construction, installation, commissioning, trial run, operation, modification, conservation, decommissioning or closure, import, export and intra-Community transfer of nuclear installations, including the management of used nuclear fuel; b) the design, ownership, location, construction and assembly, commissioning, operation, conservation and decommissioning of mining and preparation of uranium and thorium and facilities of waste from the mining and preparation of uranium and thorium; c) the production, placing, construction, supply, rental, transfer, handling, holding, use, intermediate storage, removal, transportation, transit, import, export and intra-community transfer of radiological facilities, including radioactive waste management facilities; c[1]) producing, manufacturing, supply, rental, transfer, handling, storing, processing, utilization, recycling, intermediate storage, transport, transit, import, export and intra-community transfer of radioactive material and radioactive sources, as appropriate; c[2]) producing, manufacturing, supply, transfer, handling, storing, processing, utilization, intermediate storage, transport, transit, import, export and intra-community transfer of nuclear materials, including fresh and spent nuclear fuel; c[3]) the transfer, handling, holding, pre-storage, intermediate storage, permanent storage, transport, transit, import, export and intra-community transfer of radioactive waste; d) the production, the providing and use of dosimetric and of ionizing radiation detection systems, of materials, and devices for the protection against ionizing radiation, and means for packaging or transport of radioactive materials, specially arranged for this purpose; e) the production, manufacture, lease, transfer, possession, import, export and intra-community transfer of materials, devices and equipment referred to in Annex no.1, f) holding, transfer, import, export and intra-community transfer of unpublished information relating to materials, devices and equipment pertinent to the proliferation of nuclear weapons and other nuclear explosive devices, referred to in Annex no. 1, g) providing products and services for nuclear facilities; h) providing products and services for radiation sources, dosimetric control instruments, ionizing radiation detection systems, materials and devices used for protection against ionizing radiation; h[1]) design and execution of nuclear

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[1] D.S.Marinescu, M.C.Petre – *Environmental Law Treaty (original title: Tratat de Dreptul Mediului)*, 5th edition, Universitara Publishing House, Bucharest, 2014, pg.609

[2] Republished in the Official Gazette, Part I, no.552 / 27.06.2006

specific constructions; i) orphan sources, from their detection to their permanent storage as radioactive waste; j) manufacture, import, export and transit of products for consumption which have been irradiated, containing or contaminated with radioactive material; k) activities leading to exposure of workers or the population to radon and thoron or their inside offspring, the external exposure caused by building materials, and prolonged exposure situations caused by long-term effects of an emergency or a past human activities; l) locations contaminated with mineral substances associated in ore with uranium or thorium or with residual radioactive contamination resulting from a radiological or nuclear accident, after the emergency status was over; m) human activities that involve the presence of natural sources of radiation which leads to a significant increase in the exposure of workers or other people, including the operation of aircraft in terms of exposing the crew during the flight, the extraction and processing of minerals associated in ore with uranium or thorium, and other raw materials in the process of extracting and processing, lead to an increase in the concentration of natural radionuclides in intermediate products and waste, and the processing of materials containing naturally occurring radionuclides; n) preparation, planning and response for all cases of exposure to ionizing radiation in order to protect public health, workers and workers in emergency situations".

**The national authority exercising regulatory powers, licensing and control of nuclear materials is the National Commission for Nuclear Activities Control, in accordance with article 4, paragraph 1 of Law no.111 / 1996, as amended and supplemented.**

## 2. Particularities of the incrimination

For the purpose of this paper, we shall focus our attention on the provisions of art.44 of Law no.111/1996. According to this text, "(1) Carrying out an activity among those referred to art.2, art.24, par.1, art.28, par.2 and art.38, par.1 without proper authorization required by law alongside the breach of art.38 par.$2^1$ and $2^2$ constitutes an offense and shall be punished as follows: a) with imprisonment from six months to two years or a fine, the activities referred to in: art.2 letter a, on the research, development, ownership, location, construction or assembly, conservation of nuclear installations; art.2, letter b; art.2, letter d, regarding means of packaging or transport of radioactive materials, specially arranged for this purpose; art.2, letter g; art.24, par.1, and art.38, par.1; b) imprisonment from 2 to 7 years and deprivation of certain rights, the breach of art. 38 par.$2^1$ and $2^2$, and performing unauthorized activities under: art.2 letter a, relating to the commissioning, trail-run, operation, modification, removal, import and export of nuclear installations; art.2 letter c, if radiological facilities, nuclear or radioactive materials, radioactive radiation generating waste presents a special risk; art.2, letters e and f and art.28 par.2, if nuclear or radioactive materials, radioactive waste and radiation generators present a special nuclear or radiological risk. (2) Attempt to offenses under par.1, letter b is punished".

Regarding the special legal object, we have observed that legal literature is not unitary. In this regard, some authors have noted that the object is represented by the social relations developed in order to "prevent radioactive pollution by exercising strict control of nuclear activities through the authorization procedure"3.

Other authors have defined the special legal object as "social relations concerning the safety of nuclear activities for exclusively peaceful purposes, so as to meet the conditions of safety, protection of occupationally exposed workers, population, environment and property"4.

We believe the second definition is preferable for including in its area of protection the integrity of the environment, but also for circumscribing the use of nuclear energy to peaceful purposes only. Our opinion is that article 44 of Law no.111/1996 aims mostly at protecting public health, public safety and the environment with all its natural and anthropologic components.

In what concerns the material object, we appreciate that it depends on the normative variant of the incrimination. In general, it is represented by nuclear materials, goods subjected to radiation, or to processing by nuclear materials or nuclear facilities. In some normative variants, we consider that no material object can be determined, the offense being purely formal.

The active subject of the crime is not qualified by law therefore it can be represented by any physical person or legal entity that can be held liable according to common criminal law provisions.

In fact, given that the access to nuclear materials is limited by law, we believe that the active subject of the offense can only be a physical or legal entity that usually operates, apparently legal, in the nuclear field.

The main passive subject is the State, as the main protector of the environment, public health and public safety. If by the same action the integrity of a person is harmed, we believe that we cannot consider the victim a secondary passive subject for this crime, but a primary passive subject for a crime against its integrity or life.

Regarding the constitutive content, we believe that the offense in question exists on a premise situation namely, the pre-existence of the obligation to obtain

[3] M.Gorunescu in M.A.Hotca (coord.) – Criminal offenses under special laws, Comments and explanations (original title: Infracţiuni prevăzute în legi speciale, Comentarii şi explicaţii), 3rd edition, CH Beck Publishing House, Bucharest, 2013, pg.593

[4] N.Conea, E.Tanislav, C.Gheorghe, M.Conea – Criminal offenses under special laws (original title: Infracţiuni prevăzute în legi speciale), Semne Publishing House, Bucharest, 2000, pg.244

authorization for the conduct complained of, but only in the first normative variant.

As the incrimination text clearly states, the first normative variant consists of conducting one of the activities referred to in art.2, art.24, par.1, art.28, par.2 and art.38, par.1, without proper authorization required by law. The second normative variant consists of a breach of art.38 par.$2^1$ and $2^2$.

To understand the action or omission punishable under criminal law, we find it necessary to examine the texts earlier referred to. In this regard, article 2 defining the regulatory field of the law was reproduced in the first part of the paper. Article 24, paragraph 1 of the same law states that: "The authorization of management systems in the nuclear activities of design, location, supply, manufacturing, service delivery, construction, installation, commissioning, operation, decommissioning or conservation of nuclear installations and products, services and systems classified as important for nuclear safety is mandatory". Article 28, paragraph 2 of the Law refers to obligatory licensing of ownership, conservation, decommissioning or transfer, providing that: "Upon closure or decommissioning of nuclear or radiological facilities, and in case of partial or complete transfer of nuclear and radiological installations, radioactive products or nuclear materials, the authorization holder must, in advance, request and obtain, as provided by law, the authorization for possession, storage, decommissioning or transfer, as appropriate".

Finally, article 38, paragraph 1 of Law no.111/1996 stipulates: "The Ministry of Public Health shall authorize: a) the introduction into the economic and social circuit, for use or consumption by the population, of products which have undergone irradiation or containing radioactive materials; b) the introducing into the field of medical diagnosis and medical treatment, radiation sources closed, open, ionizing radiation generating devices and pharmaceutical products containing radioactive materials".

The multitude of actions resulting from cumulating the offending provisions found in article 2 of Law no.111/1996, as amended and supplemented, generate a poor and possibly confusing incrimination. This is, from our point of view, an effect of the repeated reference technique, which, in criminal law, can lead to severe misunderstandings of the text, most of all, when certain actions or omissions are prohibited, but they are not sanctioned as such.

We appreciate that only the following actions or omissions resulting from article 2 are actually incriminated by article 44, namely because they are the only conducts for which a sanction is provided: a) research, design, possession, placing, construction, installation, commissioning, trial run, operation, modification, conservation, decommissioning or closure, import, export and intra-Community transfer of nuclear installations, including the management of used nuclear fuel; b) the design, ownership, location, construction and assembly, commissioning, operation, conservation and decommissioning of mining and preparation of uranium and thorium and facilities of waste from the mining and preparation of uranium and thorium; c) the production, placing, construction, supply, rental, transfer, handling, holding, use, intermediate storage, removal, transportation, transit, import, export and intra-community transfer of radiological facilities, including radioactive waste management facilities; d) the production, the providing and use of dosimetric and of ionizing radiation detection systems, of materials, and devices for the protection against ionizing radiation, and means for packaging or transport of radioactive materials, specially arranged for this purpose; e) the production, manufacture, lease, transfer, possession, import, export and intra-community transfer of materials, devices and equipment referred to in Annex no.1, f) holding, transfer, import, export and intra-community transfer of unpublished information relating to materials, devices and equipment pertinent to the proliferation of nuclear weapons and other nuclear explosive devices, referred to in Annex no. 1, g) providing products and services for nuclear facilities.

In national legislation, so far, we have not encountered any crime likely to be committed in so many normative variants. We appreciate that the choice of the legislator is mainly determined by the use of a per relationem incrimination method, which complicates determining the actual content of criminal offense and the framing of facts in one of the legal provisions in question.

Paradoxically, for the actions found in article 2, entirely indicated by the legislator in the content or article 44, just the conducts set out in paragraphs a, b, c, d, e, f, g are penalized by indicating the penalties applicable. The criminal activities covered by art. 2 lit.$c^1$, $c^2$, $c^3$, h, $h^1$, i, j, k, l, m, n, although prohibited, are not subjected to a criminal penalty. We believe that this mismatch was caused by repeated legislative changes, by modifying single articles without remedying the imperfections generated by the reference norms. In this regard, we observe that in the original form of the law[5], article 2 contained only 7 letters, from "a" to "g", therefore, the rest of article 2 is the effect of legislative upgrades done in the past.

The offense is considered typical also when the perpetrator carries out the activities listed under art.24, par.1, art.28, par.2 and art.38, par.1 without proper authorization required by law. According to the texts previously quoted, the offense consists of activities of design, location, supply, manufacturing, service delivery, construction, installation, commissioning, operation, decommissioning or conservation of nuclear installations and products, services and systems classified as important for nuclear safety; or cessation

[5] Published in the Official Gazette, Part I, no.267/29.10.1996

of the activity or radiological or decommissioning of nuclear installations, as well as the transfer in part or in whole, of nuclear and radiological, nuclear materials or radioactive products; or introduction into the economic and social, for use or consumption by the population, placing the medical field, for diagnosis and treatment, radiation sources closed, open, ionizing radiation generating devices and pharmaceutical products containing radioactive materials.

All regulatory arrangements set out above have the essential request attached to the material element, that the acts must be undertake without proper authorization.

We appreciate that imposing an authorization that is also an essential element in determining the constitutive content of a crime must be done by a normative act of the same legal force as the organic law, in order to comply with article 73, paragraph 3, letter h of the Romanian Constitution. This problem will be referred to in the second part of this paper, when analyzing the relevance of the Romanian Constitutional Court Decision no.405/2016.

The latter normative variant for the offense in question is represented by the noncompliance of the perpetrator with art.38 par.$2^1$ and $2^2$ of Law no.111/1996. The quoted text, namely paragraph $2^1$ stipulates: "It is prohibited to deliberate add radioactive substances in the production of food, feed and cosmetic products, as well as the import or export of such products". Paragraph $2^2$ provides that "It is prohibited to deliberate addition of radioactive substances in toys and personal ornaments, and the import or export of such products".

We believe that the incrimination actually prohibits the manufacturer, importer or exporter of food, cosmetics, toys and personal ornaments to deliberately add radioactive substances in its products to safeguard the life and integrity of human beings. This provision, from our perspective is mainly suitable for the protection of public health, more than for the protection of the environment.

The immediate result is represented by a state of danger to the social values protected, public health, public security and environmental integrity. Being a crime of abstract danger it is not necessary to produce any result for it to be typical. Moreover, if the facts in question have the effect of a more dangerous outcome, and personal life, integrity and property of people are affected, other crimes against life or property will be committed by the same act.

The causal link, given the formal character of the offense, is ex re.

The form of guilt required by law, in accordance with article 16, paragraph 6 of the Criminal Code, is the intention, either direct or indirect. The motive and purpose of the perpetrator are relevant only for the judicial individualization of the penalty.

## 3. The particular relevance of Romanian Constitutional Court Decision no.405/2016

Considering the type of normative act as criteria for the quality of a criminal norm, we consider it appropriate to determine the category of law liable to regulate criminal offenses and penalties provided, under the provisions of article 73, paragraph 3, letter h of the Romanian Constitution[6].

In this regard, we consider relevant to analyze the jurisprudence of the Constitutional Court of Romania in Decision no.405/15.06.2016[7], regarding the exception of unconstitutionality of the provisions of art.246 of the Romanian Criminal Code from 1969, art.297, paragraph 1 of the current Criminal Code and art.$13^2$ of Law no.78 / 2000 on preventing, detecting and sanctioning corruption.

By our assessment, the decision is relevant for the reasoning used by the constitutional judges that must apply with regard to other offenses regulated in a similar manner by incomplete criminal norms.

The essential legal question for this thesis focuses on the quality standard of the law when the incriminations is done by an incomplete legal norm, that must be completed with a provision from another act, in order to determine and punish a certain conduct. The same problem, but with reference to the offense of abuse of office, has been resolved by the Constitutional Court decision mentioned above.

In paragraph 51 of the Decision nr.405/2016, the Romanian Constitutional Court stipulated that one cannot be held liable for violating an objective standard if he does not fulfill a conduct undeterminable at normative level. Similarly, the Court held that the fulfillment of service duties improperly, can only be interpreted as meaning that the defective fulfillment is achieved by breaking the law.

The Court held that reference to a large sphere of normative acts, other than laws and Government ordinances, in order to complete criminal regulations, influences the objective side of the offense by extending it to acts that are not stipulated by primary regulation.

Equally, according to paragraph 61 of the decision, the prohibited conduct should be imposed by the legislature even by law (understood as an act formally adopted by Parliament, under Article 73, paragraph 1 of the Constitution, as well as a physical act with the force of law issued by the Government under legislative delegation under Article 115 of the Constitution or ordinances and emergency ordinances), and it cannot be deducted by the judge in a manner in which legal norms are replaced by a reasoning.

Consider the reasoning of the Court, we believe it to be applicable for every situation in which an incomplete norm regulates a criminal offense, and in order to determine the prohibited conduct, the legal text

[6] According to article 73, paragraph 3, letter h of the Romanian Constitution: "Organic laws shall regulate: crime, punishment and the execution thereof."

[7] Published in the Official Gazette, Part I, no.517/08.07.2016

must be completed with another provision, originating in a normative act. Without any doubt, article 73, paragraph 3, letter h of the Constitution does not require that absolutely all components of the constitutive content of the offense to be regulated by an organic law, or Government Emergency Ordinance issued in conditions legislative delegation under article 115 of the Constitution.

We also consider relevant the Romanian Constitutional Court Decision no.599/19.06.2007[8] regarding the exception of unconstitutionality of article 97, paragraphs 1,3 and 4 and the provisions of article 98, paragraphs 1,3 and 4 of Law no.26/1996 regarding the Forest Code. In that case, the exception of unconstitutionality was rejected, but the Court noted in its preamble that "since the average price of a cubic meter of standing timber is established under article 107, paragraph 1 of the Forest Code, by order of the central public authority responsible for forestry, this determination is based on a legal empowerment given by an organic law therefore the Court will not retain a violation of article 1, paragraph 3 of the Basic Law on the supremacy of the Constitution and the law".

Therefore, we believe that in terms of respecting Article 73, paragraph 3, letter h of the Constitution, an essential request attached to the material element of the offense is part of the constitutive content of the offense, and in order to comply with the Constitutional provisions earlier mentioned, the obligation that constitutes the essential request must be imposed by law, namely by organic law or by a Government emergency ordinance, or by an act of lower legal force, like a Government decision or a Ministry act, as long as the nature of that act is determined or, at least determinable, starting from the incrimination text, or from an act of legal force equal to organic law.

Fortunately, the provisions of article 44 of Law no.111/1996 refer to a proper authorization required by law, and in this respect, we have observed that all activities incriminated must be preauthorized, according to different provisions of the Law. Given the fact that it is an organic law, this quality standard imposed by article 73, paragraph 3, letter h of the Constitution is fulfilled. More than that, in the case of a breach of article 38, paragraph 1, as a normative variant of the offense stipulated by article 44, the normative act of lower legal force, like the act of the Ministry of Public Health is expressly mentioned, and following the mechanism of the Romanian Constitutional Court Decision no.599/19.06.2007, previously quoted, a legal empowerment has operated, and the completing norm, although an act of a Ministry, is determinable as an effect of an organic law provision.

## Conclusion

As we have managed to show in the first part of this paper, the provisions of article 44 of Law no.111/1996 are among the vaguest and most confusing incriminations found in Romanian actual legislation.

Given the fact that a great number of legislative changes conducted to non-hermetic correlations, we appreciate that art.44 must be modified to suit the actual status of the legislation and to prevent the need for both the addressee of the criminal provision, but also for the national judge continuously reinterpret the provision in order to determine the prohibited and the punished conduct.

For this reason, we believe that art.44 must incriminate each of the conducts found in article 2, in a direct manner, and therefore we suggest the following form:

1. Carrying out the following activities without the proper authorization required by law constitutes an offense and shall be punished with imprisonment from six months to two years or a fine:

a) the research, development, ownership, location, construction or assembly, conservation of nuclear installations;
b) the design, ownership, location, construction and assembly, commissioning, operation, conservation and decommissioning of mining and preparation of uranium and thorium and facilities of waste from the mining and preparation of uranium and thorium;
c) the production, the providing and use of means for packaging or transport of radioactive materials, specially arranged for this purpose;
d) providing products and services for nuclear facilities;
e) the design, location, supply, manufacturing, service delivery, construction, installation, commissioning, operation, decommissioning or conservation of nuclear installations and products, services and systems classified as important for nuclear safety, without a management system authorization;
f) the introduction into the economic and social circuit, for use or consumption by the population, of products which have undergone irradiation or containing radioactive materials or the introducing into the field of medical diagnosis and medical treatment, radiation sources closed, open, ionizing radiation generating devices and pharmaceutical products containing radioactive materials.

2. Carrying out the following activities without the proper authorization required by law constitutes an offense and shall be punished with imprisonment from 2 to 7 years and deprivation of certain rights:

a) the commissioning, trial-run, operation, modification, removal, import and export of nuclear installations;
b) the production, placing, construction, supply, rental, transfer, handling, holding, use, intermediate storage, removal, transportation,

[8] Published in the Official Gazette, Part I, no.523/02.08.2007

transit, import, export and intra-community transfer of radiological facilities, including radioactive waste management facilities, if radiological facilities, nuclear or radioactive materials, radioactive radiation generating waste presents a special risk;

c) the production, manufacture, lease, transfer, possession, import, export and intra-community transfer of materials, devices and equipment referred to in Annex no.1;

d) holding, transfer, import, export and intra-community transfer of unpublished information relating to materials, devices and equipment pertinent to the proliferation of nuclear weapons and other nuclear explosive devices, referred to in Annex no.1;

e) closure or decommissioning of nuclear or radiological facilities, and in case of partial or complete transfer of nuclear and radiological installations, radioactive products or nuclear materials, if nuclear or radioactive materials, radioactive waste and radiation generators present a special nuclear or radiological risk.

3. The same penalty as in paragraph 2 will be applied for the deliberate addition of radioactive substances in the production of food, feed and cosmetic products, as well as the import or export of such products and for the deliberate addition of radioactive substances in toys and personal ornaments, and the import or export of such products.

4. The attempt to offenses under paragraphs 2 and 3 is punished".

Considering the second part of this paper, regarding the particular relevance of Romanian Constitutional Court Decision no.405/2016, we have concluded that an essential request attached to the material element of the offense is part of the constitutive content of the offense, and in order to comply with the provisions of article 73, paragraph 3, letter h of the Romanian Constitution, the obligation that constitutes the essential request must be imposed by law, namely by organic law or by a Government emergency ordinance, or by an act of lower legal force, like a Government decision or a Ministry act, as long as the nature of that act is determined or, at least determinable, starting from the incrimination text, or from an act of legal force equal to organic law. In this respect, we have observed that the provisions of article 44 of Law no.111/1996 adequately refer to other legal texts from the same law, which is organic, or to normative acts of lower legal force, like an act of the Ministry of Public Health, which is expressly mentioned by article 38, paragraph 1 of Law no.111/1996, being, therefore, determinable by organic law.

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# PROTECTION OF THE WASTE REGIME BY CRIMINAL LAW. ACTUAL SITUATION IN ROMANIA

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**Abstract**

*In this paper, the author discusses the main weaknesses of the incrimination provided by article 63 of Romanian Law no.211/2011, regarding the waste regime, in its actual state, as a result of legislation changes that occurred repeatedly.*

*The paper is structured in three parts. The first part indicates the most relevant legislation changes for article 63 of Romanian Law no.211/2011 since its entry into force. The second part identifies the inconsistencies of the actual version of the law, focusing mainly on the constitutive content of the crime, while the third part points out the main solutions to the deficiencies previously mentioned, alongside de lege ferenda proposals.*

**Keywords:** *waste regime, waste protection, crimes against environment, inadequate legislation.*

## 1. Introduction

The legal regime of waste in Romania is regulated by Law no.211/2011, republished[1], with subsequent amendments. The major impact of the management of waste on the environment is beyond doubt, even resulting from article 1 of the law previously mentioned that states: "This law establishes the necessary measures to protect the environment and human health by preventing or reducing adverse effects resulting from the production and management of waste and by reducing overall impacts of the use of resources and improving the efficiency of their use".

The criminal protection assured by the legislator under the provisions of article 63 of Law no.211/2011 aims at ensuring the compliance with the provisions regarding marketing, recovery, treatment, disposal and transport of waste criminalization containing six different normative contents, sanctioned in the same manner.

Art.63 of Law no.211/2011 states: "(1) An offense punishable by imprisonment from three years to five years or a fine following facts: a) the import of appliances, equipment, machinery, materials and products used from a waste category prohibited to import; b) failure to take or respect measures in carrying out the collection, transport, recovery and disposal of hazardous waste; c) trade, abandonment and/or failure to assure the load of waste during transit through the territory of Romania; d) the refuse to return waste to the country of origin if it was brought into the country for purposes other than that of disposal and for which the competent authority ordered the return; e) placing the waste in the country in order to eliminate and / or not used for the purpose for which it has been introduced; f) acceptance by operators of deposits/incinerators for disposal of waste of smuggled waste and / or of waste brought into the country for purposes other than disposal and which could not be used for the purpose for which they were introduced. (2) The attempt is punishable".

Regarding the most relevant legislative changes that occurred since its entry into force, we observe that since November 25th, 2011[2], Law no.211/2011 has been modified three times.

The first amendment was done by Law no.187/2012 regarding the enactment of Law no.286/2009, the Criminal Code. This act had a direct relevance for the provisions analyzed, namely art.63 of Law no.211/2011, because it reduced the penalty limits originally established by the legislator, in 2011, at 3 to 5 years of imprisonment, or a criminal fine, to 6 months to 5 years of imprisonment or a criminal fine. The reason behind the reduction of the penalty limits came alongside the philosophy of the new Criminal Code, Law no.286/2009, enforced in the 1st of February, 2014, that provided some reduced the penalty limits for most crimes by comparison to the old legislation.

Two months later, on March 28th, 2014, Law no.211/2011 was republished, but this did not affect, in any way, the provisions of art.63.

The second important amendment to the Law was done by the Government Emergency Ordinance (G.E.O.) no.68/2016, regarding the amending and supplementing of Law no.211/2011 concerning the waste regime, entered into force on October 28th, 2016[3], approved by Law no.166/2017 on July 16th, 2017[4]. By this amendment, the first paragraph of art.63 was again modified, by return to the previous regulation, namely, the limits of the penalty were raised from 6 months to 5 years of imprisonment or a criminal fine to 3 to 5

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[1] Variant republished in the Official Gazette, Part I, No. 220/28.03.2014

[2] Published in the Official Gazette, Part I, No. 837/25.11.2011

[3] Published in the Official Gazette, Part I, no. 823/18.10.2016

[4] Published in the Official Gazette, Part I, no. 554/13.07.2017

years of imprisonment, or a criminal fine, just like the original provisions of the Law, as entered into force in 2011.

The hesitation of the legislator to modify the penalty limits followed by a reenactment of the previous version of the law is an indicator of the Romanian legislative fluctuation in the matter of waste regime in the last years, fluctuation that prevented a consequent judicial practice in the same timeframe.

The third legislative change was made by G.E.O. no.74/2018[5], regarding the amending and supplementing of Law no.211/2011 concerning the waste regime, of Law no. 249/2015 regarding the management of packaging and of the waste of packaging, and of G.E.O. no.196/2005 regarding the Environmental Fund. G.E.O. no.74/2018 was approved by Law no.31/2019[6]. This third legislative amendment to Law no.211/2011 does not include relevant changes to the provisions of art.63, subjected to analyze.

## 2. Particularities of the incrimination

In order to establish the actual status and deficiencies of the crime regulated by art.63 of Law no.211/2001 we will briefly point out the particularities and weaknesses of the text.

The generic legal object consists in the protection of the environment against pollution by waste. The special legal object, as we appreciate, consists in the social relationships formed around environmental protection and human health by strictly regulating the marketing, recovery, treatment, disposal and transport of waste.

Depending on the features of each variant normative, the material object can be represented by appliances, equipment, machinery, materials and products used and worn in the category of waste, prohibited import waste or hazardous waste.

The definition of waste is stipulated in Section 9 of Annex 1 to this Law, as follows: "any substance or object which the holder throws or intends to throw or is required to throw". Hazardous waste is defined by section 11 of Annex 1 to the same law as follows: "any waste which displays one or more of the hazardous properties listed in Annex no.4 of the law".

In an unexpected manner, although the qualification of hazardous waste depends on the provisions of Annex 4, part of Law no.211/2011, this annex was repealed by article 1, point 33 of G.E.O. no.68/10.12.2016 amending and supplementing Law no.211/2011 on waste regime.

This way, the actual enactment does not contain a functional definition of the concept of hazardous waste. Given the fact that the concept is used in criminal regulation, and section 11 of Annex 1 of Law no.211/2011 strictly refers to Annex 4, we appreciate that the definition of hazardous waste should not be taken from another law, but, as a last resort, if another provision clearly stipulates the definition, it can be used. As we observed, a definition of hazardous waste can be found in Article 2, point 21 of G.E.O. no.195/2005, regarding the protection of the environment[7]. According to this text, hazardous waste is "waste classified generically under specific waste regulations in these types or categories of waste and that have at least one constituent or a property that makes it hazardous". This cannot be considered a valid definition, mainly because it refers to special regulation that classifies waste, and, under Romanian law, that classification was made by Annex 4 of the Law no.211/2011, actually repealed.

The concept of hazardous waste was defined by legal literature[8] as "waste arising from anthropogenic activities that once introduced or maintained in the environment has a negative effect on the environment, people, plants, animals and material goods".

Other authors[9] state that for the management of waste a list containing all types of waste, including hazardous waste must be established, but the author does not refer to an existing list.

An environmental law dictionary[10] defines hazardous waste as "toxic, inflammable, explosive, infectios, corrosive, radioactive, or other similar types of waste that once introduced or maintained in the environment can harm the environment, plants, animals and people".

We appreciate that a definition given by a scholar, even of the highest academic rank, cannot replace the incrimination text that can only be provided by the legislator, as an effect of *nullum crimen sine lege* principle.

As a result, none of the provisions stipulated for hazardous waste can be applied at this moment.

The active subject of the offense is not qualified by law, therefore it can be represented by any physical person or legal person held liable according to general criminal law provisions.

In what concerns the normative variant covered by article 63, paragraph 1, letter f, previously quoted, the active subject is, in fact, a legal entity, but since the law does not circumstantiate this distinction, we appreciate that an Operator can also be an individual person, therefore, even a physical person is likely to commit the offense.

[5] Published in the Official Gazette, Part I, no. 630/19.07.2018
[6] Published in the Official Gazette, Part I, no. 37/14.01.2019
[7] Published in the Official Gazette, Part I, no.1196/30.12.2005
[8] D.S.Marinescu, M.C.Petre – *Environmental Law Treaty (original title: Tratat de Dreptul Mediului)*, 5th edition, Universitara Publishing House, Bucharest, 2014, pg.535
[9] M.Duţu, A.Duţu – *Environmental Law (original title: Dreptul Mediului)*, 4th edition, CH Beck Publishing House, Bucharest, 2014, pg.442
[10] C.P.Romiţan – *Environmental Law Dictionary (original title: Dicţionar de Dreptul Mediului)*, All Beck Publishing House, Bucharest, 2004, pg.59

The main passive subject is the State as guarantor of the integrity of the environment. If a legal or physical person is harmed by the action incriminated under the provisions of art.63, we appreciate that there will not be a secondary passive subject of this crime, but a single passive subject of another offense against patrimony or physical integrity of the victim.

Given the fact that the offenses covered by Article 63 of Law no.211/2011 are incriminated in six variants with different regulations, we appreciate that the premise and the constitutive content must be analyzed for each variant.

Therefore, in what concerns the variant regulated by article 63, paragraph 1, letter a, we shall not encounter a premise situation, and the material element consists of an import operation, namely the placing inside the national borders, regardless of title of goods, as circumscribed in the present situation: appliances, equipment, machinery, materials and products used and waste from abroad. In this regard, we appreciate that the civil context in which the goods were brought into the country is not relevant, as long as they are within the borders of Romania and are likely to alter the quality of the environmental quality in this area.

For the crime to be typical, the material element must have an essential requirement attached, namely that the imported products fall within the category of waste prohibited to import.

A major shortcoming of this regulation is that the forbidden to import waste category is not determinable. As we analyze the Romanian legislation, we observe that the regime of import of waste materials of any kind and other dangerous substances to health and the environment has been established in Romania by Government Decision no.340/20.06.1992[11], but the quoted decision has been repealed by art.30 of the Government Decision no.228/2004[12] regarding the control of placing unhazardous waste inside the borders considering import, active perfecting or transit.

The only actual act designating conditions directly applicable to import of waste is the Regulation (EC) no. 1013/2006 of the European Parliament and of the Council, but an exhaustive list of prohibited to import waste that cannot be found.

In these circumstances, we consider that the provisions of article 63, paragraph 1, letter a of Law no.211/2011 are not likely to be applied in practice, fact that requires the intervention of the criminal legislature in order either to repeal the provision, or to establish a category of waste prohibited to import. Given the need to protect the environment, especially in the last decade, we find it imperative for the Romanian legislator to determine the category previously mentioned.

The second normative variant of the offense can be found in article 63, paragraph 1, letter b of Law no.211/2011.

The prohibited conduct is represented by the failure to take or respect measures in carrying out the collection, transport, recovery and disposal of hazardous waste. The premise situation is the pre-existence of an obligation to take measures or respect the measures taken in processing hazardous waste in the manner established by the law: collection, transport, recovery and disposal.

To establish the existence of the premise situation it is necessary to predetermine the category of hazardous waste. In this regard, we refer to the explanations given when analyzing the material object of the crime and conclude that hazardous waste is defined in section 11 of Annex 1 of Law no.211/2011 as waste which displays one or more of the hazardous properties referred in the Annex no. 4 the law, but Annex 4, inexplicably, was repealed, without being replaced by another list of dangerous properties in accordance to the legal text.

This way, the provisions of article 63, paragraph 1, letter b of the Law no.211/2011 are without practical effect, since the type of waste for which the conduct was prescribed is not determined or determinable by current legislation. As earlier stated, the definition of hazardous waste cannot be borrowed from another law.

The third normative variant is found in article 63, paragraph 1, letter c of Law no.211/2011, and incriminates the trade, abandonment and/or failure to assure the load of waste during transit through the territory of Romania. The regulation has no premise situation and the material element consists of three alternative actions, namely trade, abandonment of waste and failure to assure the load of waste during transit through the territory of Romania.

The imprecise legislative manner used by the legislator cannot be accepted in criminal regulations, because the use of "and/or" in a criminal provision may create the impression that the three actions should be carried out either cumulatively or alternately. We appreciate that such confusion is not compatible with the accuracy and predictability of the incrimination in criminal matters, and the only reasonable interpretation, in our view, concerns the alternative nature of the conducts incriminated, and this way, the only valid conjunction would be "or" instead of "and/or".

We shall not focus on the three actions that represent the verbum regens because no deficiencies have been found. The essential requirement attached to the material element states that the prohibited act must occur while the waste is located in Romania.

The fourth normative variant is found in article 63, paragraph 1, letter d that incriminates the refuse to return waste to the country of origin if it was brought into the country for purposes other than that of disposal and for which the competent authority ordered the return.

[11] Published in the Official Gazette, Part I, no.201/18.08.1992
[12] Published in the Official Gazette, Part I, no.189/04.03.2004

The premise situation is represented by the waste return order previously issued by the competent authority. The material element lies in the refusal to return the waste to its country of origin, which can be done either by an action or by omission. Equally, we appreciate that an essential requirement is attached to the material element, and that consists of the purpose of importing the waste, which must be other than its elimination. If the waste was imported with the purpose of disposal, even if the competent authority issued an order to return, the conduct will not fit the incrimination, because the essential requirement is not fulfilled.

The fifth normative variant, found in article 63, paragraph 1, letter e incriminates the action of placing the waste in the country in order to eliminate and/or not used for the purpose for which it has been introduced. The text does not imply the existence of a premise situation. The material element can be achieved by two alternative actions, firstly, the placing of waste on Romanian land and secondly, the lack of using the waste according to the purpose for which it was placed inside the national borders. We appreciate that the foregoing considerations regarding the need to replace the phrase "and/or" with a single conjunction, in this case "or", are valid for this provision also.

Regarding the first alternative action, consisting in placing the waste inside Romanian borders, we consider that it is irrelevant to determine if the waste was imported in a legitimate or fraudulent manner, as long as the placing on land is done with the purpose of eliminating the waste.

Regarding the second alternative action, consisting in the non-use of waste for the purpose for which it was introduced inside Romanian borders, we appreciate that it is not necessary that the waste was used in another purpose other than that for which it was introduced in the country, because the crime is committed even in the case of non-use, or of storage without the intention of using the waste in any way.

If the waste that constitutes the material object of the crime in this normative variant is introduced inside Romanian borders, and after that it is abandoned, we appreciate that the conduct will fall under the provisions of article 63, paragraph 1, letter c of Law no.211/2011, previously mentioned.

The sixth normative variant is regulated by article 63, paragraph 1, letter f of Law no.211/2011, and incriminates the acceptance by operators of deposits/incinerators for disposal of waste of smuggled waste and/or of waste brought into the country for purposes other than disposal and which could not be used for the purpose for which they were introduced.

As a particularity we observe that the premise situation is also alternative: firstly, it consists in the action to smuggle, namely illegally introduce waste inside the borders of Romania and secondly the legal introduction of waste inside the borders, with a specific purpose other than disposal, if the waste could not be used for the original purpose.

For the same reason as earlier discussed, we believe that the phrase "and/or" must be replaced with "or", because the acceptance of smuggled waste is not cumulative with the acceptance of legally introduced waste, both being alternative ways, autonomously incriminated by the text analyzed.

The action of accepting waste for disposal implies the agreement of the operator of waste deposits or incinerators. We appreciate that it is not necessary for the operator to proceed to waste disposal for the action to be punishable, because the conduct fits the incrimination if the operator simply accepts the waste, if the premise situation is fulfilled.

The immediate consequence, for all six normative variants is a state of danger caused to social relations regarding environmental protection and public health.

The causality link between the material element and the immediate consequence is directly determined by the material conduct, resulting ex re.

The form of guilt required by law, as article 16, paragraph 6 of the Criminal Code states, is the intention, either direct or indirect of the perpetrator, which we find suitable for all six variants of article 63, paragraph 1. The motive and purpose of the perpetrator are relevant only in the judicial individualization of punishment.

Although preparatory acts are possible if the material element is done by an action, they are not incriminated. The attempt is criminalized for each variant normative under article 63, paragraph 2 of Law no.211 / 2011, but we appreciate that it is possible only if the conduct of the perpetrator consists of an action.

## 3. Conclusion

In these final paragraphs, we have cumulated our proposals for improving the legislation, which will be stated separately for each normative variant.

In order to effectively enforce the provisions of article 63, paragraph 1, letter a, de lege ferenda, we consider it necessary that the legislator establishes a basis for determining the category of prohibited waste import by regulating its content either by an amendment to Law no.211/2011 or in a distinct normative act, expressly determined by Law no.211/2011.

In order to apply the provisions of article 63, paragraph 1, letter b, we appreciate that the legislator must promptly define the concept of "hazardous waste" by law, possibly by setting up the reference system for this type of waste under Annex 4 of the Law no.211/2011, which would not imply other legislative changes. By our appreciation, the easiest way to fix this deficiency would be to re-enact the last version of Annex 4, before it was repealed.

In what concerns the regulation found in article 63, paragraph 1, letter c, we appreciate that de lege ferenda, the legislator must replace the confusing manner of incrimination with an accurate provision, that will not raise issues of predictability, therefore, we

propose the replacement of the term "and/or" with a single conjunction, namely "or".

The same considerations apply for the provisions of art. 63, paragraph 1, letter e where we propose the replacement of the term "and/or" with a single conjunction, namely "or", because the purpose of the legislator was not to cumulate two prohibited actions in order for the perpetrator to be held liable. We believe that the only reasonable interpretation is to accept that the text incriminates two distinct, alternative conducts, therefore, the phrase "and/or" must be replaced with a single conjunction, namely "or".

With a slight amendment, the same considerations are valid for the provisions of art. 63, paragraph 1, letter f, where the acceptance of smuggled waste cannot be seen as cumulative with the acceptance of legally introduced waste, in order for the conduct to fit the incrimination, but this interpretation must not lead to plural offenses if both types of waste are accepted by the operator.

As we have managed to show, the regulation of article 63 of Law no.211/2011 is far from being functional at this moment, and an intervention of the legislator is necessary. Equally, some of the issues analyzed, that made the legislative proposals earlier mentioned possible, are an effect of uncorrelated legislative changes in the past.

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# ON THE LIMITS AND CONSEQUENCES OF THE CASE SPLITTING IN THE ROMANIAN CRIMINAL PROCEDURE SYSTEM

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**Abstract**

*In the Romanian criminal justice system, the framework or procedural context in which one of the two main judicial functions is exercised - dealing with essential elements of the conflict report - is not fixed but flexible.*

*The current study aims to analyze some of the procedural manifestations of case splitting, one of the legally accepted operations that have as purpose to modify the procedural framework.*

*The analysis seeks to identify not only the general pattern in which case splitting may occur, but also the possible solutions to overcome any impediments or incidents generated by the actual application / enforcement of this operation. Last but not least, the study also suggests making changes to the incidental regulatory framework, where it lacks efficiency.*

**Keywords:** *case splitting, procedural incident, boundaries, effects, prohibitions.*

## Introduction:

This research approach addresses a seemingly benign issue in all incidental or ancillary procedural operations. Undoubtedly, the procedural purpose of the case splitting does not refer to the merits of the case, in the sense that this operation is not capable of influencing the solution to be given on the conflict report subjected to the investigation or judgment. Paradoxically, however, the case-splitting may result in the procedure being an important operation in the general economy of the judicial process. In terms of the regulatory framework incidentally concentrated on case splitting, the institution was approached rather tangentially in the literature.

However, the particular judicial manifestations of case splitting have shown that in many cases the erroneous or distorted realization of this operation can raise serious problems that are difficult to overcome.

## 1. Preliminary aspects regarding the procedural operation of case splitting in the Romanian criminal procedural system

From a normative and also a judicial perspective, *case splitting* is regulated as a common procedural incident on jurisdiction in criminal matters. As a way of procedural manifestation, the case splitting is a derivative incident that interferes closely with the *joining* of the criminal cases, realizing in the opposite sense a similar consequence to it. Both when joining the cases and sometimes when case splitting, there is a prorogation of competence of the judicial bodies, which thus are empowered to manifest themselves judicially, in compliance with the regulation, beyond their original competencies. In this sense, in the doctrine[1], the prorogation of competence was defined as a form of extension of the jurisdiction of a judicial body also as regard the facts or persons not falling within the scope of the competence determined in accordance with the common rules. When considering the effects[2] of the competence, the prorogation of competence is basically a procedural remedy whereby the extension of the powers that derive from the natural, ordinary jurisdiction of a judicial body and other matters will not be sanctioned under the conditions of common law. Thus, the acts performed by a judicial body through the extension of the competence as well as regarding the facts, persons not assigned to them according to the customary norms, shall not be found to be null (sanctioned by absolute nullity) or annulled (nullified by relative nullity), but will be considered valid, producing legal consequences.

In the current criminal procedural system, prorogation of competencies operates not only in terms of *facts* or *persons*, but also in terms of **circumstances,**

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[1] G. Gr. Theodoru, *Criminal Procedure Law Treaty, 3rd Edition*, Hamangiu Publishing House, 2013, p.265. The author deals with the indivisibility and connectivity under the most often encountered cases of prorogation of jurisdiction, forms that no longer found an express normative correspondent in the Criminal Procedure Code. See in this respect the provisions of article 43 to 46 CPC.

[2] If the *positive* effect of competence determines the habilitation or the empowerment of a judiciary to manifest themselves by performing specific tasks and carrying out concrete acts, the *negative* effect of competence determines the impossibility of the same judicial body to overcome its competencies established based on its competencies. In this respect, A Zarafiu, *Criminal Procedure. The general part. Special art,* 2nd Edition, CH Beck Publishing House, 2015, p.123-124.

such as the pre-proceedings questions[3] of extra-criminal nature that causes an extension of the functional competence. When synthesizing the incidental regulation, nowadays the prorogation of competence operates when joining the criminal cases, when splitting them, in case of pre-proceedings, change of legal classification or qualification of the offence. The prorogation of competence is regulated as a common incident regarding the competence, having the possibility to intervene both in the activity of the courts as in the activity of the prosecution bodies, as a rule of reference under article 63 CPC.

However, the prorogation of competence remains an *possible event*, since the extension of competence does not operate even if one of the ways provided by the law manifests itself (it is not mandatory to extend the initial competence if the change of legal classification leads to a qualification that falls within the jurisdiction of the same judicial body where the case is pending).The law prefers, as a rule, the prorogation of competence in an ascending order, intervening only in favor of a body of similar or higher degree. By exception (in the case of pre-proceeding matters), the prorogation of competence may also operate in favor of the inferior body, as it is manifested in terms of functional competence.

In order to understand the limits and procedural consequences of case splitting, similar aspects of the case joining must first be cleared, because the institutions are correspondent but accomplished in the opposite direction. As a legal operation, case joining involves bringing two or more separate causes into a single file to be solved by a single judgment. Case joining is a form of achieving the procedural operability as it involves the simplification of the judicial activity and prevents contradictory rulings, through which different rulings are issued for the same legal relationships or interrelated legal relationships .The material premise of case joining is the valid existence of many criminal causes as the unification of the procedural context cannot operate at the virtual level, but always in the concrete. The functional premise consists of an intrinsic, formal, etiological, etc. connection, between these causes that claim the need to reunite them. The circumstances justifying the judicial operation of the case joining are its cases (grounds), in the absence of which the case joining, even if it corresponds to a judicial purpose, takes on an unlawful form. At present, the situations of case joining are no longer exhaustively regulated, in order not to affect the dynamic nature of the procedural forms, except in the case of compulsory case joining.

Sometimes case joining can also lead to a prorogation of competence in the sense that the body that will investigate or judge all causes did not have initially the competence over some facts or some perpetrators[4] . It is the possibility and not the binding nature of the incidence of the prorogations of competence in terms of case joining that is emphasized in the doctrine, providing that *"if several causes between which a connection exists are pending in front of the same court or the same prosecutor's office, the case joining will not imply by itself as well the prorogation of competence"*[5]. As mentioned above, joining criminal cases is regulated by the current provisions of article 43 CPP either as a *mandatory* incident or as an *optional* incident.

The mandatory case joining is caused by the circumstance or the legal situation in which a plurality of material acts or criminal acts constitutes, by its nature or by the will of the legislator, a unit requiring the settlement of the entire procedural complex by a single court. Practically, the plurality of legal relationships of conflict will be given a single judicial ruling that will ensure the security of legal relations. Corresponding to indivisibility cases in the former legislation, the present cases of compulsory case joining involve an organic connection between several facts or several material acts that make up a legal or natural unity of the offence. For the mandatory hypothesis for which it was regulated, the case joining appears, according to article 43 paragraph (1) CPC, in the form of a positive procedural obligation for the judicial body losing the right to assess the justifiable nature of the case joining from a judicial perspective. Its manifestations are limited only to *finding* that there is one of the cases of compulsory case joining without being able to refuse or ignore the benefit of the case joining.

The provision for the criminal cases joining is obligatory issued:

When it was regulated as an optional operation, the case joining seems to be caused by a less close link between two or more criminal causes, thus manifesting itself in a short term and only if it does not affect the procedural operability.

The *optional* case joining intervenes:

a) in the case of a multiple offenses contest - when two or more offenses were committed by the same person;
b) in the case of criminal participation - when more than one person were involved in the crime (even if in different qualities);
c) when two or more offenses are connected (by the

[3] In the case of pre-proceedings questions, through the prorogation of competence, the criminal court acquires jurisdiction to judge in matters other than the criminal one. According to article 52 paragraph (2) from the CPC, the judicial consequences of this extension are manifested in two aspects, concerning the procedure (rules) and the means of evidence.

[4] In the same sense, in doctrine I. Neagu, M. Damaschin *Criminal Procedure Treaty. The general part*, Universul Juridic Publishing House, Bucharest, 2014, p.366, it was stated that "Case joining is a situation in which the prorogation of competence can be retained because, depending on the reason leading to the case joining, competence norms are established according to which certain cases are settled by criminal justice bodies, which, under normal circumstances, do not have the competence to resolve them."

[5] M. Udroiu in M. Udroiu (coord.), *Code of Criminal Procedure. Comment on articles* , 2nd edition, CH Beck Publishing House, Bucharest, 2017, p.202

object, persons, cause, etc.) and the case joining is necessary for the good performance of justice.

This *general situation* of optional case joining may include the situations which, in the former procedural law, were considered to be cases of inherent connection:

- when two or more offenses are committed by different acts, by one or more persons together, at the same time and in the same place;
- where two or more offenses are committed in a different time or place after a prior agreement between offenders;
- when an offense is committed to prepare, facilitate or hide the commission of that offense, or is committed to facilitate or ensure that the perpetrator of another offense is excluded from criminal liability.

Irrespective of the fact that the existence of any of these cases is judicially established, the case joining will only be ordered if the competent judicial authority, within the limits of its powers, considers that the pursuit or trial are not delayed by this operation. In this respect, it is stated in the doctrine that despite the fact that the new code of criminal procedure no longer maintains the express rules of indivisibility and connectivity, *"the different legal treatment of the cases in which the case joining is mandatory and those in which the case joining is optional represents precisely the distinction to be made between instances of indivisibility and the cases of connectivity"*[6] .Thus, the link between criminal cases is not, by itself, the sufficient condition for the case joining to take place; the provision of the judicial body must be based not only on legality but also on the opportunity. In this respect, the doctrine states that *"the importance of this institution is determined by the need for the act of justice to have a unitary nature in relation to the objective reality that characterizes the committed criminal activity, because otherwise there is the risk of a misapplication of the law"*[7].

By implementing in criminal matters an incident specific to civil proceedings, the law now allows case joining as well in cases where there are several causes of the same object being analyzed by several judicial bodies. In such a situation, the case joining is based on a legal situation called *litis pendens.*

It may fall under this situation of case joining when the same appeal, introduced by the same person against the same ruling is recorded in two different cases, assigned to separate distinct bodies of the same court of appeal since it has been successively filed and registered, once by fax and once by registered letter (which arrived later). The case joining determined by the *identity of object* of two or more criminal cases is rather specific to the initial moments of the criminal trial (two different criminal prosecution bodies are pursuing the same offense and conducting parallel investigations as a result of distinct referrals).

Regardless of whether it is mandatory or voluntary, the case joining is not accomplished arbitrarily, but according to expressly regulated legal preferences that prevent abnormal situations or conflicts of competence. Thus:

- if the competence in relation to different facts or different perpetrators belongs, according to the law, to several equal-rank courts, the jurisdiction to judge all the facts and all the perpetrators (the joined cases) lies with the court first notified;
- if the competence by nature of the facts or by the quality of the persons belongs to different-rank courts, the competence to judge all the cases lies with the higher rank court;
- if one of the courts is civil and one military, the competence lies with the civil court; if the military court is higher in rank, the competence shall lie with the civil court equivalent in rank to the military court, having territorial jurisdiction according to the general rules, article 41 and article 42 Code of Criminal Procedure;
- concealment, favoring the offender, and non-disclosure of offenses are within the jurisdiction (competence) of the court that judges the offense to which they refer, and if competence by the quality of the persons belongs to different-rank courts, the competence to judge all the cases lies with the higher-rank court.

Paradoxically, the preference for the civil judicial organs with regard to the organ in whose favor the prorogation of competence operates is only functioning with regard to the judiciary. During the criminal prosecution, the preference operates in favor of the specialized body. In this respect, according to article 56 paragraph (4) and (5) of the CPC, under the form of special rules, is established the absolute nature of the provision according to which, in the case of crimes committed by military personnel, the prosecution is necessarily carried out by the military prosecutor. Military prosecutors within the military prosecutor's offices or the military units of the prosecutor's offices carry out the criminal prosecution according to the competence of the prosecutor's office to which they belong, for all participants in committing the crimes committed by the military, and the competent court will be notified according to article 44 CPP.

Practically, this preference of a special nature was only established for the criminal prosecution phase, which would be replaced by the preference regulated by common rules at the time the court was seized.

In all cases, once produced judicially, the prorogation of competence generates definitive effects, and it cannot be lost even if the ground that caused it ceases or disappears. Thus, according to article 44 para (2), the competence to hear the joined cases remains with the court, even if for the act or the perpetrator who determined the jurisdiction of these courts the splitting

[6] C.Voicu in the *Code of Criminal Procedure* , Issue 3, Hamangiu Publishing House, Bucharest, 2017, p.135

[7] B. Micu, AG Paun, R. Slăvoiu, *Criminal Procedure. Course for the admission to the magistracy and to the profession of lawyer. Tests with multiple choice questions*, 3rd Edition, Hamangiu Publishing House, Bucharest, 2015, p.82

of the cases or the discontinuation or termination of the criminal proceedings have been ordered or the exoneration was ruled. However, this rule does not work for the criminal prosecution phase, according to article 63 para (2) CPC. Currently, case joining is ordered only by the court which also shall have jurisdiction to hear the joined cases, in accordance with the above rules. There is no incidence of the rule from civil matters transferring the competence to decide on the joining of the judicial body which has no jurisdiction to hear the joined cases[8].

However, in all cases, the joining of the cases is preceded by a series of *administrative measures* (references to the competent court or panel) aimed at bringing all the cases in which the joinder will be discussed in the same hearing before a single panel.

The joining of the cases shall be ordered *at the request* of the prosecutor or of the parties. The case joining may also be ordered *ex officio*, regardless of the case on which it is grounded (compulsory or optional joining). The Government Emergency Ordinance no. 18/2016 provided that the injured party, whether or not a civil party in the criminal proceeding, may request the judicial bodies to join the cases, regardless of whether the reason invoked is a case of compulsory or optional joining. In the light of this new change, in doctrine, we also find opinions according to which *"in the course of criminal prosecution the suspect as well may ask the criminal prosecution bodies to join the cases for the purpose of the good administration of justice"*[9].

During the trial, in order to be joined, the cases must be at the same *stage of the trial*: at first instance or on appeal. The condition is deemed to be fulfilled even if these cases are at *different stages* of the trial at first instance or on appeal, or they are in the re-judgment phase after the dismissal or the cassation ordered during the ordinary or extraordinary ways of appeal. Thus, in the doctrine, it was stated that *"at the stage of the trial, the joining of the cases is done differentially according to the stage of the trial. Cases are always joined if they are pending on a first instance court, even after the cassation with remanding the case for retrial"*[10].

The joining of the cases is ordered during the trial by a court resolution which can be appealed only with the merits of the case [article 45 para (3) CPC]. In the course of the criminal prosecution, the joining of cases is ordered by an ordinance which, in the absence of derogation from the ordinary rule, may be appealed under the conditions of common law, with a complaint to the hierarchically superior prosecutor.

A form of prorogation of competence, atypical and mediated, may be considered to occur in case of splitting of the case. As mentioned, the splitting of the case is the legal operation similar to the joining of the cases, but accomplished in the opposite direction.

In spite of the apparent regulatory freedom regarding the form of procedural manifestation (the law does not explicitly provide for strict cases and conditions of operation as in the case of joining), the case splitting is circumscribed to implied limitations[11] which makes its judicial existence more specific. First of all, the act of positive disposition in the case of case splitting produces, at the same time, two categories of effects. *The procedural effect* of this operation is to gain the autonomy of the context in which either one of the elements of the already active action (with regard to some of the facts or some of the perpetrators) is exercised, or even one of the actions initially exercised in the same judicial context. *The administrative effect* of case splitting consists in the formation of new files (one or more, with different indications), derived from the original one, which retains its unique number and which will be solved separately. Secondly, the normative basis of the case splitting is different, according to the subject matter.

According to article 46 CPC the court may order the case splitting in respect of some of the defendants or some of the offenses for **sound reasons** concerning the proper conduct of the trial (eg the serious illness of one of the defendants that would lead to the suspension of the trial as far as he is concerned, the acquisition of special qualities by one of the defendants that would determine the change of personal competence and declining the jurisdiction, etc.).The measure does not affect the indivisibility of the criminal proceedings because, in such a situation, there will not be multiple judicial actions (born out of a single material cause) but the same action will be exercised in different procedural contexts.[12]

When the case splitting concerns one of the judicial actions itself, the incidental normative framework is given by the provisions of article 26 CPC. The premise of this form of case splitting is the existence of a simultaneous exercise of both legal actions in the same procedural framework, conducted in front of the criminal judicial bodies. Although generated by the same material cause (committing the offense representing at the same time a tort / delict), the two legal actions are exercised with the consideration of different procedural requirements, given that the criminal action is a public action and the civil action is a private one. Moreover, the main nature of the criminal

[8] According to article 139 paragraph (2) Code for civil procedure "The exception to the connectivity may be invoked by the parties or ex officio at the latest at the first hearing before the court subsequently seized which, by court resolution, will rule on the exception"

[9] M. Udroiu in M. Udroiu (coordinator), Code of Criminal Procedure. Comment on articles, 2nd edition, CH Beck Publishing House, Bucharest, 2017, p.205

[10] N. Volonciu, Treaty of Criminal Procedure. General Part Vol. I , 3rd Edition, Paideia Publishing House, Bucharest, p.311

[11] In this respect, according to the doctrine, N. Volonciu, Treaty of Criminal Procedure. General Part Vol. I, 3rd Edition, Paideia, Bucharest, p.311 "case splitting must be used with caution so as the separation of complex issues should not be prejudicial to the unitary resolving of the case."

[12] See also M. Udroiu, previously quoted, p. 62

action influences the procedural destiny of the secondary action by removing the possibility of affecting the features of the public action[13].

In this respect, if the resolution of the civil action determines the exceeding of the reasonable time for solving the criminal action (circumscribed in principle to the procedural celerity), the criminal court may order the splitting of the civil action. In order to be able to properly substantiate the case splitting provision, the danger of delaying the settlement of the criminal action as a result of the timing of the civil action settlement must be cert and actual, even if it is to occur in the future, but under no circumstance may it be only eventually. Thus, in the doctrine, it was shown that *"the case splitting must be well justified, the interest of the breakdown exceeding the interest of the joint settlement of the cause"*[14].

By splitting the civil action no transfer of functional competence of the criminal court to the civil court will be achieved, as the newly formed file will remain pending in front of the criminal court. This criminal case will deal with the settlement of the split civil action and will remain in the competence of the criminal court that will perform its judicial function by pronouncing one of the main solutions provided by article 25 CPC, with the possibility to pronounce as well the complementary solutions provided by article 397 CPC. The judicial activity in the case having as object the split civil action will be carried out according to the procedural rules (of procedural law) provided by the criminal procedural law, but the conflict report will be settled according to the substantive rules (substantive law) provided by the civil law. In order for the case splitting order not to be unfairly transformed for the active subject of civil action that could very hardly sustain civil claims by re-administering the evidence administered before the criminal court, the law offers an effective remedy in the provisions of article 26 para (3). Thus, the evidence administered until the case splitting will be used, by takeover, as well to the settlement of the split civil action.

Although the case splitting is regulated as a common incident in the matter of competence, when it is expressed in the form of case splitting of the civil action, the act of disposition can only belong to the court. It shall rule either ex officio or at the request of the interested subjects - prosecutor, party or injured party. In this respect, the opinion of some authors is that *"**the suspect as well** may ask the prosecution bodies to split the cases"*[15]. Moreover, in this case the court resolution encompassing the positive act (ordering the case splitting) is final, leaving out the possibility of exercising a control on the legality or on the merits of the application.

Instead, case splitting over some of some facts or some of the perpetrators (who have previously received the procedural quality of a suspect or defendant) may be ordered both at the trial stage as during the criminal prosecution. In this case the court rules the splitting of the case by court resolution while the criminal prosecution body manifests itself through ordinance. In the absence of special provisions, both the court resolution and the prosecutor's ordinance are subject to judicial review by ordinary means of appeal: the appeal or the complaint against the criminal prosecution.

When the court orders the case splitting during the trial, it is clear from the manner of regulating this incident that it is approached as an *incidental matter*, as a matter to be solved by contentious manner under the general conditions of article 351 paragraph (2), by means of a court resolution preliminary to the settlement of the case on the merits. The case splitting with regard to the facts and persons has not been explicitly regulated as to the cases in which it can operate but, despite the permissive regulation of the institution, we consider that the case splitting is not possible for the offenses and defendants for which/whom the compulsory case joining initially operated, if it were considered appropriate by the court. In this sense, in the doctrine there is also the contrary opinion according to which "*from the way in which the case splitting is regulated results that criminal cases can be separated in all situations, irrespective of the case of article 43 that would have determined the joining"*[16]. The prorogation of competence in case of case splitting operates under the conditions of article 44 para (2) CPC which provides that, once acquired, the competence will be retained by the court even though for the fact or the perpetrator that determined its original competence the case splitting was ordered.

Against the backdrop of the absence of an explicit interdiction, both the case joining and the case splitting, with the above-mentioned amendment, do not have an interlocutory character, and they can intervene several times during the criminal proceedings. Also, considering the subject matter and limits of the preliminary camera procedure, we consider that the act of case splitting is not allowed at this stage of the criminal proceedings.[17]

Last but not least, from the point of view of their procedural consequences, case splitting and case joining are the only ways in which, after the commencement of the trial, the procedural framework in which the judicial function and, implicitly, the object of judgment can be changed.

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[13] See also M. Udroiu in the Criminal Procedure. General Part, 5th Edition, CH Beck Publishing House, Bucharest, 2018, p.60-61 "the criminal action constitutes the central element of the criminal proceedings, representing the main action."

[14] N. Volonciu, Treaty of Criminal Procedure. General Part Vol. I , 3rd Edition, Paideia Publishing House, Bucharest, p.311

[15] M. Udroiu in M. Udroiu (coordinator.), Criminal Procedure Code. Comment on articles, 2nd Edition, CH Beck Publishing House, Bucharest, 2017, p.206

[16] I. Neagu, M. Damaschin Criminal Procedure Treaty. General, Universul Juridic Publishing House, Bucharest, 2014, p.371

[17] See, in this respect, M. Udroiu in *M. Udroiu (coordinator), The Code of Criminal Procedure. Comment on articles* , 2nd Edition, CH Beck Publishing House, Bucharest, 2017, p.206

## 2. Critical analysis of an unprecedented procedural manifestation regarding the case splitting in the recent practice of the Romanian courts

In a relatively recent case-law solution[18], a Romanian court ordered the conviction of the defendant PGA, based on article 26 related to article 48 Criminal Code with reference to article 248[1] Criminal Code, with the application of article 41 par.(2) Criminal Code from 1968 and article 5 of the new Criminal Code, to 7 years imprisonment, for committing the crime of complicity to abuse of office, in a qualified form. Under the provisions of article 255 para (1) Criminal Code from1968 with reference to article 6 and 7 of Law no. 78/2000 with the application of article 5 of the new Criminal Code ordered the defendant PGA to be sentenced to 7 years imprisonment for having committed the crime of bribery.

Under the article 33 letter a) and article 34 letter b) Criminal Code from 1968, orders the defendant PGA to execute the seven-year prison sentence, which the court increases by 2 years, having finally, the defendant to execute 9 years imprisonment. Of the amount of the penalty imposed on the defendant, the 24-hour retention period from 24 March 2009 on 25 March 2009 was deducted. As regards the civil aspect of the case, the court ordered to leave as unresolved the civil side of the criminal trial and the case splitting of the cause on this issue .The court held as legal basis for these measures (irreconcilable in terms of the effects they imply) the provisions of article 25 para (5) in relation to article 397 para (5) CPC.

Analyzing the above judgment from the perspective of the objectives of the present study, the unlawfulness of the measures ordered by the court on the civil side of the case is manifested in several aspects. Firstly, there is a clear contradiction between the *recitals of the judgment*, which explain the nature of the measure ordered for the civil action and its procedural consequences (continuation of the civil action before the criminal court but separately from the criminal action) and the *operative part of the judgement*, in terms of the legal ground being held. Thus, both the provisions of article 25 para (5) CPC and of article 397 para (5) CPC regulates the legal cause of "leaving as unresolved the civil action" as a way of divestiture of the criminal court with respect to lawfully exercised civil action. The solution (even in the *sui generis* form of leaving as unresolved) rendered in respect of the civil action and obviously the legal basis on which it is grounded must be indicated in the *operative part of the judgement*, according to article 404 para (1) CPC. The court's ruling must be developed and motivated in fact in the recitals, according to article 403 para (1) letter c) CPC, the detailed exposition having to keep the legal and factual correspondence of the issues resolved in the *operative part of the judgement*.

However, there is a substantial contradiction between the recitals of the judgement and the operative part of the judgement, the underlying legal basis not having a correspondent in the reasoning of the provision on the civil side, a fact which proves the lack of effective judgment in the first instance. The effects of the final courts' ruling do not correspond to the legal ground retained in the *operative part of the judgement* because the essence of the "leaving the civil action unresolved" is to enable the possibility to having it exercised in front of the civil court, the criminal court losing its functional competence to solve by extension the private action, following the manner the main action was solved.

To that end, in the absence of a concordance between the legal basis enshrined in the operative part of the judgement and the nature of the final provision, the effects of which are similar to case splitting, the measure taken by the court in respect of the civil side remains unjustified in law and thus arbitrary. Secondly, the measure finally implemented by the court without indicating the legal basis is also unlawful in terms of the procedural form in which it was disposed. Thus, according to article 26 para (1) CPC, the court may order the case splitting for the civil action when its settlement determines the exceeding of the term for solving the criminal action and according to para (5) of article 26 CPC the court resolution ordering the civil action to be split is final.

If analyzing how the case splitting of the civil action is configured, it is undoubtedly that it has the nature of an incidental matter in the criminal proceedings. Without having the capacity to influence the way in which the case is dealt with on the merits, the case splitting acts as a matter or a preliminary matter which must be resolved before the action is resolved. From a procedural point of view, the solution of the incidental issue in case of case splitting is circumscribed to the requirements provided for in article 351 para (2) CPC corresponding to counter-claims guarantees. According to article 26 para (2) in relation with article 351 para (2) CPC, even when invoked ex officio, the case splitting must be discussed by the prosecutor and the parties, in all cases being released (by sentence delivery) by reasoned court resolution. The nature of the decision by which the court ruled on the case splitting of the civil action is customized by the provisions of article 26 para (5) CPC, its legal regime derogating from the provision of a general nature provided by article 408 para (2) CPC and which, as a rule, allows appeals to be made against all judgments delivered during the trial. By requiring the court to deliver a sentence on the case splitting, the law excludes the possibility that this measure may be ordered directly by the substantive judgment on the merits of the case.

[18] Bucharest Court of Appeal, Criminal Section I, criminal sentence no.115 / 23.06.2016 (unpublished), which is final on the civil aspect by the dismissal of the appeals being formulated as not grounded

Furthermore, considering the requirements under article 351 para (2) CPC, the issue of case splitting should have been first discussed in a contradictory manner in an appropriate procedural context, namely in the course of the judicial investigation, the premise of declaring that this stage was terminated in the conditions of article 387 para (1) and (2) CPP being precisely the absence of any request or issues. It is clear from the analysis of the documents in the file that the issue of case splitting has never been put into the contradictory discussion of the participants in the process, this aspect being not even debated in the debates, as it court resolutions rendered on 30.05.2016 and 02.06.2016. Therefore, not being invoked prior to the completion of the judicial inquiry, the incidental question of case splitting, even if it appeared as present directly during the debates, it would have been impossible to discuss it for the first time at the ending moment of the trial, the adequate remedy being the one provided by article 395 para (1) CPC and consisting in retaking the judgment. As the case splitting was not discussed beforehand and not even in the debates, the act of disposition could not be delivered directly by sentence except in severe violation of the legal provisions.

Such a way of proceeding deprived the defendants of the possibility of expressing positions with regard to the court's intention, amounting to a severe violation of the rights of defense and the right to a fair trial in its component of the contradictory nature of the proceedings, which also represents the injuries sustained. Although accepted at the legislative level [but only in the procedural form provided by article 26 related to article 351 para (2) CPC], the case splitting appears as a justifiable measure only when it corresponds to a functional purpose. In the context of the identity of the material cause and the possibility of overlapping in terms of consequences, in the jurisprudence of the High Court of Cassation and Justice the case splitting operation was viewed with caution if the determination of the guilt of the defendant, the individualization of the punishment and the legal framing relate to the extent of the damage caused by the offense such as, in particular, those that have produced particularly serious consequences.

In this respect, the High Court of Cassation and Justice held that in the unitary resolution of a criminal case the determination of the extent of the damage caused by the act committed by the defendant is an important criterion which is reflected in the criminal aspect of the case, his guilt, but also the plan of criminal responsibility, in the process of individualization of punishment, taking into account the gravity of the damaging consequences. The Court found that as long as the extent of the damage is not established in full, the civil side being split exactly in order to determine the damage caused, the criminal side cannot be resolved correctly either on the retention of guilt or on the individualization of the punishment, in relation with the injury caused.[19]

Relevant, in this respect, is another case-law solution[20] where the High Court of Cassation and Justice held that the court of appeals had wrongly split the civil case and sent the case to its settlement at the court of first instance, as long as it held the defendant's guilt for the offense of deception with particularly serious consequences, without knowing the existence and extent of the damage. Last but not least, the manner in which the Court of Appeal has ruled on the civil aspect of the case is criticized in terms of compliance with legal requirements and the procedure by which the court has agreed to continue the civil action, even though it has left it beforehand unresolved. Thus, assuming the irreconcilability of the two provisions that were mutually exclusive and anticipating the impediments which the pending litigation of the civil action would provoke with regard to the civil aspect of the process, the Court of Appeal opted for a hybrid procedure to overcome this incident.

Consequently, in the recitals of the judgment, and in breach of its obligation to justify in fact and in law only the acts of disposition embodied in the operative part of the judgement [article 403 para (1) letter c) and d) CPC], the court proceeded to requalification of the solution expressed in the operative part of the judgement in a sense that does not correspond either to the legal nature of the provision or to the legal basis retained by the deliberation. Challenging the procedural purpose of the pending litigation for the civil action, the court of first instance *"explained"* in its recitals (page 282, paragraph no. 12) that in fact this statement does not signify the divestiture of the court but only a split of the civil action from the criminal action.

By developing the "meaning" of the provisions given in the civil aspect of the case, the court (pages 283-284) stated that "if it leaves the civil action unresolved, it will not order the case to be resolved by the civil court, but will only separate the two actions to offer the parties the possibility to formulate all their defense in the civil action connected with the criminal proceedings." In fact, the court of first instance has radically reconfigured the nature and effects of the provision on the civil action, removing the legal basis retained in the operative part of the judgement and distorting its meaning. This apparently judicial operation does not have a legal correspondent and exceeds the limits within which the court is required to make the report.

By its final consequences, this operation cannot be described as a form of clarification of the operative part of the judgement as the procedure provided for by the provisions of article 277-279 CPC refers only to the material form (external envelope) of the procedural act and not to the legal mechanism it involves. Assessing the explanations given in the recitals regarding the sum

[19] ICCJ, Criminal Section, decision no.6281 / 25.11.2004
[20] ICCJ, Criminal Section, Decision no.5019 / 08.09.2005

of the provisions on the civil side, it is undisputed that their result consisted in distorting the initial purpose of the measure. Thus, a provision which has the effect of the divestiture of the criminal court and was duly substantiated by the provisions of article 25 para (5) and art. 397 para (5) CPC was transformed solely as a result of the reasoning in the recitals by the Court of Appeal to an extent that made it possible to reinstate the criminal court and continue the civil action in a separate file.

Practically, the Court of Appeal has moved to the field of other power in the state, because, by replacing the legislator, it has reclassified the effects of the disposition aiming to leave the civil case unsolved, replacing *its judicial component* (divestiture of the court) with an *administrative* one (the formation of a new file having as object the settlement of the split civil action). Moreover, taking into account the sequence of the two procedural operations as set out in the minutes of the decision no. 115 / 23.06.2016, the illegality of the case splitting also derives from its delay. As the court first ordered to leave the case unresolved, any subsequent action on it was lacking procedural support because the functional competence that would have allowed it to manifest itself was lost.

The only legal effects with regard to the civil proceedings left unresolved operating *ex-lege*, under the terms of an express regulation - article 27 para (2), 397 para (5) CPC, concern exclusively the precautionary measures. It is only them that are maintained by the law even if the judicial context in which they have been disposed of has disappeared, pending the bringing of the action before the civil court, but not more than 30 days, otherwise ceasing lawfully. Therefore, as stated above, the case splitting had the capacity to produce its effects only if it operated autonomously and in advance, without being cumulated with the ruling of leaving the civil case unresolved. In the absence of an express legal remedy, while the court reserved judgement on the civil action due to discussing the civil claims, contradictorily, during the debates, the court should have been ordering the redocketing of the case to discuss case splitting, according to article 395 CPC.

Moreover, in order to observe the incidental nature of the case splitting, the redocket of the case had to be accomplished by resuming the judicial investigation, since only in this way the issue of the separation of the two actions could be solved according to the requirements of article 351 para (2) and 26 para (5) CPC – through final reasoned court resolution (in fact and in law).

From the perspective of the above mentioned aspects, we appreciate that the form in which the actual operation of case splitting was manifested does not respect the requirements and limitations foreseen at the normative level, and a closer analysis of the framework in which it is allowed being necessary.

## Conclusions:

Apparently regulated permissively, case splitting knows certain implicit boundaries that make it more specific in terms of procedural manifestation.

There are substantial differences between the way in which this operation is performed during the criminal prosecution and in the trial, the Romanian procedural system also having jurisdictional procedures in which the case splitting disjunction is prohibited. In certain situations, the judgment of the court in the case of splitting, although seemingly in line with the normative pattern, may be regarded as an unlawful measure that could be remedied in the appeal by sui generis reason for closure with the remanding of the case for retrial. From this perspective, a legislative modification that explicitly provides for situations in which the operation case splitting is prohibited by law would be more than adequate.

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# IMPLICATIONS OF CJEU JURISPRUDENCE ON THE DELIMITATION OF WORKING TIME BY REST TIME IN THE COLLABORATIVE ECONOMY

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**Abstract**

*The specificity of the collaborative economy has raised a number of issues with regard to the qualification of legal relationships between workers, final beneficiaries and the online platform that mediates the provision of work, respectively whether between the platform and the worker there is an employment relationship or there is a commercial relationship between the platform, self-employees and consumers. In particular, the question arises whether, in the case of these workers, the working time regulations apply and, if so, how they can be applied in concrete manner. The article contains an analysis on how some principles derived from the CJEU case law can be used to determine whether and under what conditions workers in the collaborative economy can benefit from protection by limiting working time and how can work time be delimited by rest time in their case, given the specificity of their work condition, in order to ensure an effective protection.*[**]

**Keywords:** *working time, rest time, collaborative economy, workers, employees, self-employees*

## 1. Introduction

The development of information and communication technology has led to the emergence of new forms of work and working time arrangements, and has made it possible to increase the degree of labor flexibility, driven by economic, but also social and personal needs. The phenomenon is not very new, appearing in the early 1970s in first forms and developing along with the development of mobile communications and information technology, especially in the last 30 years, after the emergence and development of the INTERNET[1].

In present time work is also done in what is called the *"collaborative economy*" or *"the gig economy"* in which the worker is essentially directly linked to the client via a platform accessible on the INTERNET[2], which rises in the first place the question of whether such a worker has the status of worker or employee and, consequently, the question whether or not he/she enjoys the protection guaranteed to employees, which is still unclear in the European case-law.

It can be noticed a return to task-oriented work, to a result that must be achieved at a certain time, at least in certain areas of activity, the classic concept of working time remaining still largely applicable in the industrial field[3].

The use of information technology has allowed work to be unspatialised, and the physical space of its deployment has become less relevant in this context.[4]

The notion of collaborative economy includes business models in which activities are facilitated by online platforms that generate an open market for the temporary use of goods or services provided by individuals[5].

In the collaborative economy, work is organized in two main forms: *crowdwork* - the creation of micro-

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[1] See for this evolution: Jon Messenger, Luty Gschwind – Three Generations of Telework, Conference paper – 17th ILERA World Congress, 7-11.09.2015, Cape Town, South Africa, available at https://www.ilera2015.com/dynamic/full/IL156.pdf (accesed 13.03.2019);

[2] See for details, for example: *A. Donini*, Il lavoro digitale su piattaforma, Labour & Law issues, no. 1/2015, p. 50-71; *E. Dagnino*, Il lavoro nella *on-demand economy*: esigenze di tutela e prospettive regulatorie, Labour & Law issues, nr. 2/2015, p. 87-106; *A. Aloisi*, Il lavoro „a chiamata" e le piattafrme online della *collaborative economy*: nozioni e tipi in cerca di tutele, Labour & Law issues, nr. 2/2016, p. 18-56; *G. Friedman*, Workers without employers: shadow corporations and the rise of the gig economy, Review of Keynesian Economics 2.2/2014, p. 171-188; *A. Aloisi*, Commoditized workers: Case study research on labor law issues arising from a set of on-demand/gig economy platforms, Comp. Lab. L. & Pol'y J. 37/2015, p. 653; *J. Hamari, M. Sjöklint, A. Ukkonen*, The sharing economy: Why people participate in collaborative consumption, Journal of the Association for Information Science and Technology 67.9/2016, p. 2047-2059; *J. Schor*, Debating the Sharing Economy, Journal of Self-Governance & Management Economics 4.3/2016; *B. Cohen, J. Kietzmann*, Ride on! Mobility business models for the sharing economy, Organization & Environment 27.3/2014, p. 279-296; *H. Heinrichs*, Sharing economy: a potential new pathway to sustainability, GAIA-Ecological Perspectives for Science and Society 22.4/2013, p. 228-231.

[3] It has been shown that the limit between working time and rest time becomes more unclear as a result of the increasing variability of the work program on the one hand and the increasing task orientated work which results in a bigger pressure to work the hours required to perform the task – *J. Rubery*, Working time in the UK, Transfer: European Review of Labour and Research 4.4/1998, p. 672.

[4] Răzvan Anghel – Noua reglementare privind telemunca. Probleme specific privind delimitarea timpului de lucru de timpul de odihnă în cazul telesalariaţilor, Curierul Judiciar, nr. 4/2018, p.211.

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European agenda for the collaborative economy, Brussels, 2.6.2016 COM (2016) 356 final, available at: https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-356-EN-F1-1.PDF, p.3, accessed on 13.03.2019;

tasks for which a global offer is launched through an on-line platform and can be done anywhere; *on-demand* services - performing services in a certain area, hired through an on-line application[6].

There is a difference in the organization of working time between the two forms of work arrangements. In the case of crowdwork, the worker has greater autonomy and can work at any time in principle, while in the case of on-demand work, the on-line platforms exercise greater control over the services provided by setting quality standards and limiting providers' freedom to choose tasks and customers[7].

The delimitation of working time from rest time and the limitation of the first when working in the collaborative economy presents numerous difficulties, the boundary between working time and rest time being very difficult to determine, porous[8], in this case, the rest time being affected by interspersed periods of activity[9], and the carrying out of the activity may involve the alternation of intensive work periods with inactive periods[10].

It has been shown that "the normal working time pattern, which characterized Ford's standardized, industrial, mass production, loses its force," and "for much of the labor force over the last two decades, working time has become not just shorter but also more flexible and heterogeneous", being noticed that "the variable forms of working time take the place of uniform ones"[11].

Thus, in the labour relations that were born in the mass industrialization process, there was a difference between the "paid time" for which the employee received financial compensation - the salary - and the "free time" at his disposal[12]. If in the conception of the industrialization era on the organization of labour, working time was a spatial time in which the collective of workers was placed in a community of place, time and action[13], the new possibilities of modelling the organization of the working time and the labour offered by the information technology, have raised new problems regarding the delimitation of working time by rest time[14].

Also, the subordination of the worker to the employer, which is characteristic of the traditional model of the employment relationship, has been gradually replaced in many areas by the assignment of tasks and objectives and the granting of greater autonomy to the employees, by applying flexible procedures for their coordination[15], which resulted in the transfer of working time control from the employer to the employee and the increasing difficulty of delimiting working time from rest time.

In the collaborative economy, the worker's autonomy is considered to be defining although there is no solid empirical evidence in this respect[16]. On the contrary, it is highlighted a blurred boundary between working time and privacy time[17] and lack of control over working time[18].

The degree of autonomy of the worker, expressed in the possibility to choose the task to be performed, the time used for this purpose and the way of organizing and performing the work, differs significantly depending on the control exercised by the platform administrator and the type of activity[19].

At the same time, the space boundaries are blurred in the sense that space for work is increasingly entering the space for private life; at the same time, it is remarked that work is space-independent[20].

At the present, understanding and defining working relationships in the collaborative economy are deficient, although the key issue in their analysis and in the analysis of working time organization is their classification[21], as it is essential to determine whether they are employment relationships or business relationships.

The work done within the framework of the collaborative economy generates problems regarding the protection of the persons carrying out such activities, including the problem of limiting the working time for the purpose of protection of health and

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[6] Jon Messenger – Working time and the future of work, International Labour Organization, ILO Future of Work Research Paper Series, 2018, p.22; see for the evolution and the definition of crowdwork: Janine Berg, Marianne Furrer, Ellie Harmon, Uma Rani, M Six Silberman – Digital labour platforms and the future of work – Toward decent work in the online world, International Labour Organization, 2018, p.3

[7] Jon Messenger – Working time and the future of work, cited, p.23;

[8] *A. Supiot*, Temps de travail: pour une concordance des temps, Droit social, 1995, p. 949-950.

[9] *J.-Y. Boulin*, Working time in the new social and economic context, Transfer: European Review of Labour and Research 7.2/2001, p. 204.

[10] *J.-Y. Boulin, G. Cette, D. Taddéi*, Le temps de travail: une mutation majeure, Futuribles 5/1992, p. 8.

[11] *H. Seifert*, Flexibility through working time accounts: reconciling economic efficiency and individual time requirements, WSI - Diskussionspapiere, no. 130/2004, p. 1.

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[14] Răzvan Anghel – Noua reglementare privind telemunca..., cited, p.213.

[15] C.A.Moarcăş, Impactul globalizării asupra reglementărilor din domeniul muncii. Posibile schimbări în sistemul relaţiilor industriale, Revista de Drept Public, nr.1/2005,,p. 28- 29.

[16] Jon Messenger – Working time and the future of work, cited, p.23-24;

[17] Jon Messenger – Working time and the future of work, cited, p.21, 24, 25;

[18] EUROFOUND – Work on demand: Recurrence, effects and challenges, Publications Office of the European Union, Luxembourg, 2018, p.4;

[19] for a classification of activities provided through on-line platforms and the way they are provided see EUROFOUND, Employment and working conditions of selected types of platform work, Publications Offices of the European Union, Luxemburg, 2018, p.5, 21;

[20] Jon Messenger – Working time and the future of work, cited, pag.19;

[21] Jon Messenger – Working time and the future of work, cited, p.22; EUROFOUND – Work on demand..., cited, p.3;

safety at work, but also for ensuring a balance between professional life and personal life.

But in order to solve this problem, it must first be determined whether the legal rules that require working time limitation are applicable. In the next stage, in order to ensure the protection offered by these normative acts, the working time must be firstly delimited by the rest time, as it can only be limited something defined and determined; as a result, it has to be checked whether this delimitation process is possible in practice and by what methods.

The legal framework applicable in the European Union on the organization of working time is Directive 2003/88 and the sectoral directives, as well as the internal rules for transposing them. The jurisprudence of the Court of Justice of the European Union may provide benchmarks to determine whether and how these legal acts can be enforced, even if the Court has not yet expressly addressed those issues.

## 2. Applicability of rules on the organization of working time

### 2.1. General aspects

The Working Time Directives are, as a rule, applicable to workers, an autonomous concept of EU law, with the exception of Directive 2002/15 on road transport, which also applies to self-employed workers.

By reference to Article 2 (1) of Directive 89/391 / EEC, to which Article 1 (3) of Directive 2003/88 / EC refers, the latter applies to all areas of activity[22]. It is true that Article 2 (2) of Directive 89/391 / EEC excludes from its scope activities which have inherent characteristics which are inevitably inconsistent with the provisions of the Directive but only if they form part of the public administration so those activities in the collaborative economy that are activities in the private domain, cannot be excluded[23].

In the judicial practice, more and more have raised the issue of the nature of the legal relationships established in the collaborative economy between those who provide the work and the operators of the on-line platforms that put the first ones in contact with the clients. The problem is generated by the fact that, viewed globally, it seems that a feature of the collaborative economy is that service providers are often individuals who occasionally offer goods or services from individual to individual, but, in the mean time collaborative platforms are increasingly used by micro-enterprises and small entrepreneurs[24].

Thus, on-line platform operators claim that it is a commercial relation, and those that do the work are self-employed, professionals that are leading their own business, while some of them who have filed a complaint with the courts claim that they are employees engaged in a labour relations.

This issue must be addressed with priority, since working time rules apply only if the person who performs the work has the status of a worker, otherwise, if it is a commercial relationship, these rules are not applicable as only workers enjoy protection by limiting working time and also benefit of guaranteed rest periods, considering the relationship of subordination with the employer, as opposed to an independent professional who is in a tie with the contractual partner.

If the person who performs the work in the collaborative economy is considered to be an independent service provider, the provisions of Directive 2006/123, which generally define service providers, or special directives such as Directive 86/653 / EEC on self - employed commercial agents, are applicable and those regulations do not provide for protection measures with regard to the organization of working time, assuming that the self - employed is free to organise the work to do. Only Directive 2002/15 also applies to self-employed workers.

It is important, however, that the attribution of the status of a worker does not depend on the classification of the legal relationships in which he/she is part according to the national law, being an autonomous notion of Union law[25].

However, it is essential if there is a subordinate relationship between the on-line platform operator and the worker. The first element of this subordinate report implies that the platform operator has control over the organization of the activity.

So, in order to determine the nature of these legal relationships, two aspects need to be considered:

- if the services offered to the beneficiaries are an activity of the operator of the on-line platform or belong to the natural person providing the work and the platform acts only as an intermediary between the service provider and the beneficiary offering only the frame for the demand to meet the offer; if the on-line platform merely provides intermediation services

[22] see, among many others, CJEU, Judgment of 14.10.2010, 2nd Chamber, case C-428/09, Union syndicale Solidaires Isère c. Premier ministre, Ministère du Travail, des Relations sociales, de la Famille, de la Solidarité et de la Ville, Ministère de la Santé et des Sports, ECLI:EU:C:2010:612, par.21, 22; Judgment of 5.10.2004, *Pfeiffer e.a.*, C-397/01-C-403/01, Rec., p. I-8835, par.52, www.curia.eu;

[23] as fear was expressed: Alan Bogg, Foster parents and fundamental labour rights, www.uklabourlawblog.com, 25.07.2018, par.16;

[24] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European agenda for the collaborative economy, cited, p.5;

[25] CJEU (Grand Chamber), judgement of 20.11.2018, in case C-147/17, Sindicatul Familia, par.41; Judgment of 14.10.2010, Isère, C-428/09, cited,, par. 28; CJEU, (5th Chamber), Judgment of 21.02.2018, case C-518/15, Matzak, par.28 and 29, www.curia.eu; Judgment of 20.09.2007, Kiiski, C-116/06, EU:C:2007:536, par. 26 and the case-law cited there; Judgment of 1.12.2005, case C-14/04, Abdelkader Dellas, Confédération générale du travail, Fédération nationale des syndicats des services de santé et des services sociaux CFDT, Fédération nationale de l'action sociale Force ouvrière c. Premier ministre, Ministre des Affaires sociales, du Travail et de la Solidarité, ECLI:EU:C:2005:728, par. 44, and also the case-law cited there;

between professionals and customers, the work done does not belong to it, but belongs to the professional so that it is excluded that the operator of the platform is considered an employer and, as a consequence, the person who provides the work to be considered a worker;

- If the activity is considered to be organized and to belong to the operator of the on-line platform, it should be analysed whether the natural persons performing the work are commercial partners, subcontractors of the operator of the platform, or have the status of employees of the platform, i.e. workers.

It is acknowledged, however, that in the context of the collaborative economy there are increasingly blurred boundaries between the category of workers employed under an individual labour contract and that of self-employed workers[26].

### 2.2. Criteria regarding the responsibility of organizing the activity

The CJEU has been called to address this issue in an administrative case concerning the authorization of certain activities, being asked to determine whether an online platform through which public transport services are provided has the status of a public transportation service provider, with the consequence of being subject to specific authorization requests, or has the status of information service.

Although the issue of work relations between the on-line operator and service providers has not been addressed in this case, the decision sets out several principles that may be useful in determining whether an on-line platform can be considered as responsible for organizing the activity, or a simple intermediary between and customers and the service providers.

Thus, in Case C-434/15[27], the Court held that "a brokerage service which, by means of an application for smart phones, has the purpose of linking, for the purpose of obtaining remuneration, unreachable drivers using their own vehicle with persons wishing to travel urbanely, must be regarded as being indissociably linked to a transport service and as falling within the scope of the qualification as a "transport service within the meaning of Article 58 (1) TFEU".

In this case, the difference between information society services and classical services has been made.

The Court has identified the following elements defining the service provided as a transport service (par.37-39):

- the service is not limited to a brokerage service consisting of connecting, through a smartphone application, a non-professional driver using his own vehicle and a person wishing to make an urban journey;
- the provider of this brokerage service creates at the same time an offer of urban transport services which it makes accessible especially by means of computer tools such as the used application;
- the provider of this brokerage service organizes the general operation of the application in favour of persons wishing to make use of this offer;
- the intermediation service is based on the selection of non-professional drivers using their own motor vehicle to which this company supplies an application, in absence of which, on the one hand, those drivers are not in a position to provide transport services and, on the other hand, the person who wants to make an urban journey would not access the services of those drivers;
- the supplier of the service exercises a decisive influence over the conditions of service provided by those drivers, such as: the fact that it determines, by means of the application used, at least the maximum price per race; that the company collects that price from the customer and retain a part of it before paying the rest to the driver and that it exercises a certain control over the quality of the motor vehicles and their drivers, as well as the behaviour of the latter, which may lead, if necessary, to their exclusion.

Therefore, in order to determine whether it is an information society service within the meaning of Article 1 (1) (b) of Directive 2015/1535[28] or a service providing direct benefits to consumers, it must first be ascertained whether this is only a brokerage service. Such a service offers to the users, both consumers and physical service providers, a virtual meeting place in which demand and supply meet freely, and workers choose freely to carry out an activity and agree with the beneficiary on the remuneration requested, collecting the price directly or with minimal involvement of the platform that offers only an electronic payment system and retains a commission just for the money transfer service.

On the contrary, if through the on-line platform its operator exercises a certain level of control, manifested in providing the service on its own behalf, controlling the level of charges, collecting and distributing the remuneration to the providers of work, controlling the professional qualities of those, their behaviour, it should be considered as a classical service provider, who retains responsibility for organizing the activities.

### 2.3. Criteria defining the status as worker of individuals who work through on-line platforms

CJEU has had the opportunity to rule on a number of cases, including some concerning the interpretation of the provisions of Directive 2003/88, on the notion of worker in European Union law by laying down rules to determine whether a person performing the work has this status or not .

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[26] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European agenda for the collaborative economy, cited, p.12

[27] CJEU (Grand Chamber), Judgement of 20 December 2017, EU:C:2017:981, Asociación Profesional Elite Taxi vs. Uber Systems Spain SL, www.curia.eu;

[28] former art. 1, par. 2 of Directive 98/34, referred by art. 2 (a) of Directive 2000/31;

At the same time, the Court has also ruled on provisions defining concepts which exclude the status of worker, such as the notion of a service provider within the meaning of Directive 2006/123 or a commercial agent within the meaning of Directive 86/653 / EEC.

Thus, for a person who performs an activity involving the conclusion of contracts with service and product recipients, in order to be a commercial agent within the meaning of Article 1 (2) of Directive 86/653, the activity performed must be independent.

The Court has held[29] in this regard that, in order to retain that status, this essential requirement must be fulfilled (paragraph 23); it further pointed out that the circumstance that the worker performs the activity on the principal's premises, alone, does not exclude the independent character of the work (par. 28, 32); however, if the worker's independence is impaired, he/she loses the status of a commercial agent, that happening by subordinating to the instructions of the principal and by the ways of carrying out the tasks performed (par.32), under the latter aspect, being possible to be relevant that the work is carried out from the headquarters of the principal. Thus, being in the immediate proximity of that principal, by virtue of his presence at his seat, that agent may be subject to the instructions of that principal and, at the same time, by having material advantages connected with that presence, such as the provision of a workspace or the access to the organizational facilities of that head office, it cannot be ruled out that the agent in question is in fact in a situation which prevents him from carrying out his activity independently from the point of view of organizing this activity or the associated economic risks (par.33).

Consequently, if those elements are fulfilled and the individual does not enjoy total independence, he/she can only have the status of worker, so that judgment is relevant in this respect.

The CJEU had the opportunity to analyse the notion of worker even in cases concerning the organization of working time.

The Court held that Directive 2003/88 did not refer either to Article 3 (a) of Directive 89/391 (which defines the concept of 'worker') or to the definition of a worker as is apparent from the legislation and /or national practices[30] and, for the purposes of its application, that notion cannot be interpreted differently according to the national legal systems but has a specific autonomous meaning to Union law[31] and must not be interpreted restrictively[32].

In the Court's view, the concept of a worker must be defined according to objective criteria characterizing the employment relationship, taking into account the rights and obligations of the persons involved[33] and the *sui generis* legal nature of a labor relationship from the perspective of national law cannot have any effect on the status of worker within the meaning of Union law[34]. For example, the Court has held that the fact that a person who performs work is not subject to the Labour Code in his country of employment cannot be decisive for assessing the existence of an employment relationship between the parties, that generating a legal situation *sui generis*[35].

The CJEU also stated that it is for the national court to determine whether the applicant falls within the concept of a worker, in which case it must conclude based on objective criteria and assess in its entirety all the circumstances of the case before it, which are connected with the nature of both the activities in question and the relationship between the parties concerned[36]. In that analysis, the national court must in particular verify whether the work actually provided by the person concerned can be regarded as normally belonging to the labor market, taking into account not only the status and practices of the beneficiary of the work concerned but also the purpose of the activity and the nature and the arrangements for the performance of work[37].

The Court has held in many cases that an essential characteristic of the employment relationship is the fact that a person performs the work in return of remuneration for a certain period of time in favour of

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[29] CJEU, (4th Chamber), judgement of 21.11.2018, C-452/17, EU:C:2018:935, in case Zako SPRL;

[30] CJEU (2nd Chamber) Judgment of 14.10.2010, case C-428/09, Isère, cited, par.27; CJEU, 1st Chamber, Judgement of 26.03.2015, case C 316/13, Gérard Fenoll c. Centre d'aide par le travail „La Jouvene", Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon, ECLI:EU:C:2015:200, par.24, www.curia.eu.

[31] CJEU, Judgment of 14.10.2010, 2nd Chamber, case C 428/09, cited, par.28; CJEU, 1stChamber, Judgement of 26.03.03. 2015, case C 316/13, cited, par.25; CJEU, (5th Chamber), Judgment of 21.02.2018, in case C‑518/15, Matzak, par.28, www.curia.eu;

[32] CJEU, 5th Chamber, Ordinance of 7.04.2011, case C-519/09, Dieter May c. AOK Rheinland/Hamburg – Die Gesundheitskasse, ECLI:EU:C:2011:221, par.21, www.curia.eu.

[33] CJEU, Judgment of 14.10.2010, 2nd Chamber, case C 428/09, cited, par.28; CJEU, 1st Chamber, Judgement 26.03.2015, case C- 316/13, cited, par.27;

[34] CJEU, Judgment of 14.10.2010, 2nd Chamber, case C 428/09, cited, par.30; see Judgment of 20.09.2007, Kiiski, C-116/06, Rep., p. I 7643, par. 26 and the case-law cited; CJEU, 1st Chamber, Judgement of 26.03.2015, case C-316/13, cited, par.31; Judgement Trojani, C-456/02, EU:C:2004:488, par. 16; CJEU, (5th Chamber), Judgment of 21.02.2018, in case C‑518/15, Matzak,, par.29, www.curia.eu;

[35] CJEU, 1st Chamber, Judgement of 26.03.2015, case C -316/13, cited, par.30;

[36] CJEU, Judgment of 14.10.2010, 2nd Chamber, case C 428/09, cited, par.29; CJEU, 1st Chamber, Judgement of 26.03.2015, case C 316/13, cited, par.29; Judgement Trojani, C 456/02, EU:C:2004:488, par. 17;

[37] CJEU, 1st Chamber, Judgement of 26 .03. 2015, case C 316/13, cited, par.42; see mutatis mutandis, Judgement Trojani, C-456/02, EU:C:2004:488, par. 24 (in this case, the question arises whether the applicant can claim a right of residence as an employed or self-employed person or a provider of services in the situation where work is done under a social-professional re-integration program run by a non-profit organization).

another person and under that person direction[38]. As a result, it has been shown that a 'worker' must be considered to be any person who carries out real and effective activities in order to obtain remuneration[39], except for activities which are so small that they appear to be purely marginal and accessories[40]. In this regard, it was appreciated that in the context of collaborative economy, when a person provides purely marginal or ancillary services using on-line platforms, this would indicate that that person does not have the status of worker while the provision of stable work leads to the qualification of that person either as a worker or as self employed according to the analysis of other facts[41].

In the Court's view, neither the higher or lower productivity of the person concerned, nor the origin of the resources for remuneration, or the limited level of remuneration, can have consequences on the status of worker within the meaning of Union law[42]. Also, in the Court's view, the existence of an employment relationship is not excluded either by the overall reduced duration of the activity[43] or the reduced duration of the daily activity[44]. Also, the CJEU has held that this status is not excluded by the fact that the worker enjoys a considerable margin of appreciation in the day-to-day exercise of his duties or that the mission attributed is a "trust mission"[45].

In the recent case of Matzak, the CJEU also held[46] that "any person who carries out real and effective work is to be regarded as a" worker ", except for activities that are so small that they appear to be purely marginal and accessories" and "the characteristic element defining a report of work consists in the fact that a person performs work in return for which he receives a remuneration, for a certain period of time, for another person and under his direction[47].

In an earlier judgment, the Court has already held that must be regarded as a worker within the meaning of European Union law also a person who has concluded a contract on the basis of which she/he provides occasional work, on request and for irregular periods of time, being paid only for the work actually done, and without any obligation for the employer to actually request the work[48].

However, the Court held that, in order to determine whether the activity was real and not a purely marginal activity, the national court may have regard to the irregular nature and limited duration of the work actually performed, which may indicate that it is a marginal activity; it is very important, however, that the CJEU has held in this context that another important element in the analysis of national courts is whether the person concerned must remain at the disposal of the employer to perform the work if so requested[49].

In a recent ruling[50], the CJEU reiterated its previous jurisprudence on the elements defining the notion of worker. Accordingly, it follows from the case-law of the CJEU:

- the essential characteristic of the employment relationship is the fact that a person performs work in return for which she/he receives a remuneration in a given period for another person and under his direction[51];
- an employment relationship requires a relationship of subordination between the worker and his employer, but the existence of such a link must be assessed on a case-by-case basis in the light of all the elements and circumstances of the relationship between the parties[52];
- the natural persons, in relation to the company with which they have contractual relations, are in a subordination relation materialized by the continuous supervision and evaluation of their activities by the respective company in relation to the requirements and the criteria specified in the contract, in order to carry

[38] CJEU, Judgment of 14 .10. 2010, 2nd Chamber, case C-428/09, cited, par.28; see mutatis mutandis, for article 39 CE, Judgment of 3.07.1986, Lawrie Blum, 66/85, Rec., p. 2121, par. 16 and 17, and also Judgment of 23 .03. 2004, Collins, C-138/02, Rec., p. I 2703, par. 26; CJEU, 5th Chamber, Ordinance of 7.04.2011, case C 519/09, cited, par.21; see especially the Judgment of 3 .07. 1986, Lawrie Blum, 66/85, Rec., p. 2121, par. 16 and 17, Judgment of 23 .03. 2004, Collins, C- 138/02, Rec., p. I 2703, par. 26, and Judgment of 7.09.2004, Trojani, C-456/02, Rec., p. I 7573, par. 15; CJEU, 1st Chamber, Judgement of 26.03.2015, case C 316/13, cited, par.27; Judgment of 20.09.2007, Kiiski, C 116/06, par.25; CJEU, (5th Chamber), Judgment of 21.02.2018, in case C‑518/15, Matzak, par.28, www.curia.eu;

[39] Judgement Trojani, C-456/02, EU:C:2004:488, par. 17;

[40] CJEU, 5th Chamber, Ordinance of 7.04.2011, case C 519/09, cited, par.21; CJEU, 1st Chamber, Judgement 26 .03. 2015, case C 316/13, cited, par.27; CJEU, (5th Chamber), Judgment of 21 .02. 2018, in case C‑518/15, Matzak, par.28, www.curia.eu;

[41] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European agenda for the collaborative economy, cited, p.14;

[42] CJEU, 1st Chamber, Judgement 26.03.2015, case C 316/13, cited, par.34; see Judgement Bettray, 344/87, EU:C:1989:226, par. 15 and 16, Judgement Kurz, C-188/00, EU:C:2002:694, par. 32, and also Judgement Trojani, C 456/02, EU:C:2004:488, par. 16.

[43] CJEU (Sixth Chamber), judgment of 6 November 2003, in Case C-413/01, Franca Ninni-Orascheand Bundesminister für Wissenschaft, Verkehr und Kunst, par.25

[44] CJEU, Judgment of 3 June 1986, in case C-139/85, R. H. Kempf v Staatssecretaris van Justitie, par.13;

[45] see for this opinion CJEU, Judgment of 10.09.2014, Haralambidis, C-270/13, EU:C:2014:2185, par. 39-41, and Judgment of 9.07.2015, Balkaya, C-229/14, EU:C:2015:455, par. 41

[46] CJEU, (5th Chamber), Judgment of 21.02.2018, in case C‑518/15, Matzak, www.curia.eu;

[47] For the same opinion see Judgment of 26 .03. 2015, Fenoll, C-316/13, EU:C:2015:200, par. 27 and the case law cited.

[48] CJEU, Judgment of 26 February 1992, in case C-357/89, V. J. M. Raulin v Minister van Onderwijsen Wetenschappen, par.9;

[49] CJEU, Judgment of 26 February 1992, in case C-357/89, V. J. M. Raulin v Minister van Onderwijsen Wetenschappen, par.14;

[50] CJEU (Grand Chamber), judgement of 20.11.2018, in case C-147/17, Sindicatul Familia;

[51] CJEU, (Grand Chamber), judgement of 20.11.2018, in case C-147/17, Sindicatul Familia, cited, par.41; Judgment of 14.10.2010, Isère, C-428/09, cited, par. 28 and the case-law cited;

[52] Judgment of 10.09.2015, Holterman Ferho Exploitatie and others, C-47/14, EU:C:2015:574, par. 46.

out the activity[53].

It should also be noted that the CJEU has analysed the issue of organizing working time, including in the case of an independent self-employed worker who was working on demand[54]. The applicant in the main proceedings did not work under an individual employment contract but had the status of self-employed, performing work according to a contract on the basis of which he was remunerated only by a commission for the work carried out, very similar to the situation of the persons supplying work based on orders received through an electronic platform. For this reason, the employer did not consider that it should grant him leave of absence and a leave allowance as to an employee on the basis of an employment contract. However, in its decision the Employment Tribunal considered that the applicant was to be classified as a 'worker' within the meaning of Directive 2003/88. It is true that in its judgment the CJEU did not consider whether or not the plaintiff in the main proceedings had the status of a worker within the meaning of Directive 2003/88, which is an autonomous concept of EU law. It can be argued that the CJEU has started from the presumption of the relevance of the reference for a preliminary ruling to the national court[55], on the basis of the British court's conclusion that the applicant was a worker. However, it is noteworthy that the CJEU was in no way obliged to accept this conclusion and could have started the analysis of the referral with the verification of the applicability of Directive 2003/88 and of whether the situation of the applicant falls within its scope; the fact remains that the CJEU had no objection to the classification of the applicant as a worker within the meaning of Directive 2003/88 by the referring court[56].

This judgment may be of great relevance in the future as a precedent in the classification of legal relationships between workers through an electronic order distribution platform and the owner of such a platform.

From the perspective of national law, there is the question of the qualification of the legal relations established between the parties, namely whether they are employment relationships or trade relations between professionals.

On this regard, there are already different solutions given by the EU courts on the basis of a case-by-case analysis. For example, given that workers using an electronic platform are registered as self-employed, in some cases they were qualified as employees[57] while in other cases they were considered not to have this status[58]. Recently, the bond of subordination, defining for the labour relation, was found in a situation where the on line application was equipped with a system of geolocation allowing the real-time monitoring by the company of the position of the courier and the accounting of the total number of kilometres travelled and, secondly, the company had power of sanction with respect to the courier[59].

The Romanian High Court of Cassation and Justice – the Panel for preliminary clarification on legal aspects, by Decision no. 37 of November 7, 2016, found that in the event of a failure by the parties to conclude a written employment contract, the natural person who has worked for and under the authority of the other party has the possibility to ask the court to acknowledge the existence of the employment relationship and its effects even if the employment relationship ceased prior to the filing of the petition to the court.

In order to analyse the nature of legal relationships in the frame of which work is done, there may be relevant the provisions of art. 7 of Law no. 227/2015 on the Fiscal Code, defining independent and dependent activities as follows:

- **dependent activity** - any activity carried out by a natural person in an income-generating employment relationship;
- **dependent activity on the main job** - any activity performed on the basis of an individual employment contract or a special legal status, declared to the employer as a main job by the employee; if the activity is carried out for several employers, the employee is obliged to declare only to the chosen employer that the place in question is the place where he performs the function he/she considers to be the main job;
- **self-employment** - any activity carried out by a natural person for the purpose of obtaining income, which meets at least 4 of the following criteria:
- the individual has the freedom to choose the place and way of working, as well as the work schedule;
- the individual has the freedom to work for more than one client;
- the risks inherent in the activity are assumed by the natural person carrying out the activity;
- the activity is done by using the patrimony of the natural person who performs it;
- the activity is performed by the individual by using the intellectual capacity and / or the physical performance of the person, depending on the specificity of the activity;
- the natural person is part of a professional body / order with the role of representing, regulating and

[53] CJEU (Grand Chamber), judgement of 20.11.2018, in case C-147/17, Sindicatul Familia, cited par.45;

[54] CJEU (5th Chamber), Judgment of 29.11.2017 în case C-214/16, Conley King vs. The Sash Window Workshop Ltd, Richard Dollar,

[55] See for example CJEU- Judgment of 6.09.2016, in case C-182/15, EU:C:2016:630, par. 20 and the case-law cited there;

[56] Răzvan Anghel - Working time and rest time in recent CJEU case law (July 2017 - February 2018), Revista EuRoQuod nr.2/2018, pp.77-78;

[57] United Kingdom Employment Appeal Tribunal London, [2018] IRLR 97, [2017] UKEAT 0056_17_1011, [2018] ICR 453, [2017] WLR(D) 809, par.124, available: www.bailii.org, accessed 18.04.2018;

[58] among others, Conseil de Prud'hommes de Paris, n° RG: F 16/11460, sentence of 29.01.2018;

[59] Cour de cassation, chambre sociale, audience publique du mercredi 28 novembre 2018, N° de pourvoi: 17-20079, www.legifrance.gouv.fr;

supervising the profession, according to the special normative acts regulating the organization and the exercise of the respective profession;

- the natural person has the freedom to carry out the activity directly, with employed person or through collaboration with third parties under the law.

Thus, when the activity does not meet the criteria to be qualified as independent, the income obtained is qualified by the Fiscal Code as salary income and assimilated to salaries precisely to eliminate the possibility of dissimulation of employment relationships in self-employment.

*Per a contrario*, if there are not met at least four of the criteria set out in Art. 7 of Fiscal Code, the activity cannot be considered as independent, so that it can be considered that in fact the activity was performed in an employment relationship even without the conclusion of an individual contract of employment in written form.

Therefore, it could be considered as elements which, once proven, would lead to the conclusion that a work relationship exists, among others, the following:

- the individual does not have the freedom to choose the place and the way of doing the work, as well as the work schedule, as established by the beneficiary's indications;
- the risks inherent in the activity are assumed by the person benefiting from the activity;
- the activity is done by using the beneficiary's goods;
- the natural person does not have the freedom to carry out the activity directly, with employed personnel or through collaboration with third parties under the law[60].

## 3. The practical difficulties of delimiting working time from rest time in the collaborative economy

With regard to the delimitation of working time from rest time for individuals who work in other areas than those belonging to the employer, the CJEU offered a solution, pointing out that "it is up to the employer to use the necessary control tools to avoid possible abuses" of employees who work outside their premises[61], such as the use of credit cards dedicated exclusively to the payment of fuel needed for the professional use of vehicles made available by the employer[62].

In the French case-law, for example, it has been held in several cases that a worker's geolocation system, which has a certain freedom in the organization of work, can be used by the employer to determine the working time but only if there is no other means of that control to be carried out and only if the employee and the competent administrative authority are informed, since the rights and freedoms of the employee can only be affected if the measure is justified by the aim pursued and proportionate to it[63], so that another solution was even in the sense that such a measure it is not justified in the particular case of such an employee[64].

In the situation where the working time can no longer be delimited by reference to the time a worker is at the workplace determined by the employer, the work being done anywhere and at any time, it becomes relevant the actual performance of the work so that the durations of the work itself must be clearly determined. For this purpose, electronic means of monitoring the employee activity can be used, ranging from cameras and systems to monitor access to a work area or to monitor the energy consumption of some equipment and continuing with the means of modern information technology such as internet traffic monitoring, computer keyboard monitoring, replication of desktop activity, verification of information that reflects software activity, electronic communications control, social networking activities, geolocation systems, dedicated software monitoring the activity of mobile devices, and so on[65]. Employers may wish to use these technical means to control the employee's behaviour and thus to be able to delimit working time from rest time[66] in order to determine remuneration and to verify employee compliance with service obligations.

Using these means of remote monitoring and control of employees' work poses, however, serious and numerous issues concerning the protection of employees' personal data, the protection of their privacy and dignity, especially in the context where the traditional and clear limit between working time and personal time is becoming more blurred with the development of flexible forms of work organization[67].

It is important that CJEU has already established that a record of working time which implies the indication of the hours at which each worker begins and

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[60] Răzvan Anghel, Procedura soluționării conflictelor individuale de muncă – Ghid pentru practicieni, Ediția a II-a, revizuită și adăugită, Editura C.H. Beck București 2018, pp.308-309.

[61] CJEU, 3rd Chamber, Case C-266/14, Judgment of 10.09.2015, Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) c. Tyco Integrated Security SL, Tyco Integrated Fire & Security Corporation Servicios SA, ECLI:EU:C:2015:578, par. 40 (*www.curia.eu*).

[62] Idem, par. 41.

[63] Cour de Cassation, Chambre sociale nr. 10-18036, public audience of 3.11.2011 (*www.legifrance.gouv.fr*).

[64] Cour de Cassation, Chambre sociale nr. 13-23645, public audience of 17.12.2014, ECLI:FR:CCASS:2014:SO02387 (*www.legifrance.gouv.fr*).

[65] Răzvan Anghel – Noua reglementare privind telemunca..., cited, p.215.

[66] See also *A. Fabre*, Le temps de trajet des travailleurs nomads devant la Cour de justice: la mobilité vue de plus haut, Droit Social 1/2016, p. 61 (*https://search.proquest.com/openview/93c636846dc716af2978ca28f35137c5/1*).

[67] *T.A. Coelho Moreira*, The electronic control of the employer in Portugal, in Labour & Law Issues, vol. 2, nr. 1/2016, p. i.4.

ends the working day, as well as the interruptions or appropriate breaks, is part of the concept of "personal data" in the meaning of art.2 (a) of Directive 95/46 / EC[68].

Next, however, the question is whether the period of availability, in which the employee does not actually work but only awaits the orders of the employer or the orders of its clients to carry out certain activities, must be considered working time.

The problem arises in the context in which the CJEU has determined that the availability time should be considered as working time only when the worker is present in the workplace or in another place imposed by the employer[69], but not when at his/her own home[70] or in another location not set by the employer[71] unless the way in which the activity is organized makes it impossible for them to devote themselves to their own activities[72].

As a result, new elements for delimiting working time from rest time must be identified for workers in the collaborative economy, where working time is no longer defined by the presence in a certain space.

For example, a British appeal court has determined that the working time of employees using an online order platform for potential clients can be determined by reference to the time the application provided by the employer is active, which means that the employee is at his disposal to take orders[73].

However, availability time differs in its qualities depending on the type of activity and on-line platform. If work on demand in a given location may involve periods of availability in which the worker cannot devote himself to other activities, crowdwork, which allows more freedom in choosing tasks to be performed and the moment of fulfilment, may imply that periods of waiting for a new task does not constitute real periods of availability but rest periods that do not constitute working time.

At the same time, provisions on the protection of personal data may prevent the use of means of supervising the activity of the employee if they interfere with his private life in the context in which he carries out the work including in private premises belonging to him and during periods of time which are interspersed with periods affected by private interests. This also creates a further difficulty in determining working time, which affects mainly the worker who finds himself faced with a very difficult choice: to renounce the protection of privacy or to renounce the protection of health and safety at work by limiting working time in relation to the employer.

## 4. Conclusions

The new ways of labour supply in the collaborative economy rise primarily the question of the status of the individual that do the work, whether he/she is a worker or a self-employed worker, essential being the verification of the fulfilment of the condition of subordination, which has several defining elements: the one who performs the work must act under the leadership of the on-line platform, which determines the nature of the activity, the remuneration and the working conditions[74]; any activity performed outside a relationship of subordination from the point of view of working and remuneration conditions must be regarded as a self-employed activity for which the individual is solely responsible[75]. At the same time, the activity must be a consistent one to define a working relationship and not at such a low level as to be purely marginal and auxiliary precisely because in the collaborative economy, many people provide occasional, isolated activities for additional non-essential income.

The spatialization of work and the determination of working time by reference to the duration of the worker's presence in an area imposed by the employer in the exercise of his prerogative of controlling and disciplining the work has generated in the jurisprudence, including the case-law of the CJEU, the concern to find criteria for delimitation of working time from rest time by reference to the space.

In this context, without removing from the definition of working time the periods in which the worker actually carries out the work, the CJEU has established criteria for delimiting working time from rest time by reference to the presence of worker to the work place in order to include inactive periods when the worker is at the employer disposal, exercising the duties of work so that the Court was not asked with preliminary questions concerning the delimitation of working time by the rest time, according to the criterion of actual work, as in the classical way of work organization the employer supervision and control was presumed to be exercised so no problems of determining the actual time of work were of interest.

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[68] CJEU, 3rd Chamber, Case C-342/12, Judgment of 30.05.2013, *Worten – Equipamentos para o Lar SA c. Autoridade para as Condições de Trabalho (ACT)*, ECLI:EU:C:2013:355 (*www.curia.eu*).

[69] For example, CJEU (5th Chamber) – Ordinance of 11.01.2007 in case C 437/05, Jan Vorelvs. Nemocnice Český Krumlov, EU:C:2007:23

[70] CJEU, Judgement of 03.10.2000 in case C-303/98, Sindicato de Médicos de Asistencia Pública (SIMAP) c. Conselleria de Sanidad y Consumo de la Generalidad Valenciana, EU:C:2000:528

[71] CJEU (4th Chamber) Judgement in case C-87/14, European Comission vs. *Ireland*, EU:C:2015:449

[72] CJEU, (5thChamber), Judgment of 21 .02. 2018, in case C‑518/15, Matzak, cited;

[73] United Kingdom Employment Appeal Tribunal London, 2018, IRLR 97, 2017, UKEAT 0056_17_1011, 2018, ICR 453, 2017, WLR(D) 809, par. 124 (*www.bailii.org*) accessed 18.04.2018;

[74] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European agenda for the collaborative economy, cited, p.13;

[75] CJEU, judgment of 20 November 2001, in case C-268/99, Aldona Malgorzata Jany and Othersand Staatssecretaris van Justitie, www.curia.eu, accessed 13.03.2019, par.33, 34, 37

In the context of the new way of organizing work, mainly results-oriented, abandoning the employer's constant supervision and of work despatialization, the CJEU's case law no longer provides clear rules for the delimitation of working time by rest time, especially as regards inactive availability periods, but only principles and hints for future possible solutions.

Practically, if a worker is awaiting orders from the employer, in a freely chosen place, according to CJEU's case law, that period should not be considered working time. But if the period of actual work performance cannot be determined, although obviously the work has been done, the interpretation should be in favour of the employee, presumed to be in a vulnerable position, so that the entire period of availability to be considered as working time especially that, according to the case-law of the CJEU, the qualification of a period as working time does not depend on the intensity of work[76] and there is no intermediate category between working time and rest time so that if a period cannot be considered rest time it must automatically be considered working time, as the two notions are mutually exclusive[77]. To assess whether a period is rest time, all the specific elements of the activity must be analysed, especially if the worker must be in a certain area to respond to the orders and whether she/he is under the obligation to start work shortly after receiving the order[78] .

Such an interpretation is able to determine employers to adopt effective means of quantifying the working time, which is such as to ensure adequate protection for workers.

Furthermore, the fact remains that Article 17 (1) of Directive 2003/88 allows Member States to derogate from Articles 3 to 6, 8 and 16 where, based on the specific characteristics of the activity pursued, the length of working time is not measured and predetermined or can be determined by the workers themselves.

However, these exemptions must be adopted by states through normative acts, as the provision in the directive is not enough[79]. Although it cannot derogate from the provisions of Article 2 which include the definition of working time, the derogation from the provisions of Article 6 on maximum weekly working time makes it useless to delimit working time from rest time as this is relevant only for limitations of working time.

The new forms of working in the collaborative economy will further pose many problems on working time organization and regarding the delimitation of it from rest time.

The analysis on whether working time regulations are applicable and how will have to be done on a case by case approach, depending of the particular and ever changing conditions of work imposed by the on-line platforms, even in the case of the same platform if the terms and conditions of use are changed.

From the CJEU previous case law some principles may be detached for finding the legal solution to working time problems, generated by innovative work arrangements, as those questions were not addressed in a preliminary question on the subject, and such a possible future answer, anyway may not be applicable to all the possible situations. All those principles are useful on the condition to find first the essence of every work arrangement in the collaborative economy and then find the applicable principle.

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[78] mutatis mutandis CJEU, (5th Chamber), Judgment of 21.02.2018, in case C‑518/15, Matzak, cited.

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# LIABILITY OF THE TRANSPORTATOR IN THE CASE OF THE RAILWAY TRANSPORT CONTRACT

**Adriana Elena BELU**[*]

**Abstract**

*When dealing with rail transport, whether we deal with aspects of domestic or international rail transport, the provisions of GO no. 7/2005 for the approval of the Romanian Railways Regulation and the Romanian Rail Transport Regulations for Internal Transport and the Convention on International Carriage by Rail (COTIF) of 9 May 1980 and Uniform Rules for the International Carriage of Goods Goods (CIM) for international transport.*

**Keywords:** *Contractual transport, rail transport, tort law, illicit nature of the harmful act.*

## Introduction

Relationships arising from the transport contract are independent of the relationship between the shipper and the beneficiary, which is based on another contract, which are not opposable to the carrier, and thus the existence of two stand-alone contracts with its own effects.

Carriage of goods is determined by the sale of a buyer from another locality or the rental of equipment for use in another locality than the one in which they are located. The use of purchased or leased goods may take place only by transporting them from the place where they are to be used.

The conclusion of the contract of carriage is determined by the prior conclusion of the sale-purchase, rental contracts without losing its autonomy through this connection. Thus, in practice, the transport contract, being autonomous, is concluded and executed independently of any existing conventions between the shipper or the consignee and third parties. In the same sense, the problem can be raised and vice versa, ie the provisions of the transport contract can not be opposed to the parties to the contract that preceded it. Thus, in a transport contract, if the jurisdiction of the Court of Arbitration in London, in which the jurisdiction of the International Commercial Arbitration Court in Bucharest was established in the event of litigation, was settled in case of litigation between sellers and buyers.

The transport contract is a legal institution with specific characters, which distinguishes it from all other contracts with economic or civil law content or which have as object the provision of services. Represents in legal terms the realization of economic relations of a special nature, such as the displacement of the object of transport, which gives it its own juridical figure with distinct characters. Being entered into between economic agents with regard to the performance of certain services, in order to carry out its tasks, the transport contracts are economic service contracts and are of a special nature.

The contract of carriage is a unitary, autonomous and autonomous contract, in the content of which there are elements that resemble elements specific to other contracts, but which confer on this contract an own legal nature.

But not every move of things from one place to another is the subject of a transport contract but only when the shipment is made on the basis of the assumed obligation of the carrier and which it has taken to the place of loading and will hand them over to place of destination.

The towing contract is of a legal nature different from the legal nature of the transport contract because it does not involve the taking over of the goods in the port of shipment and their handing over to the port of destination but only the offshore or seagoing offshore . The towing contract may be terminated for a certain distance, for a certain length of time or for the execution of a particular operation, in return for a payment. Both Contracting Parties have obligations whose non-compliance entails the contractual liability of the defaulting party, and in the event of damage to property due to third parties by performing the towing operations, the defaulting party shall be liable to them. The contract of carriage is also different from the contract of shipment, which is the contract on the basis of which a person, called expeditionary or commissioner, undertakes to the other contracting party, appointed as the sender or the principal, that by virtue of the empowerment given by the latter to conclude with carriage on own account but on the expedition's behalf a contract for the carriage of goods and to carry out all the ancillary operations for the dispatch of the goods or their arrival at destination and the consignor undertakes to pay him a certain amount of money and the price of ancillary services. The legal relationships established between the parties to the shipment contract are of a complex legal nature.

There are two civil contracts in the relations between the consignor and the consignor: a contract

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without a warrant, under which the sender authorizes the shipper to conclude with a carrier the transport contract and a service contract, on the basis of which the consignor must execute all the operations necessary for transport, such as the taking over of the goods and their loading in the means of transport, the completion of the necessary formalities. The consignor is responsible for the destruction or destruction of the goods from the moment they are received until they are handed over to the carrier, and is only responsible for the proper execution of the specific shipment contract obligations and the choice of the carrier, the means of transport and the route. The sender has the right to terminate the contract, but only until the date of conclusion of the contract of carriage, in which case he is obliged to pay the expedient a sum of money, which represents the equivalent of his activity until the termination and the price of the accessories provided; unpaid, as long as the goods are still in detention, will have the right of retention. By the way it is formed and viewed from the complexity of its constitutive elements and its purpose, the transport contract has its own legal structure and specific physiognomy, being independent of any other civil or commercial contract.

## 1. Regulation of the transport contract.

The legal provisions applicable to the transport contract come from a series of normative acts that need to be coordinated with each other. The Civil Code refers to the transport contract within the scope of art. 1955 - art. 2008. The transport activity is also regulated by normative acts specific to each transport sector: Government Ordinance no. 19/1997 on transport; The Romanian Railways Regulation approved by Government Ordinance no. 7/2005, Government Emergency Ordinance no. 12/1998 on the Romanian railways and the reorganization of the Romanian National Railway Company, Government Ordinance no. 42/1997 on the maritime and inland waterways, Government Ordinance no. 27/2011 on road transport. Besides the special laws and custom, as provisions that derogate from the legal regime established by the New Civil Code, it is also necessary to consider Art. 140 of the Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, which stipulates that the provisions of the international instruments ratified by Romania in the field of transport prevail over the provisions of the Civil Code.

Art. 193 of the Law no. 71/2011 provides that art. 20 par. (3) of the Government Ordinance no. 19/1997, which regulates the transport contract in general, is modified in order to know the provisions of the New Civil Code as a general rule.

Also in the sense of recognizing the provisions of the New Civil Code as a general norm in the field of transport, art. 194 of Law no. 71/2011 provides for the amendment of para. (7) of art. 1 of Government Emergency Ordinance no. 12/1998 on the Romanian railways and the reorganization of the Romanian Railway Company.

In addition to the common features of any provision of services, the transport contract is distinguished by its own characteristics, such as: an activity consisting in the movement of persons or goods; the exercise of the carrier activity as a self-employed profession; the technical and commercial management of the operation; autonomy of the transport contract against the correlation contracts.

## 2. Mandatory clauses of the transport contract.

According to art. 1961 par. (2) the transport document is signed by the consignor and must contain, inter alia, particulars of the identity of the consignor, the carrier and the consignee and, where applicable, the person to whom the shipment is due. The transport document also mentions the place and date of receipt of the goods, the point of departure and the destination, the price and timing of the shipment, the nature, quantity, volume or mass and the apparent condition of the goods when handed over for transport, the dangerous nature of the goods, if any, as well as additional documents that have been handed over and accompany the shipment. The Parties may also agree on other entries in the transport document.

The provisions of the special law remain applicable.

The terms of the contract of carriage concern: the date of the contract; the nature of the transport document; the parties concerned; identification of the goods transported; carrier's obligations; payment of the price; the signature of the document.

The date of the contract is important because it determines the day of conclusion of the contract of carriage, as from the normal start of the assumed obligations. In addition, dating is of interest in determining whether or not the sender was a person with an exercise capacity at the time the legal act was finalized.

The nature of the transport document is requested incidentally by art. 1965 of the New Civil Code, which states that when the transport document is on order or at the bearer, the property of the transported goods is transferred by the effect of the transmission of this document. The type of transport document influences the identification of the recipient. The Civil Code requires that the sender, the carrier and the consignee and the person who has to pay for the shipment be identified. The identity of the sender allows the carrier to know the person from whom he or she can validly receive counter-orders, such as changing the destination or replacing the consignee. The carrier, being the main party to the contract, must be nominated, because only the recipient or the rights transferee will know without a doubt who can be held accountable in the event of loss or damage to the displaced property. The mention of the seat serves to

determine the territorial jurisdiction of the jurisdiction that will settle the dispute between the contracting parties, most of the times the defendant being the carrier.

The mention of the addressee is necessary to enable the carrier to determine the person entitled to the cargo at the end of the journey.

The description of the cargo that the shipper handles to the carrier is a mandatory requirement in the contract of carriage, since the nature, quantity, volume or mass and the apparent condition of the goods when delivered for carriage must be specified, the dangerous nature of the goods, if any. If things are in boxes or packages, you must specify their quality, number and seals or marks applied.

The purpose of these mentions is to facilitate the identification of things both by the carrier, who must release them at the end of the journey, as well as the recipient, who will receive them. The load description serves to assess the amount of compensation that the carrier may owe in the event of loss or damage to goods during transport.

Regarding the carrier's obligations, the New Civil Code requires that the point of departure and the destination be mentioned. By knowing only the destination, the carrier will be able to properly guide the means of transport. The term of the shipment must be mentioned, the term of delivery of the items being transported shall be decided by the parties. The time limit for the execution of the contract of carriage starts to run from the date when the work was handed over to the carrier by the consignor.

Payment of the price must be expressed in the document. The cost depends mainly on the type of transport, the distance traveled, the nature, the dimensions and the weight of the work being carried. In addition to the actual price of the transport, its total cost may also include other amounts.

The new Civil Code provides that the transport document is signed by the sender. By signing it, its unconditional adherence to the terms of the transport contract is manifested. The text does not include the carrier's signature. The nominative transport document must be signed by both contracting parties, namely carrier and consignor.

## 3. Comparative view of transport.

Two obligations are the basis of any legislation on transport, in the general sense of a different carrier according to the rules of common law, in particular the meaning of railway under the various transport regulations.

The imperative nature of these obligations is:

- equality of treatment towards the public wishing to take part in the contracting of a transport, resulting in the publicity of the law or regulation which stipulates the conditions and the price on the means of transport, which become mandatory in the relations between the state or the entrepreneur and the private persons on the basis of the concluded transport contract;
- non-disregard of the general principle that it is not permissible to circumvent the contractual obligation giving rise to the waiver.

Any enterprise of private or private interest violates the principle of fairness in law when it is allowed by law or the regulation which would require it to deviate or diminish its contractual responsibility. Justice, by jurisprudence, has the honor of restoring the violation of this high justice principle.

### 3.1. France

In France, land transport was governed by the provisions of Art. 1782-1786 Civil Code and Title VI S. III Commercial Code dealing with commissioners for water and land transport in Art. 96-102 and S. IV which contained a series of provisions concerning carriers generally in Art. 103-108, these articles contained general rules applicable to any kind of transport. However, it does not apply to maritime transport as these are regulated separately from the commercial code or from the transports on the roadways to which the laws of 30 May 1851 of 17 July 1908 apply, or the trams and railway undertakings of local interest to which they apply the law of 11 June 1880 and the decree of 16 July 1907.

For a long time after the promulgation of the commercial code, France has envisioned a rich legislation on rail transport, seeking new provisions to satisfy the requirements of this mode of transport.

From the point of view of the legal nature of the transport contract, the French Civil Code regards it as an operating lease and the commercial code as a commission contract. The French Leader did not know to relinquish the transport contract that autonomy that is so logical and necessary to the important economic function it performs. The rule of law translated into law is incomplete and too old that it can no longer solve problems that arise with the development of the transport industry.

As far as the railway transport is concerned under the old laws, whenever the special tariff was applied, this presupposed in the transport contract the existence of a negligence clause on the part of the railway administration and the recipient was the one who had to prove the fault of the roads railways.

The law of March 29, 1905 considers any clause introduced in the consignment note to be void under which the reduction of liability is stipulated.

The provisions of the Code, which did not restrict the parties' freedom of contract, the carrier, to the freedom to contract with the shipper on the terms of the contract, could mitigate the extent of its liability or remove it altogether by stipulating in the contract a non-warranty clause. However, the case-law has saved the general principle of common law that each is responsible for the consequences of his deeds or the non-fulfillment of an obligation.

Through a series of steady decisions, it has defeated the desire of railway companies to work

beyond the boundaries of an elementary contractual liability, being nullified by any clause to the contrary. The legal reasoning which the French courts based in their judgments referred to a clause whereby railways would be sheltered from any liability or diminished the degree of their liability resulting from the breach of contract is equivalent to the right of the railway company to free themselves from the effects of culpability, which would result in the encouragement of all the most damaging crimes and negligence and the deceptive facts. As a consequence, such an irresponsibility clause would be against public order and would not be valid.

**3.2. Germany**

In Germany, it was easier to regulate the transport contract because there is no legal tradition as it was in France where the commercial code of 1807 drafted the basic principles of transport and created a legal regime that had been put into practice. The German Legislative Commission of 1848, which had been designated to deal with trade and transport business, was able to study this problem and resolve it in a satisfactory manner.

The 1861 code deals with transport through art. 390-421. Damages in the event of damage or loss were calculated according to the value of the goods in the destination city, and when the carrier was guilty of misdemeanors or misdemeanors, it used the principles of common law with regard to damage to the sender. For the amounts due by virtue of transport, the carrier had a pledge on the shipment. All of these provisions, together with the others contained in the old code, have been the basis for the drafting of the Berne international convention, which is largely a true replication of the German principles. In 1900, the new German code was promulgated, which, in transport matters, reproduced exactly the provisions of the Berne Convention, paying particular attention to the conditions under which transport must be carried out and at the same time regulating the responsibility of the carrier.

The German legal system on transport has been adopted by many countries in their transport legislation because the Germans have been the only ones who have been able to adapt to the new requirements emerging with the development of the transport industry, new principles capable of satisfying them.

Transport law is viewed by German doctrine and law as a conventional right of the parties, although their will is limited by some prescriptive rules prescribed by the Code, however, they have some freedom to contract. The principles of railway law refer to a transport of public interest, are imperative and the contractual freedom of the parties is wholly excluded.

**3.3. Italy**

The Italian Commercial Code of 1865, which was a copy of the French code of 1807, contained in the transport field old provisions because, during the entry into force of the French code, the transport industry was very poorly developed, trafficking in persons or goods was extremely low when, after several decades, the transport companies have expanded, especially the railway companies, and those provisions could no longer meet the new needs due to the multiplication of the means of transport and their intensification.

The Italian code deals with freight and freight forwarders, each with a sphere of activity and distinct responsibility. The Chief Officer was responsible for the way the carrier carried the task of carrying, responding to the damage, the loss or delay of the work, and the carrier responded to the commissioners as to how it had carried out the shipment.

There is no provision in this code on rail transport, and then, in the absence of a special law or regulation, the provisions of the commercial code apply, which is totally inadequate and abusive.

Thus, due to the lack of specific rules that clearly and precisely define the concept of railway administration's reputation, those companies, through their regulations and statutes, which they changed as they pleased, began to restrict their responsibilities in many cases or reserve their right to fix in the consignment note the amount of damages they would have to pay to the entitled party in the event of damage or loss attributable to them. Many times, through an express clause, they were free from any liability. The damages suffered by the public as a result of such abusive treatment, forced in the event of damage or loss, to satisfy what companies wished to indemnify or to give up any compensation when the companies provided the clause of their irresponsibility in the contract.

Following the promulgation of the commercial code in 1885, a number of conventions entered into between the Italian State and the various companies to which the state had conceded the operation of the railways, setting out in detail the conditions under which they were obliged to carry out the transports, and also the extent of their responsibility . The Royal Decree of November 26, 1921 brought many changes to the existing legal regime for rail transport.

The Italian Legislative Commission of 1921, which deals with the reform of the commercial code, has echoed a pressing need. He also deals with the transport of people. The few principles of the commercial code applicable to all modes of transport are insufficient in their content and, with the development of public transport services, their applicability has become increasingly difficult. In this situation it was necessary to intervene in the jurisprudence to supplement these shortcomings and the legislator who by special laws to adapt the old provisions to the new requirements.

**3.4. England**

The regulation of transport in England is subject to the rules contained in the Railways and Canal Traffic Act of 30 July 1854 where no convention whereby the carrier would derogate from the general principles

underlying its liability is prohibited under the penalty of nullity.

Any carrier is subject to those provisions which have a single purpose, a fair compensation in the event of loss, damage or delay.

### 3.5. Switzerland

The law of 29 March 1983 governed transport in Switzerland, which contains the same provisions as the Berne international convention. The contract of carriage is treated in Art. 440-457 of the Obligation Code of 30 March 1911.

## 4. Liability in the contract of carriage.

Failure to comply with the obligations assumed in the contract of transport gives rise to civil liability for the carrier and the consignor. As regards the liability of the consignor or the consignee, the rules that apply are those of ordinary law, whereas special aspects of the common law apply to the carrier.

Regarding the carrier, there is contractual liability and tort liability. Tort liability is subject to the provisions of the civil code, and contractual liability is subject to the provisions of special laws, and only in the absence of specific provisions is it subject to common law.

The legal regime of the carrier's liability is given by the provisions of the civil code by art. 1984-2002.

### 4.1. Tort liability of the carrier.

Tort law is a sanction specific to civil law, applied for committing an illicit act of causing damage and has a reparatory character.

According to the civil code, any person has the duty to observe the rules of conduct that the law or custom of the place requires that, by his actions or inactions, the rights or legitimate interests of others, are not prejudiced. The person who has discretion violates this obligation is responsible for all the damages caused, being obliged to repair them fully. In certain cases provided by law, a person is obliged to repair the damage caused by the deed of another, the things or animals under his guard, as well as the ruin of the edifice.

The carrier, through the performance of the contract of carriage, assumes responsibility towards its contractor but may also assume liability to third parties in the sense that in the event that third parties have been harmed by acts committed by the carrier in the course of the activity outside the contract of trabsport, the liability of the carrier will be a tort / delict.

### 4. 2. The contractual liability of the carrier.

When the sender did not notify the carrier of the fault of the work, and he did not check the thing and did not know his vice, if the work deteriorated because of his vice and the things adjoined, the sender will be responsible for the damage caused by his fault. The sender's deed may extend the wholly or partly the civil liability of the carrier. In order for the liability to be wholly excluded, the creditor's deed must fulfill the features of force majeure, ie it is absolutely unpredictable and irresistible, otherwise the rules of common fault will apply. In the case of the transport contract, the following will be attributed to the sender and the consignee: - inappropriate loading or unloading, if these operations were done by the means of the consignor or the consignee or under their supervision; - the sender hid the vice of the work, declaring the contents of the package to be false; - the sender has handed over products which are excluded from the transport by any special law, under a false, inaccurate or incomplete name and confiscated by the authorities; - handing things over to a package with defects that could not be seen from the outside appearance when things were taken to transport; - the consignor did not indicate in the transport documents and on the packaging the particularities of the goods which required special conditions or certain precautions during transport or storage; - the creator designated by the consignor or consignee to accompany the transport has not taken the necessary measures to ensure the integrity of the transported work; - incorrect indications in transport documents; - handing over incomplete transport documents.

### 4. 3. Liability for non-transport or for delay

The carrier is also liable for the damage caused by not carrying out the transport or by exceeding the transport term, resulting in unlawful acts, such as not carrying out the transport and exceeding the transport time.

The performance of these acts may entail the liability of the carrier and is a manifestation of the non-fulfillment or inadequate execution of the obligation of the transport to carry out the transport within a certain period, determined conventionally or legally.

If it is found that the loss or damage or alteration could have occurred in certain cases, it is presumed that the damage was caused by that cause.

The carrier is relieved of liability if it proves that the total or partial loss or alteration or deterioration occurred due to:

- any other offense committed intentionally or by fault by the sender or consignee or instructions given by one of them;
- the major force or deed of a third party for which the carrier is not required to respond.

Article 1991 The NCC aims to group the exonerating causes of liability that may be encountered in the event of loss, alteration or degradation of the goods carried. The text is not an exhaustive list of excusable causes of liability, but the article refers to other causes provided by special laws and other texts of the new Civil Code, and exonerating causes of liability apply also to the transport contract.

Art. 1991 The NCC establishes two categories of exonerating causes of liability, depending on the legal mechanism of producing the exonerating effect of

liability. The first category is characterized by the following mechanism of producing the exonerating effect of liability: in order to apply the exonerating cause, it must be proven that it is produced and that there is damage. It is not necessary to prove the concrete causal link, that is, the fact that the actual damage is the consequence of the interference of the exculpatory case relied on. Concerning the causal link between the exonerating cause and the prejudice, art. 1991 alin. 2 The NCC requires only an abstract analysis in order to ascertain whether the intervention of the alleged reimbursement case would have the effect of giving rise to the damage suffered. If the vocation of the existence of an abstract causal link has been proved, it is assumed that there is also the concrete causal link.

The second category is characterized by the following mechanism for producing the exonerating liability: for the purpose of applying the exonerating case, it must be proved that it is produced, that there is damage and that there is a concrete causal link to prove that the damage is the consequence of the exculpatory liability .

**4. 4. Causes that eliminate the illicit nature of the injurious fact**

The causes that remove the unlawful nature of the harmful act are: legitimate defense; the state of necessity; the performance of a legal duty or legal order given by a competent authority; the victim's consent; the exercise of a subjective right.

In the event of intentional or gross negligence on the part of the carrier, the provisions relating to the extinction of the claimant's claims and those relating to the notice period are not applicable.

The clause which removes or limits the liability established by law to the carrier is considered unwritten. The consignor may take the risk of transport in the case of damage caused by packaging or in the case of special consignments which increase the risk of loss or damage to the goods.

Unless otherwise agreed, the carrier who undertakes to transport the goods on its operating lines and those of another carrier shall only be liable for carriage on the other lines as a commission agent.

## Conclusions

Unless otherwise provided by law, in the case of successive or combined transport, liability may be brought against the carrier who has concluded the contract of carriage or the last carrier. In their relations, each carrier contributes compensation in proportion to its share of the transport price. If the damage is caused intentionally or by gross negligence on the part of one of the carriers, the full compensation is incumbent upon him. When one of the carriers proves that the damage did not occur during its transport, it is not required to contribute to compensation. Goods are presumed to have been handed over in good condition from one carrier to another if they do not require the transport document to state the state in which the goods were taken over.

In the successive or combined transport, the latter carries the others with regard to the collection of the sums under the contract of carriage and the exercise of the rights. The carrier who fails to fulfill these obligations shall be liable to the previous carriers for the amounts due to them.

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# THE SHAREHOLDERS VOTING RIGHTS IN COMPARATIVE LAW

**Roxana-Mihaela CATEA***

**Abstract**

*The most important consequence of owning shares in a company is the possibility to exercise your voting right as a shareholder and decide the future of the company and of your own capital increases. Nowadays, companies are becoming increasing interested in knowing the identity and the financial reputation of their shareholders in order to ensure a healthy and stable economic flow. Although Romanian legislation provides minimum quorum and majority guidelines for approving shareholders' decisions, the procedural manner in which shareholders exercise their voting rights may benefit to some extent from the solutions identified by other legal systems, which have a clearer regulation of minority and majority shareholders rights. Also, the discrepancies due to the absence of a more standardized legal framework for the exercise of voting rights have been overcome as a result of the interpretation provided through case law, which has revealed a series of criteria for determining whether the stockholder's vote has been duly cast. Considering the current Romanian legal background, this article aims to analyze the Romanian legal system with respect to the shareholders' voting rights in comparison with the guidelines set out by other legal systems and to emphasize the welcoming recent EU legislation for the harmonization and protection of shareholders' rights.*

**Keywords:** *right to vote, minority shareholder, majority shareholder, exercising voting rights, joint stock company, limited liability company, corporate policy, proxy voting*

## 1. Introduction

### 1.1. Introduction

The purpose of a company is to organize its activity in order to produce profit. This is the lucrative purpose which generates interest in owning a part of that company by individuals or other legal entitites.

Law no. 31/1990 regarding companies ("**Law no. 31/1990**") provides that votes are cast in the general meeting of shareholders and their result represents the will of the company itself. Renowned scholars have said that the general meeting of shareholders represents the deliberation body of the company because it expresses the company's social will[1]. Although in doctrine, the legal nature of the resolution of the general meeting of shareholders pendulated between an unilateral legal act and a contract between shareholders, the true nature of such an act was established as being a sui generis act, since it cannot be included in any other category of legal deeds[2].

As opposed to voting in limited liability companies, voting in joint stock companies may lead to several issues due to the specific nature of the procedures and types of vote set out by Law no. 31/1990.

For example, as opposed to the open voting procedure established by Law no. 31/1990 for shareholders in limited liability companies, art. 130 par. 1) of the same law provides that open votes are the general rule in joint stock companies, while secret votes are established for specific operations.

While the Romanian legal system is in line with most of European legal systems establishing a subjective system, where commercial and corporate norms are applicable to legal professionals, in USA the common-law rules apply both to individuals and to legal professionals performing a commercial or corporate deed. However, federal regulations have been adopted in USA in order to uniformize commercial rules by issuing a common Commercial Code[3] applicable for all states.

Apart from the differences within the Romanian legal system connected to the type of company analized, there are significant differences between the manner in which the shareholder's voting rights are cast in other legal systems, both in relation to substantial aspects regarding the shareholder's voting competence and to procedural aspects regarding how the vote is actually cast.

While most of Europe's legal system is a continental one, in USA

## 2. Overview of the shareholder voting rights in Romania

### 2.1. Voting as a limited liability company shareholder

For a shareholder in a limited liability company, each share grants the right to one vote. Votes are cast in the general meeting of shareholders. Law no. 31/1990 established a restriction referring to shareholders who cannot exercise their right to vote in the general

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[1] V. Nemes, *Commercial Law*, 3rd Edition, Hamangiu Publishing House, 2018, p. 142.

[2] St. D. Carpenaru, S.David, C. Predoiu, Gh. Piperea, *Commented Companies Law*, 4th Edition, C.H. Beck, Bucharest, 2009, p. 485.

[3] St. D. Carpenaru, *Romanian Commercial Law Treaty*, VIth Edition, C.H. Bech, Bucharest, 2019, p. 15.

meeting if the matter on the agenda refers to their own share capital contributions or the legal acts concluded between the shareholder and the company. Needless to say that if a shareholder loses the ownership of its shares, even within a forced execution procedure[4], it shall lose the capacity required by law to act as shareholder and exercise votin rights.

From a procedural point of view, art. 192 of Law no. 31/1990 establishes that the general meeting passes a ruling considering the votes representing the "absolute majority" of the shareholders and their shares, provided that the articles of association do not establish othervise. In order for the general meeting to amend the articles of incorporation, Law no. 31/1990 provides that shareholders' unanimity in this respect is required.

### 2.2. Voting as a joint stock company shareholder

Voting rights and procedures in a joint stock company are more detailed by the Romanian legislator, most likely due to the more complex configuration of this type of company.

Generally and similar to limited liability companies, in a joint stock company a subscrised and paid up share grants the shareholder the right to one vote, provided that the company's articles of association do not establish otherwise.

When discussing the voting rights of a shareholder within a joint stock company, it is neccesary to determine if the shareholders have established certain limitations attached to their shares through the articles of association. For example, the shareholders may include in the articles of association certain vote limitations for shareholders owning more than a share.

A limitation has been set through Law no. 31/1990 regarding certain resolutions in which the shareholders who are also members of the board of directors, of the directorate or of the supervision board cannot vote with respect to their discharge from their mandate or with respect to an issue in which their person or management would be subject to discussion. Similarly, a shareholder who, either personally or in his capacity as a proxy of another person, has an interest contrary to the company's interest needs to refrain from voting in connection to that certain operation.

Another relevant aspect regarding the exercise of a vote in joint stock companies is linked to the type of shares owned by the shareholder. For example, in case of priority shares without voting rights attached hereto, the shareholder owning such type of shares is prohibited from voting.

If the shareholders did not pay their contributions, their voting rights are suspended.

The right to vote cannot be transferred and any convention which states that the shareholder undertake to exercise its voting right in accordance with the company's or the company's representatives' instructions or proposals is null and void. In practice[5], courts have clarified this matter in the sense that only if the company or its representatives instruct or propose that the vote be cast in a certain manner, the procedure is null. However, if the shareholder mandates a third party to exercise its voting right as the third party deems proper, the shareholder's instruction shall not be deemed null.

From a procedural point of view, voting in general meetings of shareholders is performed through an open vote. Art. 130 par. 2) of Law no. 31/1990 provides that a secret vote is mandatory for the appoinment or revokation of members of the board of directors or of supervision council, for the appoinment, revokation or dismissal of censors or financial auditors and for passing decisions in connection to the liability of the members of administration, management and control bodies of the company.

The provisions of Law no. 31/1990 also entail that shareholders in joint stock companies must exercise their rights in good faith, while observing the rights and legitimate interests of the company and of other shareholders.

## 3. Voting rights in other legal systems

If in general, one share generates the right to one vote in a Romanian company, a difference in this respect can be observed in foreing law systems, such is the French one. For example, pursuant to articles L225 - 122 and L225 - 123 of the French Commercial Code, a voting right equivalent to twice that attributed to other shares could have been attributed to fully paid shares which can be proved to have been registered in the name of the same shareholder for at least two years, depending on the proportion of the share capital they represent, by the memorandum and articles of association or a special shareholders'meeting. Recently, thorugh the adoption of the so-called Florange law this principle was reversed for listed companies, so that the attribution of double voting rights is automatic by operation of law except if the articles expressly provide otherwise.This system enables companies to recognize, subject to the satisfaction of certain requirements, double voting rights to their shares.

Shareholders' extensive rights under French law allows them remove any director at any shareholders' meeting by a simple majority vote of the shareholders, upon proposal of any single shareholder, even if the subject is not on the agenda for the relevant

[4] Brasov Appeal Court, Decision no. 433/R/2016 - Losing the quality of shareholder after being under forced execution for the shares. Absolute nullity of the general meeting of shareholder resolution passed after the transmission of the shares to a third party.

[5] Gorj Tribunal, Resolution no. 1/2010 - Claim for the annulment of the resolution of the general meeting of shareholders.

shareholders' meeting and regardless of the term of office for which the director was originally appointed[6].

The trend for enlarging shareholder protection is recognizable in Sweden, as well. For example, the Swedish Companies Act provides for certain protection of minority shareholdersso that some rights under the Swedish Companies Act may be exercised by each shareholder (i.e., regardless of the number of shares owned or the number of votes they represent) whereas some rights may only be exercised by a shareholder whose shareholdings represent 10 per cent or more of the share capital. In order to illustrate such a system, imagine that a shareholder is allowed to introduce matters to the agenda and present proposals for resolutions at general meetings; and take court actions against the company to set aside or amend a resolution on the grounds that it has not been duly passed or that the correct procedure for its adoption was not followed. However, in Sweden, the right of a shareholder to voe via a proxy is somewhat limited, in the sense that to introduce proxy voting, the company initialy must alter its articles of association, by introducing a provision on proxy voting. This would enable the distribution of proxy forms where the shareholders may indicate their votes (as 'yes' or 'no') regarding the relevant proposals, which are then executed without the shareholders being present at the shareholders' meeting.

The preoccupation for the protection of minority shareholders is not trending in all European countries, as one might expect. For example, in Luxembourg, where a law issued in 2016 amended the provision which stated that one vote is attached to one share. The former rule limited the voting rights to the number of the shares, in order to strengthen the exercise of minority shareholders' voting rights in listed companies in order to improve the corporate governance of such companies.

Also, in Luxembourg the management of the company is strictly limited to its board. Should a shareholder be directly involved in the management of the company, he or she may be deemed a de facto director and face civil or criminal liability, or both, and generally be liable under the same circumstances as the appointed directors[7].

Another example of the shareholders' voting rights being limited is included in Switzerland's Code of Obligations and established that a company may limit the voting rights of shareholders to a certain percentage (usually between 2 and 5 per cent), above which the registration with voting rights in the company's share register may be refused, thus making the shareholders' voting rights capped at the relevant percentage limit. Through this feature, a company may also be able to limit coalitions between shareholders[8]. Also, in Switzerland, shareholders of a Swiss company have no right to request direct access to the company's shareholder register, this aspect not making the decision process smooth at all, since shareholders may not be aware of other shareholders with similar interests in the company. However, a most welcomed provision of the the Swiss Ordinance against Excessive Compensation (the Ordinance), which entered into effect on 1 January 2014, states that any institutional representation of shareholders can be done only through an independent proxy elected annually at the shareholders' meeting, and no longer through a company representative[9].

In contrast with the Swiss limiting laws blocking shareholders for having access to the shareholders' registry, in the United Kingdom, under Section 116, Section 809 and Section 811 of the Companies Act[10], shareholders have the right to inspect and copy a company's register of members and any register of beneficial interests. This disclose of the company register allows other shareholders to be identified and subsequently communicated with, or (in circumstances where the directors of a company have failed to comply with a shareholder's requisition) allow the interested shareholder to call the general meeting itself at the company's expense (Section 305).

Also, in the United Kingdom, shareholder's rights in connection to the manner in which a vote is cast are firmly regulated. In this respect, under the Companies Act, a shareholder who holds at least 5 per cent of a company's issued share capital to require the directors of a company to obtain an independent report on any poll taken or to be taken at a general meeting of the company (Section 342).

## 4. The shareholders' Directive

In 2017, the European Council adopted a revised version of the EU Shareholder Rights Directive, applicable from June 2019[11] (the "**2017 Shareholders Rights Directive**"). Topics include the identification of shareholders, rules that require investors to be transparent about how they invest and how they engage with companies they invest in, voting rights concerning executive compensation (say on pay), and transparency on and shareholder engagement in respect of related party transactions.

The 2017 EU Shareholders Rights Directive is an amending Directive which shall require transposition into each Member State's national law and is expected to be implemented during the second part of 2019.

For the purpose of ensuring better transparency within European companies, the 2017 Shareholder

[6] C. com. Articles L. 225-18; L. 225-105.
[7] Tom Barnes, *The Shareholder Rights and Activism Review*, Third Edition, 2018, London, Law Business Research Ltd., p. 132.
[8] Tom Barnes, *The Shareholder Rights and Activism Review, Third Edition*, 2018, London, Law Business Research Ltd.,p. 129.
[9] Tom Barnes, *The Shareholder Rights and Activism Review, Third Edition*, 2018, London, Law Business Research Ltd.,p. 125.
[10] Section 116, Section 809 and Section 811 of the United Kingdom Companies Act.
[11] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

Rights Directive regulates the company's right to identify their shareholders and request such identification in connection to shareholders holding more than a certain percentage of shares or voting rights. Such a percentage shall not exceed 0,5 %. Also, in case an intermediary such as an investment firm, a credit institution, or central security depository, is involved in the chain between the company and its shareholders, the companies are allowed, within the limits set out above, to request that intermediary to provide information regarding the shareholders' identity, without such a circumstance being deemed as a breach of legal provisions. This obligation stems both from a necessity for more transparency within the corporate governance and from the role of the intermediary, who provides services of safekeeping of shares, administration of shares or maintenance of securities accounts on behalf of shareholders or other persons.

Additionaly, the 2017 Shareholders Rights Directive establishes the right of the shareholder to request and obtain information from the intermediary and the intermediaries are required to transmit the following information, without delay, from the company to the shareholder or to a third party nominated by the shareholder:

a) the information which the company is required to provide to the shareholder, to enable the shareholder to exercise rights flowing from its shares, and which is directed to all shareholders in shares of that class; or
b) where the information referred to in point (a) is available to shareholders on the website of the company, a notice indicating where on the website that information can be found.

The role of the intermediary is further increased by the 2017 Shareholders Rights Directive, to the extent that the intermediary becomes a de facto proxy on behalf of the shareholder. Article 3c of the 2017 Shareholders Rights Directive states that intermediaries facilitate the exercise of the rights by the shareholder, including the right to participate and vote in general meetings. The intermediary's attributions in this respect comprise but are not limited to one of the following:

a) the intermediary makes the necessary arrangements for the shareholder or a third party nominated by the shareholder to be able to exercise themselves the rights;
b) the intermediary exercises the rights flowing from the shares upon the explicit authorisation and instruction of the shareholder and for the shareholder's benefit.

Another measure introduced by the 2017 Shareholders Directive for the protection of shareholders and their voting rights refers to the possibility for the shareholder to receive a written confirmation of the receipt of its vote when it is cast electronically. Additionally, the 2017 Shareholders Directive states that after the general meeting, the shareholder or a third party nominated by the shareholder can obtain, at least upon request, confirmation that their votes have been validly recorded and counted by the company, unless that information is already available to them.

The European Commission summaries the challenging requirements investors will face in a Q+A on its website[12], and the conclusions of the survey reveal that investors remain poorly informed and under-prepared for these paradigm shifts with just over half (58%) of participants aware of the Directive.

Irrespective of the conclusions of said survey, it appears that the general professional views[13] with respect to the amendments of the Shareholders Rights Directive are that the Directive represents a historic opportunity to address some of the systemic problems in capital markets and ensure a more sustainable capitalism functioning in a fairer and more transparent way in the interests of all stakeholders.

## 5. Conclusions

From a regulatory perspective, increased transparency and accountability reflected in European legislation are likely to reinforce the trend of safeguarding and extending shareholders' voting rights and may potentially strengthen minority or activist shareholders. While the traditional strategy among corporate legal systems in Europe focuses mainly on the company, the new emerging generation of legislators tend to shift the interest on the protection and active involvement of shareholders, instead of the central role of the company itself.

In support of this conclusion, the 2017 Shareholders Rights Directive seeks to make it easier for shareholders to exercise their rights, and facilitate cross-border voting, thus alining European legislation with the international activism trends of minority shareholders emerging and developed in the USA.

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# CONSIDERATIONS REGARDING THE CONDITION, AS A MODALITY OF THE LEGAL ACT

**Valentin COCEAN***

**Abstract**

*The provisions of the new civil code did not bring significant changes to the matter of modalities, instead they clarified some aspects, which in the past, due to lack of legislative clarification, could spark controversy. Nevertheless, for an accurate understanding of the condition as a modality of the legal act an analysis is still necessary, particularly regarding the role of the parties' will and their conduct in relation to the condition included in the contract.*

**Keywords:** *condition, the realization of the condition, the will of the parties, abuse of right, obligation*

## 1. Introduction

The herein article's purpose is not to present the issue of condition as a modality of the legal act. For the most part, looking at practice and specialized doctrine, this issue does not raise special problems. However, there are a few aspects, mostly related to the role of the parties' will, which have been neither sufficiently analyzed in juridical literature, nor encountered in litigation brought before courts. These aspects will be subject to a, far from exhaustive, analysis in the study hereunder.

Firstly we shall take on the matter of the distinction between condition and the obligation pertaining to one of the contractual parties, a distinction which not always is easy to make.

Secondly, we shall emphasize the role that the parties' will plays in the qualification of a provision regarding a modality of a legal act, specifically in the correct assessment of its nature in relation to what the parties envisioned upon conclusion of the contract.

Finally, we shall analyze the effect that the parties' conduct has in establishing if the condition has realized or not, the limitations of their freedom to act related to the type of condition provided in the contract.

These issues have been summarily treated in specialized literature, therefore the idea of this study. Pretending to neither present new aspects, nor to give definitive verdicts in issues hereunder, the article presents the author's opinion, making propositions for ways to look at and solve possible situations which might occur in practice and in which contractual provisions including conditions would need a more detailed analysis, one that exceeds the standards in the matter.

Thusly, we shall not include aspects related to condition as a modality of the legal act which have already been treated by both doctrine and practice, but we shall only touch issues which might raise controversy, establishing guidelines which could be used to clarify them.

## 2. Content

The condition as a modality of the legal act, represents a future and uncertain event upon the happening of which the efficacy or abolition of a subjective right and its corelative obligation depend.[1]

Previously, according to the old regulation, the condition was defined as the future event upon which the creation of the subjective right and its corelative obligation depended.

The wording chosen by the lawmaker in the 2009 Civil Code (art. 1399 – "affected by condition is the obligation whose efficacy or abolition depend on a future and uncertain event") raised, however, the issue of the validity of the old definition[2].

Some authors considered that the old definition remains valid, the lawmaker's reference to the efficacy of the obligation having no significance[3]. Others felt the need to note the terminology change, without analyzing its meaning[4].

Finally, other authors correctly noted that, without bringing a new solution, we are witnessing a change in terminology which much better reflects the regime and effects of suspensive condition[5], as the obligation affected by it exists but is not effective.

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[1] E. Chelaru, The General Theory of Civil Law, C.H.Beck Publishing House, 2014, page 150.

[2] G. Boroi, Civil Law Lecture. The General Part, 2nd Edition, revised and completed, Hamangiu Publishing House, 2012, page 192.

[3] L.Pop, I.F. Popa, S.I. Vidu, Civil Law Lecture. The Obligations, Universul Juridid Publishing House, 2015, page 433; C.T. Ungureanu, Civil Law. The General Part. The Persons, Hamangiu Publishing House, 2012, page 190

[4] E.J. Prediger, Introduction to the Study of Civil Law. The Civil Legal Relation, the Legal Act and the Statute of Limitation, Hamangiu Publishing House, 2011, page151; T. Prescure, R. Matei, Civil Law. The General Part. The Persons, Hamangiu Publishing House, 2012, page 178.

[5] Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei. The New Civil Code. Comments by Article, C.H. Beck Publishing House, 2012, page 1478; E. Chelaru, op.cit. page 150

This is how one can explain the fact that the creditor under suspensive condition has the possibility to take action in order to preserve their right or that the acquirer under suspensive condition of a real estate right can make a provisional note in the land registry. The same way, this is the justification for the possibility of estranging the conditional right and, also, for the creditor's possibility to ask and obtain warranties for their claim.

Finally, even the retroactive effects the happening of the suspensive condition has find a better justification in considering the affected obligation as existing from the very signing of the legal act, but as lacking efficacy until the happening of the condition.

Beyond this, ultimately terminological, issue, the matter of condition is treated similarly in specialized doctrine. Therefore, we shall not reiterate general aspects, instead we shall jump right to the ones targeted by the herein study.

**2.1. The qualification of a contractual provision as being a condition or as establishing an obligation incumbent on one party.**

Surely, this issue can only regard the mixed condition or the one entirely dependent on the will of the obligor, on principle resolutive (because it could be mistaken for an obligation whose failure to fulfill could result in termination, leading to the retroactive annulment of the legal act's effects) and only when the wording of the contractual provision is not clear.

For an event to be qualified as a (resolutive) condition it needs to be external to the legal relation generated by the act, different from the execution of the benefit intrinsic to the legal relation created by the respective act. If one of the parties of the legal relation undertakes an obligation, this cannot be deemed as condition as a modality, even if the failure to fulfill it leads to snactions, including, as the case may be, the lack of effects of the legal act.

As far as it can be deduced from the wording of the contractual provisions, the consequence agreed upon by the parties for the happening or not-happening of the respective event (obligation) is also relevant. If this gives the other party the option of asking for termination of the legal act, then we shall, clearly, be talking of a simple obligation. The appearance of the possibility to ask for termination or resolution of the contract cannot be the effect of a resolutive condition, but it is specific to the culpable failure to fulfill the counterparty's obligations.

A resolutive condition would have a different consequence, respectively the by-law, automatic dissolution, as soon as the condition would happen (without any other manifestation of will being necessary) of the right affected by it.

An important role will surely be played by the rules of interpretation of the legal act, which will serve to establish the real will of the parties.

A greater difficulty would appear when qualifying a provision in a concession which would regard a certain conduct on behalf of the beneficiary. Respectively, the issue would rise of qualifying that provision as either a burden or a condition.

The difficulty rises from the fact that, usually, the burden establishes an obligation which is also exterior to the basic relation regarding the transmittal of the right from the one that disposes to the beneficiary.

Aside from the interpretation of the parties' will, including assessing the consequence they projected in case of failure to fulfill the requirement set in the contract regarding the action or inaction of the beneficiary, we can imagine criteria which, under no pretense of infallibility, could help clarify the respective provision.

Thus, we think it should be deemed as a condition and not as a burden the provision establishing a certain conduct for the beneficiary which will not exclusively depend on his own will. The patrimonial criterion can also constitute a clue, meaning the possibility of pecuniary evaluation of the conduct set for the beneficiary is suitable rather to a burden than a condition.

**2.2. The distinction between term and condition, in relation to the will of the parties.**

At first sight, the distinction between the two modalities of the legal act raises no difficulty, the criterion being the certainty of the future event's happening.

However, we must not forget that the matter of the legal act is governed by the principles of the juridical will, respectively the one of free will and that of real will.

Thusly, the parties will be free to choose the legal regime to govern the contractual provision regarding a future event, notwithstanding the degree of certainty of its happening.

But even when the choice of the parties was not direct or if it was not clearly stated, it is necessary to establish the way they foresaw the future event. Meaning, if the parties envisioned that event as certain to happen, then it would be deemed as a term, even if in reality the happening is not certain.

This solution was expressly provided by the 2009 Civil Code, under art. 1420, thus consecrating once more the principle of the real will of the parties.

Thereby, art. 1420 of the Civil Code provides that "if an event which the parties deem as a term does not happen, the obligation becomes due on the date the event should have normally happened". Also, it specifically states that, in such case, the legal regulations regarding term are applicable.

The assessment of what the parties thought regarding the respective event must not be made objectively, meaning we should not take into account if the parties had the possibility of observing that the event was not certain. What matters here is just the way the parties assessed the event upon conclusion of the contract. Notwithstanding of the fact that they knew or could have known that the event was uncertain to

happen, the only relevant fact is the way they assessed it.

For example, if the contract concluded between the parties included a provision which established that an obligation would be executed on the day of a certain concert, which is settled and public, one can assess that the parties deemed the happening of the concert as being certain event and, therefore, qualify the respective provision as containing a term and not a condition, although, objectively, the event was not certain to happen.

**2.3. The relation between the parties' conduct and the happening or not happening of the condition.**

We shall not reiterate here the basic rules, set by the legal dispositions and not challenged by doctrine.

We shall only refer to special situations related to mixed or potestative conditions.

Art. 1405, par.1 of the 2009 Civil Code provides that, if the obligor under condition prevents the its happening, then the condition will be deemed as having happened. And the second paragraph states that, should the party interested in the happening of the condition, ill-fatedly determinate such happening, the condition will be deemed as not having happened.

The text must be understood as regarding both the suspensive and the resolutive condition, as the case may be. We must not omit the fact that, if for one party the condition is suspensive, for the other it can be viewed as resolutive, and the other way around. Thusly, we must not fail to observe the symmetry of the two types of conditions. The resolutive condition sets a situation opposite to that resulting from the inclusion of a suspensive one. In the case of a rights translative act, for example, should the acquirer receive the right affected by a resolutive condition, then the transmitter could be seen as having the respective right under suspensive condition. (consisting of the same event which constitutes the resolutive condition).

However, what we need to establish regarding article 1405 of the 2009 Civil Code is the reason it was adopted. The purpose was to avoid situations in which the one profiting from the happening or not happening of the condition would act in order to determinate or, respectively, prevent the happening of the event established as such.

This purpose is found both in the hypothesis of suspensive condition and in that of the resolutive one. And where the same purpose exists we must apply the same rule (*ubi eadem est ratio, ibi eadem solutio esse debet*), we must give the same solution.

The principle of good-faith, however, bounds us to analyze the legal disposition from a broader perspective. Thus, it must be considered that the provision sets a general rule, that which imposes verifying the parties' conduct regarding the event stated as being a condition (and, of course, the intent of the parties).

The law moralizes the situation, by sanctioning the lack of loyalty of the party which stands to profit from the happening or not happening of the condition and acts ill-fatedly to that purpose[6].

One might object that, when the condition is entirely dependent on the will of the obligor, the party upon whose will the happening of the condition depends has the freedom to act as they wish, however, only if their conduct is not abusive.

There is no issue in the hypothesis in which the party acting towards the happening or not happening of the condition is not the one of whose will the happening of the event depends on, as per contract. In such case, the dispositions of art. 1405 of the Civl Code would apply.

The necessity for sanctioning such conduct in the event that the condition was not agreed on by the parties as being dependent of the will of the party acting towards the happening or no happening of the condition is evident.

Let's take a classic example. The hypothesis in which Primus sells to Secundus a certain good under the condition that the later gets married. It would obviously be a potestative condition on behalf of Secundus. In this case, should Primus act (for example, by spreading depreciating rumors regarding Secundus) towards preventing (or enabling – insomuch as the condition was suspensive or resolutive, positive or negative) the happening of the condition (at any rate, towards the outcome which would profit them), their behavior would represent abusive conduct, which must be sanctioned, as it is unequivocal that the parties did not intend for the fate of the contract to depend on the will of Primus.

We also consider that, in the event in which the conduct chosen by the party upon whose will the happening of the condition depends, as per contract, is an obviously abusive one, by which, without any justification, failing to abide by legal dispositions, acting towards the happening or not happening of the condition, the aforementioned legal dispositions are also applicable.

Moreover, we think that, without a breach of legal provisions being necessary, insomuch as the parties conduct meets the requirements to be qualified as an abuse of right, the same solution must apply[7]. Naturally, the interested party must prove that the requirements for abusive conduct qualification were met.

In other words, it is exactly in this type of situations that lies the reason for the adoption of article 1405 of the Civil Code, respectively that of preventing the beneficiary of the happening or not happening of the condition (weather it was not deemed to be potestative as far as they were concerned or, being

[6] Ph. Malaurie, L. Aynes, Ph. Stoffel-Munk, Civil Law. The Obligations, translation into Romanian, Wolters Kluwer Publishing House, 2007 page 745.

[7] To the same purpose, also see E. J. Prediger, op.cit., page 154

potestative, their conduct is abusive) from acting towards the prevention or, respectively, the realization of the event.

We must also observe the provisions of art. 1404, par.1 of the 2009 Civil Code, which state that the happening of the condition is assessed in accordance with the will of the parties[8]. And we do not think one could allege that by the happening of the condition the parties would have envisioned a situation in which one of them, even the one on whose will the realization of the event depended, would act ill-fatedly, securing for their own the benefit of a right as a result of committing an abuse of right.

This conclusion we deem valid not only with regard to the mixed condition, but also for the simple potestative or purely potestative one.

The only case in which this solution might not apply is the one of an obligation undertaken under a purely potestative, resolutive condition on behalf of the obligor. Here, the validity of the obligation is acknowledged[9], resulting from a per a contrario interpretation of art. 1403 of the Civil Code, but the same applies to the obligor retaining the right to end the obligation whenever they may wish.

We consider that we must not exclude in such case either, the solution of deeming the condition as not having happened, insomuch as the obligor's action towards the happening of the event could be qualified as abusive. However, in such a hypothesis, proving the abuse would be extremely difficult.

Otherwise, the purely potestative condition raises no particular isssues, given that, if it is a suspensive one and depends on the will of the obligor, the conditional obligation would not be valid, on the other hand, should it depend on the will of the creditor, art. 1405 of the Civil Code would not apply, as the creditor has no interest in acting for precluding the suspensive condition from happening or for enabling the happening of a resolutive condition.

Finally, we consider that a distinction must be made between the stipulation of the condition in the sole interest of one of the parties and the case in which the happening of a condition depends on the will of one of the parties, therefore we reached the conclusion that giving up on the condition, possible as per art. 1406 of the Civil Code as far as the condition has not happened yet, will not fall under the rules of art. 1405, as the requirement regarding interest is not met[10].

## Conclusions

As we have previously shown, the herein study did not intend to analyze the entire problematics of the matter of condition, but only some aspects, prone to raise difficulties in practice.

We particularly targeted the role the will of the parties plays in qualifying a contractual provision regarding a future event and as a way of assessing the happening or not happening of a condition.

Surely, we do not pretend to have solved the difficulties which will probably appear while applying the legal dispositions regarding the condition as a modality of the legal act, nor do we assess our proposals as being absolute. This article is an attempt to support practitioners, courts and the involved parties' representatives, who will be put in the position of answering the aforementioned questions.

Naturally, this issue will make for much ampler analyses in specialized literature and the advanced solutions will either be confirmed or rebutted by the courts' practice.

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[8] P. Vasilescu, Civil Law. Obligations, Hamangiu Publishing House 2012, page 405
[9] G.Boroi, op.cit., page 194
[10] For an analysis on giving up on a condition, see Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, op.cit., page 1483.

# UNPREDICTABILITY IN THE LOAN CONTRACT

**Georgiana COMAN**[*]

**Abstract**

*Referring to the conditions of the unpredictability to the substantive elements of the loan agreement, it can be observed that this institution could intervene when the exceptional circumstance of its essence would affect the object of the contract. More specifically, in the case of CHF (Swiss national currency) loans, unpredictability may arise as a result of an exceptional circumstance that would exponentially increase the value of this currency relative to the Romanian leu.*

**Keywords:** *unpredictability, loan contract, instance, binding force, swiss currency*

## 1. Introduction

Under Romanian law, unpredictability has existed for quite a long period of time, as a mere theory, without finding legal consecration. Since 2011, with the entry into force of the new Civil Code, unpredictability has become an institution of civil law governed by the provisions of article 1271. Thus, the Romanian legislator tries to align the Romanian legislation with the European tendency that is to regulate the institution of unpredictability or, in other words, the possibility of revising the contract. Moreover, lately, we can observe that all the European states are trying to harmonize their legislation in the field of contracts with the legislations of the other states, uniformity which has as cause the freedom of movement of persons and goods.

The way in which the institution of unpredictability was regulated in the Romanian Civil Code was basically influenced by the Draft Common Frame of Reference (DCFR) Rules, which in paragraph III 1: 110, second paragraph, provides for the possibility of the court intervening in the event of an exceptional situation in the performance of a unilateral contract or legal act that makes the debtor's obligation excessively onerous. Also, the Unidroit Principles which, although regulates the international commercial contracts, in Article 6.2.2 speaks of the hardship clause and defines it as when the occurrence of events has fundamentally altered the balance of the contract either because the value of the obligations of a party have increased, or because the amount of benefit that a party receives has reduced.

Unpredictability appears as an exception to the effect of the principle of binding contract force.

Or, in other words, it is a limitation of the principle of binding force, not a violation of it.

The express regulation of the establishment of the unpredictability was necessary for its application to be carried out only if all the conditions provided by the law were observed. The purpose of the binding force of contracts is mainly to ensure the stability and security of legal relations. As an exception to this principle, unpredictability must be applied with caution and always in compliance with all the conditions laid down by the legislator.

Lately, unpredictability is often invoked in cases concerning the execution of the loan agreement or contracts that represent the variants of the former, contracts where the loan was granted in the Swiss national currency.

In order to better understand the notion of unpredictability, it is necessary to present the main features of the principle of binding force of the contract.

## 2. Unpredictability - exception to the principle of binding force of the contract

Along with the principle of relativity and irrevocability, the principle of the mandatory force of civil legal acts (pacta sunt servanda) indicates how the effects of the civil legal act occur. This principle is explicitly provided by the provisions of article 1270 C.civ. according to which: (1) The valid contract concluded has the force of law between the contracting parties. The contract shall be amended or terminate only with the consent of the parties or for causes authorized by law.

The following conclusions can be drawn from Article 1270: under a contract, the parties are required to perform their own obligations, even if their execution has become more onerous either because of the increase in the cost of fulfilling their obligation or because of the decrease in the amount of the consideration as indicated paragraph 1 of Article 1270. At the same time, the amendment or termination of a contract has as its main source the will of the parties.

Further, the legislator wanted to strengthen the principle of binding force of the contract, mentioning in Article 1271 paragraph 1 C.civ. the fact that the parties are held to perform their obligations, even if their execution has become more onerous either because of the increase in the cost of fulfilling their

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obligation or because of the decrease in the value of the consideration.

Therefore, the fact that the execution of one of the parties or, on the contrary, of both parties has become more onerous does not justify removing the principle of binding force of the contract without the consent of the party to whose benefit the execution is.

However, the legislator considered a remedy, a possibility to rescue the contract, in the event of a break in the contractual balance due to the change of circumstances in an exceptional way, circumstances that were not considered by the parties at the beginning of the contract

## 3. The notion of unpredictability and its conditions in the light of the Civil Code

### 3.1 The notion of unpredictability

According to art. 1271 alin.2 C.civ. if the execution of the contract has become excessively onerous due to an exceptional change of circumstances which would make it manifestly unfair to oblige the debtor to perform the obligation, the court may order: a) the adaptation of the contract, in order to distribute fairly between the parties the losses and the profits resulting from the change circumstances; b) the termination of the contract, at the time and under the conditions it establishes.

Therefore, unpredictability implies an exceptional change in the circumstances taken into consideration by the parties at the beginning of the contract, circumstances that would make it manifestly unfair to oblige the debtor to execute the obligation in the manner agreed upon by the parties initially. A first condition for unpredictability is the existence of a contract. Although the DCFR Rules governing unpredictability apply to unilateral acts, the Romanian legislator chose to apply this institution only to sinalagmatic (bilateral) contracts.

This paragraph also indicates the mandatory condition for the existence of a situation of unpredictability, namely, that the execution of the contract has become excessively onerous. At the same time, it is clear from this paragraph that another condition must be fulfilled in order to ascertain the interference of the unpredictability, namely to be a successive contract, because in the case of contracts with a sudden execution, uno ictu, the moment of the beginning of the contract, corresponds to the moment of the execution of the obligation, or the execution does not take place at a very long time from the date of beginning of the contract so that an exceptional situation would not be possible. The only situation in which an exceptional situation might arise during the performance of a contract with a sudden execution would be the one in which the obligation of one party would be affected by a suspensive term. Also, the contract must be an honourable one, because if we were in the case of a free-of-charge contract, there is no benefit from both sides, so even the contractual balance would not be affected. Last but not least, the contract must not have finished at the time when the court is required to find the unpredictability

With regard to the classification of contracts in commutative contracts and random contracts, in the event of unpredictability, it can only be a commutative contract where the parties at the time of beginning of the contract knew the rights and obligations arising from that contract and their extent determined or at least determinable (Article 1173 (1) C.I.). The explanation for which the institution of the unpredictability would not find application in the case of random contracts is simple. In the case of these latter contracts, even the parties, by their will, offer at least one of them a chance of winning and at the same time expose them to the risk of loss, which depends on a future and uncertain event (art.1173 paragraph 2 C.civ .). Thus, the premise of unpredictability is even a feature of this type of contract.

The Consumption Loan Contract (mutuum) fulfils the above-mentioned conditions regarding the category of contracts to which the institution of unpredictability might apply, being a sinalagmatic contract, with successive, commutative and pecuniary execution.

The consumption loan contract is defined by article 2158 paragraph 1 C.civ.. According to this article the consumption loan contract is the contract by which the lender gives to the borrower a sum of money or other such fungible and consumable goods by nature and the borrower undertakes to return after a certain period the same amount of money or quantity of goods of the same nature and quality. The legislator therefore established the principle of nominalism in relation to the consumption loan contract for money. Moreover, with regard to the money-lending contract, the legislator sought to reinforce this principle by stipulating in article 2164 paragraph 2 that if the loan is borne by a sum of money, the borrower is not required to return only the nominal amount received, whatever its variation, unless otherwise agreed by the parties.

Also, paragraph 2 of article 2159 C.civ. appreciates that Unless otherwise proven, the loan involving a sum of money is presumed to be forfeit. Thus, a variant of the Consumption Loan Contract is the interest-bearing loan agreement. This implies that under the contract a term of payment of a sum of money or other goods of the same kind shall also arise insofar as there are no particular rules on the validity and execution of that obligation. In other words, when there is no other contract called. The interest included in the contract price may be determined in cash or other benefits under any title or denomination the borrower undertakes as the equivalent of the use of capital. Also, according to article 2169 C.civ. The amount of money borrowed is interest-bearing from the day it was handed over to the borrower.

Referring to the conditions of the unpredictability to the substantive elements of the loan agreement, it can be observed that this institution could intervene when

the exceptional circumstance of its essence would affect the object of the contract. More specifically, in the case of CHF (Swiss national currency) loans, unpredictability may arise as a result of an exceptional circumstance that would exponentially increase the value of this currency relative to the Romanian leu.

At present, at national level, there are a lot of loan contracts or varieties of this contract. In many cases, the parties have established the object of the contract in a currency other than the national one, particularly in the Swiss national currency (CHF). In close connection with the determination of the object of the contract in another currency, there is the interest provided by the parties, which was in principle set at a lower amount than if the object of the contract had been set in the national currency. Characteristic of these contracts is the exchange rate fluctuation because the borrower has to repay the amount of money borrowed in the same currency in which it was agreed, according to the principle of nominalism. However, the conversion of the national currency into the borrowed currency can mean for the borrower a greater or lesser financial effort depending on the currency exchange. Could the contract's object, in case this object is established in another currency than the national one, change the character of the contract from a commutative to a random one? It is a question to which we would in principle be tempted to give a negative answer because the evolution of the financial and banking market that determines the value of a currency in relation to the other, should not be an uncertain but rather predictable event. However, analyzing the evolution of a certain currency, namely the Swiss franc, in relation to all other national currencies, the answer may not be so simple.

Returning to the consumption loan contracts for pecuniary interest signed on the territory of Romania in the last 10 years, it can easily be noticed that the loan, in a fairly large proportion, was established in Swiss francs. By making only a small comparison, between the value of a Swiss franc by reference to the Romanian leu on January 1, year 2008 (2.29 lei) and January 1, year 2019 (3.99 lei), it can easily be noticed that the national currency has experienced a depreciation more than considerable during this period.

In connection with this surprising evolution of the Swiss national currency, it was also the observance of the obligations of the borrowers, which became obviously more onerous. Therefore, there are many cases in which the parties have requested, through the courts, the adaptation of these contracts as a result of unpredictability.

Before considering the possible solutions available to courts in these cases, it is necessary to briefly outline the conditions imposed by the legislator for establishing the existence of a case of unpredictability.

### 3.2. Conditions of unpredictability

Article 1271 paragraph 3 C.civ. provides for the conditions under which the court may intervene in the contract concluded by the parties. These are:

a) the change of circumstances occurred after the beginning of the contract;
b) the change of circumstances and the extent thereof have not and could not reasonably have been taken into account by the debtor at the time of the conclusion of the contract;
c) the debtor did not take the risk of changing the circumstances and could not reasonably be considered to have assumed that risk;
d) the debtor has attempted, within a reasonable time and in good faith, to negotiate the reasonable and equitable adjustment of the contract.

In the case of consumption loan contracts was established in the Swiss currency, previously this currency has an important evolution, it can easily be said that the condition that the change of circumstances occurs after the conclusion of the contract, is satisfied. Also, having regard to the previous ratio between the two coins, it follows that, in principle, the second condition, namely that the change of circumstances and the extent of the circumstances were not and could not be envisaged by the debtor, reasonably at the time of the conclusion of the contract, is fulfilled. However, it is important to note that both the exceptional circumstance that has occurred and the effects of the imbalance that has taken place must occur after the beginning of the contract. According to the doctrine [1], in order to verify the condition of an exceptional situation, it is of interest that the unpredictability as well as the economic-financial aspect - which must characterize the effect on the contract - should relate not only to the nature or the cause of the event, but also to its effects on the performance of contractual obligations.

As regards the third condition, which presupposes that the debtor did not take the risk of changing the circumstances and could not reasonably be considered to have assumed that risk, the opinions are different. It could be said that a person who sign a loan contract in a currency other than the national one and, in fact, the one in which it is remunerated, has automatically assumed the risk of a currency change, regardless of the level or magnitude of that change? As mentioned above, the conclude of these contracts, in the circumstances described, was also based on other benefits for the borrower, in principle, less interest than in the case of contracts where the refund was agreed in the national currency. Another benefit was, in some cases, fixed interest, not variable. That is why analyzing the fulfillment of this condition is complex and involves considering all these elements.

It should be remembered that the contractual imbalance must make the execution of the contract

[1] Conditions of Contractual Contradiction between Traditions and Current Affairs-STUDIA-C.Zamşa, Romanian Business Law Review no.6 / 2009

excessively onerous for the one who invokes unpredictability. Therefore, many claimants in the filed cases before the courts, together with the exchange rate of these coins and the change in their personal financial conditions, invoke the courts also from this point of view to make appeals. Obviously, while the proof of Swiss currency development in relation to the Romanian leu is at the hands of the court, in terms of changing the borrowers' financial situation, it must be proved by the party according to art. 259 Civil Procedure Code.

We also note that the court should also take into account the fact that a certain degree of risk was assumed by the parties at the conclusion of the contract. As the Constitutional Court has pointed out in Decision No.623 / 2016, *the contract itself entails an inherent risk voluntarily assumed by the two parties to the contract, based on their autonomy of will, a principle that characterizes the matter of the conclusion of the contract, and one above - added which could not be the subject in particular of a prediction by any of them, a risk which goes beyond the contractual power of the contracting parties and which involves the interventions of elements which could not be taken into account at the time of a quo. Imprudence aims to call over-added risk and, in the context of its intervention, it is meant to reap the benefits the parties have been obliged to under the new economic / legal realities. It is not intended to revert to the benefits at the time of the conclusion of the credit agreement or to the risk accepted by the parties at the same time, being therefore alien to them, but provides a legal basis for the adjustment or termination of the contract (... ) Adaptation takes place when the social utility of the contract can be maintained, while the cessation when the new conditions intervene, you are forgiving the social utility. It follows from the above that the adaptation of the contract during its execution to the new reality is equivalent to the maintenance of its social utility, in other words it allows further execution of the contract by rebalancing the benefits*[2].

As the legislator does not offer clear criteria regarding the notion of "changing circumstances", a notion underpinning the institution of unpredictability, I believe that the courts should take into account both previous jurisprudence and possible doctrinal criteria, but taking into account, the current socio-economic reality. Moreover, even regulating the institution of unpredictability in th Civil Code, although it has the role of establishing very clearly the conditions of the unpredictability, one might say that it encourages the parties to invoke the unpredictability, not just a doctrinal theory.

As regards the latter condition, namely that the debtor has tried, within a reasonable time and in good faith, to negotiate the reasonable and equitable adjustment of the contract, it is necessary to consider whether that condition falls within the scope of the notion of a prior procedure governed by art. 193 C.pr.civ. In other words, if the lack of negotiation would constitute a fine of non-receipt in the case of a petition for the purpose that regards unpredictability. According to art. 193 paragraph 1 of the Civil Procedure Code, the court may be referred only after a preliminary procedure, if the law expressly so provides. Proof of the completion of the prior procedure shall be attached to the request for a summons. At the same time, according to paragraph 2, the failure to carry out the preliminary procedure can only be invoked by the defendant by means of a grievance, under penalty of decay.

By virtue of this last condition, it can be said that the legislator provided for two steps to establish the interference of the unpredictability[3]: a stage of the negotiation initiated by the debtor in order to adapt the contract and a court stage of the court's intervention at the request of any party dissatisfied with the election of the phase negotiations-be for the cancellation or for the adjustment of the contract.

Regarding the terms of good faith, fair and reasonable, we note that while the good faith was presumed by the legislator through art. 14 C.civ., regarding the reasonable term and the equitable term, the legislator left the judgment of the court (if a lawsuit is pending), the definition of these terms. Thus, the judge has a great margin of discretion in this regard. However, I consider that the judge should refer to a diligent and prudent person for the consideration of the reasonableness of the condition. Obviously, even in the case of good faith, the court might find that the party had an attitude from which the intention was that the negotiations would fail so that the presumption would be overturned. Such a situation would occur if the contract is to be canceled directly, but there is no agreement between the side.

Turning to the solutions that the court could decide if the conditions of the unpredictability were met, the legislator stipulated in article 1271 paragraph 2 C.civ. that if the performance of the contract became excessively onerous due to an exceptional change in the circumstances that would make it manifestly unfair to order the debtor to perform the obligation, the court may order: a) the adaptation of the contract in order to distribute fairly between the parties the losses and benefits changing circumstances; b) the termination of the contract, at the time and under the conditions it establishes. Could the solution decided by the court be influenced by the will of the parties? In principle, the answer should be negative because if both sides would like to terminate the contract, this would happen precisely as a result of the parties' agreement and not as a result of a court ruling. On the other hand, if only one party would request the termination of the contract, I believe that the court is not limited to the solution it can

[2] Constitutional Court Decision no.623 / 2016, paragraphs 96 and 97

[3] Cristina Zamşa, Imprevision in the light of the law on the application of the new Civil Code. Reflection of the new concept on the contract - Romanian Business Law Review, no. 5 of June 30, 2011

dispose of, and it is necessary to consider whether the adjustment of the contract would be feasible. The principle of availability provided by art. 9 C.civ. would not be defeated in this respect because the legislator, by the way he chose to regulate the institution of unpredictability, has made it clear that termination of the contract is to be ordered only if which would not be possible to adapt it. If the court has ordered the termination of the contract, the deadline set may only be one later.

Regardless of which of the solutions would be ordered by the court, it should also have a fair distribution between the parties of the losses and benefits resulting from the change of circumstances or of the moment and conditions in which the termination of the contract occurs. Obviously, the parties may at any time until the process terminate, conclude a transaction by which they themselves establish these elements. In most cases, even by the petition to sue, the claimant also indicates the form in which he wishes to adjust the contract, namely the stabilization of the course of the Swiss franc to the one at the date of the conclusion of the contract. I believe that the courts should also consider the evolution of other currencies relative to the national currency, noting that the Romanian leu depreciated in general but differently from a percentage point of view. Inflation should also be considered. All of these elements and not only should be analyzed precisely so that the contractual imbalance is removed, and not just transmitted from one side to the other. Also, the institution of unpredictability should not be the way for a contractual party, through the court's appeal, to change the contractual conditions in an easy way.

In practice, in the case of interest-earning contracts where the object of the contract was established in the Swiss currency, it seems to be rather difficult for the courts to rule on how the unpredictability is going to take effect. The difficulty of such a solution results from the fact that these contracts are complex and, implicitly, the effects of such contracts are complex. Courts have to be cautious when they have the adaptation or termination of the contract, mostly because, in principle, the solution is contrary to the will of one of the contracting parties.

## 4. Differences between the regulation of the unpredictability in the French Civil Code to the Romanian Civil Code

Unlike the Romanian civil law, in the French Civil Code the legislator provided in Article 1195 expressly that during the period of prior negotiations between the parties in the event of an exceptional occurrence, the effects of the contract are not suspended. This solution is also expressly provided by the Unidroit Principles under Article 6.2.3 (2).

A further difference from the domestic regulation, the French legislature has made it necessary to bring legal action to a negotiation initiative and not to a proper negotiation. Thus, it is admitted that even the refusal of the other party to negotiate legitimizes the party invoking the imprudence to bring its claim before the courts.

## 5. Conclusions

Although more than 7 years have passed since the entry into force of the New Civil Code regulating the institution of unpredictability, the courts appear to be very cautious in order to review the loan agreements in which the loan was granted in the Swiss currency. This caution appears to be largely justified by the fact that the judge does not want, through his solution, to move the losses resulting from the change of circumstances from a part to the other and to create a new contractual imbalance. At the same time, this caution is both legitimate and necessary because the review of contracts by the court should not lead to the abolition of the principle of binding force of the contract. However, it is worth noting that several states chose not to give any law to the contract. This, together with the express regulation of the institution of unpredictability, undoubtedly leads to a greater margin of appreciation for the courts.

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# CONSUMER'S STATUS IN CROWD AND PEER TO PEER FINANCE

**Monica CALU***

**Abstract**

*Taking into account the decrease in nominal yields of traditional savings products, consumers are increasingly attracted to alternative ways of investing, such as those offered by crowdfunding platforms. As control over the traditional financial sector has been strengthened after the crisis, new forms of financial intermediation have emerged, such as crowdfunding or peer-to-peer loans. Simple individuals and regular institutions use these types of platforms to lend money directly to consumers or businesses in order to make a financial return from interest payments and the repayment of capital over time.*

*Such services are usually provided by new market operators known to intensively digitize their processes, including technology support for credit analysis and payments settlement.*

*From the perspective of consumer protection, these are risky tools where protection is particularly necessary. It is likely that consumers will not understand the risks involved in the transaction, especially the value of the investment, and an additional problem is the reliability of the trading platforms.*

*Existing EU legislation does not harmonize consumer protection standards in the crowdfunding field and leaves the full development of Member States. It is also a matter of applying a mix of regulations of public and private law to achieve the desired results. Applying the rules of private law on consumer credit by their consumers is another problem. Consumers are often unaware of the legal complications involved.*

*The purpose of this study is to show how, in the absence of harmonization of private-law measures for breaches of the national rules transposing the Consumer Credit Directive and due to the insufficient regulation of crowdfunding, the traditional division of public law (especially financial supervision) and private law (in particular contract law and consumer protection) at national level may create obstacles for consumers to rely on consumer protection standards in private actions against financial institutions.*

**Keywords:** *consumer protection, peer-to-peer loan, crowdfunding, digitalization, risk*

## 1. Introduction

FinTech, technology-enabled innovation in financial services, has developed significantly over recent years and is impacting the way financial services are produced and delivered. FinTech does not only lead to an increasing automation of processes, but also to a fundamental reorganization of financial services with new business models (for example, peer to-peer lending and robo-advising). FinTech is set to have a profound impact on consumers in retail finance. While FinTech comes with opportunities such as increased competition and new services (e.g. peer-to-peer lending, mobile payments and peer-to-peer money transfers, telematics insurances, crowdfunding), it also poses huge challenges regarding privacy, fairness and security

After a financial crisis and credit crunch, caused, among other things, due to irresponsible lending and increased risk appetite, retail investors are lending billion of dollars over the Internet, on an unsecured basis, to total strangers. Technological and financial innovation permit now person-to-person or peer-to-peer lending ("P2PL") to connect lenders and borrowers in ways never before imagined. But, not everything is all right with peer-to-peer loans.... The emergence of peer-to-peer online is especially due to the recent global financial crisis, which has prompted banks to tighten lending rules.

Online peer-to-peer lending (P2PL) is a fast growing financial service industry that presents challenges such as rationality and compliance with consumer protection as it allows unsecured loan transactions between consumers, intermediated by online platforms.

P2PL has been praised enthusiastically as a miracle that could help fill the space left by traditional bank and non-bank lending.[1] Subsisting in the marginal lending economy for ages, in the form of credit unions, payday loans and microcredit[2] and friendly societies, P2PL has reappeared on a widespread scale thanks to the Internet.

Consumers are eager to have access to a simplified, streamlined lending process, and peer to peer companies are capitalizing on this need. Auto loans and mortgages, once the territory of "traditional lenders" are now offers on innovative peer-to-peer lending platforms.

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[1] M. Pagano, 'Peer-to-peer lending boom could make banks obsolete' *The Independent*, Monday 17 December 2012, http://www.independent.co.uk/news/business/news/peertopeer-lending-boom-could-make-banks-obsolete-8421241.html [Accessed May 10, 2014].

[2] A. Brill, "Peer-to-peer lending: innovative access to credit and the consequences of Dodd-Frank" (2010) 25 *Wash Leg Found Leg Backgrounder* 1.

Consumers who did not fit the new tighten conditions required to obtain a bank loan or a credit from non-bank entities, now have an alternative way of doing so. Internet technology has transformed the lending market in different aspects, creating various modalities and facilitated the ease of contact between lenders and borrowers. The P2P platforms allow the conclusion of a lending contract by clicking on an option on a screen. However, the internet has also led to the rise of concerns regarding the need to protect consumers in the online environment from the perils such as pyramid schemes[3]unlicensed and shadowy lending[4] and abusive practices.

In United Kingdom, the Financial Conduct Authority set out new rules for this crowdfunding activity, in March 2014[5]. It is, for example arguable that the FCA's classification of P2P lenders as retail investors[6] shows failure of anticipation that P2PL can involve consumers- lenders and borrowers- on both sides of a loan transaction. P2PL open debates about the definition of a "consumer of financial services" by modifying the features of key participants in a lending transaction.

The issue of online peer-to-peer lending appears to contest fundamental presumptions, settings and purposes of consumer protection law and policy of the EU and everywhere.

In this article the aim is to show the suitability and propriety of a more interventionist consumer protection approach, after assessing the consumer protection justifications for regulating peer-to-peer lending. I stress out that regulation ought identify and admit the consumer-to-consumer transaction possibility in peer-to-peer lending and as a result to consider the need to protect two very different types of consumers: lenders, which, as these platforms become more popular will increasingly involve more inexperienced and unsophisticated investors and borrowers, generally associated with consumers category.

## 2. Crowdfunding regulation at EU level for peer-to-peer lending

Across European Union, national regulatory frameworks for P2P lending are not yet (definitively) established and are very different from each other and most EU regulatory measures provide a framework for either peer-to-peer business lending or peer-to-peer consumer lending. The current regulatory system in European Union is a weak struggle for the needs of consumers and the platforms that connect them. Peer-to-peer lending platforms are no credit institutions under Article 4(1) (1) of the Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms.

Crowdfunding is considered an emerging alternative funding method at the level of EU institutions, especially in the immediate post-crisis economic context, characterized by the decline in bank lending and difficult access to finance. To this end, the European Commission explores the potential and the risks of this new and growing form of funding, as well as the existing national legislative framework at Member State level.

The recent European Commission Proposal on European Crowdfunding Service Providers for Business (March 2018)[7] establishes an (optional) legal framework for investment- and lending-based crowdfunding platforms that enables platforms to easily provide their services across the EU Single Market and aim to approach crowdfunding risks in a in a balanced way. Investors will be protected by clear rules on information disclosures, risk management, with coherent approach to supervision, not to forget the rules on governance.

Although the legal framework set out in the proposal is considerably innovation-oriented, the question arises whether the European Commission could not go (much) further in its innovation-oriented approach by relying on block chain technology to address some or several risks of peer-to-peer lending, of course without undermining consumer protection. *Consumer lending falls outside the scope of the proposal. These aspects are covered by other EU legislation such as the Consumer Credit Directive (CCD) and the Mortgage Credit Directive (MCD)*. EU regulatory measures are preponderantly addressing peer-to-peer lending risks. In this regard, the proposal refers to the (partial) application of existing EU consumer protection legislations. More specifically, (i) when a consumer is receiving a loan for personal consumption and operating outside his professional capacity, P2P lending falls within the remit of the Consumer Credit Directive and (ii) when a consumer is receiving a loan to purchase an immovable property, P2P lending falls within the remit of the Mortgage Credit Directive. Therefore, regarding P2P consumer lending, we discuss the relevant regulatory measures laid down in EU consumer protection legislations with a focus on the CCD. Note that when P2P lending platforms offer both business lending services and consumer lending services, it is very likely that they need to comply with the strictest regulatory measures applicable. Additionally, the proposal is characterized by extensively elaborated measures to prevent conflicts of interest (Article 7) and money laundering (Article 9, 10 and 13). Especially the initial evaluation of

[3] See, for example, *4finance UAB v Valstybinė vartotojų teisių apsaugos tarnyba and another* (Case C-515/12) [2014] Bus LR 574.

[4] R. Mayer, "When and why usury should be prohibited" (2013) 116 *Journal of Business Ethics* 513 at 524.

[5] Policy statement 14/4, The FCA's regulatory approach to crowdfunding over the internet, and the promotion of no readily realisable securities by other media, March 2014: http://www.fca.org.uk/static/documents/policystatements/ps14-04.pdf

[6] Financial Conduct Authority, (Policy Statement, PS14/4) at 16, 31. Contrast Financial Services Authority, "The Financial Conduct Authority: approach to regulation" (June 2011) at 16.

[7] https://ec.europa.eu/info/publications/180308-proposal-crowdfunding_en

suitability of a potential client and the possibility to simulate their capacity to support losses are worth mentioning (Article 15).

In particular, there is the dual aspects of the status of peer-to-peer lenders (as investor and consumer) and the suitable degree of protection that should be accord to them.

In the EC's proposal for a regulation of the European Parliament and of the council on European Crowdfunding Service Providers (ECSP) for Business, Brussels, 8.3.2018 COM (2018) 113 final 2018/0048 (COD). Article 3(1)(a): '*crowdfunding service'* means the matching of business funding interest of investors and project owners through the use of a crowdfunding platform and which consist of any of the following: the facilitation of granting of loans […]. Article 3(1) (g): '*investor*' means any person that, through a crowdfunding platform, grants loans or acquires transferable securities. The EU consumer law and policy, as paradigm, defines a consumer *as a natural person acting for purposes outside of his or her normal business, trade or profession.*

Though, nothing suggests that users of peer-to-peer platforms are not simply individuals acting outside their *business, trade or profession*. Lenders on peer-to-peer platforms are often described as investors rather than consumers because they lend money directly to borrowers. Categorization as investor rather than consumer is worthy of attention and with important consequences because investor protection is totally different from consumer protection. Investor protection regulation often suppose mastery and a level of competence and are therefore less likely to be interventionist than ordinary consumer protection regulations.

For instance, in United States, Supreme Court in Securities & Exchange Commission v. Howey Co., 328 U.S. 293 (1946), establishes the *test* of whether *there* is an "*investment contract*": An investment contract exists if there is "an investment of money in a common enterprise with profits to come solely from the efforts of others. „This three-part test, thus, requires: (1) investment of money with the expectation of profits, (2) commonality, and (3) the entrepreneurial efforts of others[8]. Consequently, this, appears to defy the business-consumer antithesis and also reignites topical consumer lending issues such as fairness of commercial practices and responsible lending[9]. Typical investor protection rules including the segregation of client and financial intermediary's accounts[10] may be irrelevant in consumer protection[11]. Different types of consumer are provided with different levels of consumer protection and different regulated activities are subject to varying levels of intervention depending on what category a consumer of that service falls into. This differential approach is, however, problematic for peer-to-peer lending which involves two consumers with similar levels of knowledge and experience who may find themselves subject to different levels of protection simply because of their participation as lender and borrower. It is noticeable that experience is a key element in whether consumer protection measures apply to particular individuals.[12]

## 3. What are the key-points for peer-to-peer lending?

The European Commission's Proposal on European Crowdfunding Service Providers for Business provides a fairly comprehensive framework for peer-to-peer risks. There are provisions regarding the extensive disclosure standards and warnings related to credit risk for investors and the extensive regulatory measures for money laundering and conflict of interest. On the other hand, peer-to-peer consumer lending has a considerably less extensive regulatory framework. The application of the Consumer Credit Directive (CCD) on peer-to-per lending platforms is highly limited and is not certain the application of MiFID II[13] on peer-to-peer lending, which would be relevant for credit risk and conflict of interest. There are not specific regulatory measures which address operational risk in peer to peer consumer lending or norms addressing money laundering.

### 3.1. Regarding the peer-to-peer lending risks

In order to subsequently evaluate which types of regulatory measures can be eliminated or reduced by block chain technology, when we approach consumer lending Article 85 of the CRD IV could inspire for regulatory measures addressing operational risk in P2P (consumer) lending.288 Article 85 stipulates: "1. Competent authorities shall ensure that institutions implement policies and processes to evaluate and manage the exposure to operational risk, including model risk, and to cover low frequency high-severity events. Institutions shall articulate what constitutes operational risk for the purposes of those policies and procedures. 2. Competent authorities shall ensure that contingency and business continuity plans are in place to ensure an institution's ability to operate on an

[8] https://supreme.justia.com/cases/federal/us/328/293/

[9] S. Brown, "Using the law as a usury law: definitions of usury and recent developments in the regulation of unfair charges in consumer credit transactions" (2011) 1 *Journal of Business Law* 91.

[10] Staikouras, "A novel reasoning of the UK Supreme Court decision in Lehman Brothers: the MiFID segregation rule from the angle of financial intermediation and regulation theory" (2014) 2 *Journal of Business Law* 97.

[11] Financial Services Act 2012 ss.1C(2)(a) and (b); Joint Committee on the draft Financial Services Bill, Session 2010-12 at [108].

[12] *Maple Leaf v Rouvroy* [2009] EWHC 257, [2009] 2 All ER (Comm) 287; *Patel v Patel* [2009] 3264 (QB), [2010] 1 All ER (Comm) 864; *Rahman v HSBC Bank plc* [2012] EWHC 11 (Ch).

[13] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

ongoing basis and limit losses in the event of severe business disruption."

### 3.2. Creditworthiness assessments of peer-to-peer lending borrowers/consumers.

Creditworthiness is what creditors look at before they grant any new credit. Creditworthiness assessments aim at protecting lenders when making an investment decision and borrower when concluding a peer-to-peer loan agreement.

Article 8 of the Consumer Credit Directive states the obligation on the creditor to assess the creditworthiness of consumers on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database. This obligation is imposed on the creditor, i.e. the P2P lender, without expanding this obligation to credit intermediaries.

The Proposal on European Crowdfunding Service Providers for Business does not present any disposition regarding creditworthiness assessments of borrowers at all.

Considering the insufficient pre-contractual information standards requirements in peer-to-peer, it is controversial that there are no regulatory measures that impose to this lending platforms to conduct qualitative creditworthiness assessments of borrowers.

### 3.3. Disclosure standards for peer-to-peer consumer lending

If we consider the important asymmetric information aspects in peer-to-peer lending, disclosure standards regarding the peer-to-peer lending risks creditworthiness of borrowers are crucial to reduce credit risk for platform lenders, Article 16 of the proposal approaches "Key investment information sheet", requires peer-to-peer lending platforms to provide (potential) investors-lenders with a clear, comprehensible and correct key investment information sheet with the aim of this key investment information sheet to warn intending peer-to-peer lenders that the investing environment they have entered into imply risks covered neither by the deposit compensation scheme nor by investor compensation guarantees. The key investment information sheet contains the following explanatory statement, appearing directly underneath the title of the key investment information sheet: *"This crowdfunding offer has been neither verified nor approved by ESMA or national competent authorities. The appropriateness of your education and knowledge have not been assessed before you were granted access to this investment. By making this investment, you assume full risk of taking this investment, including the risk of partial or entire loss of the money Second, the key investment information sheet contains the following risk warning: "Investment in this crowdfunding offer entails risks, including the risk of partial or entire loss of the money invested. Your investment is not covered by the deposit guarantee and investor compensation schemes established in accordance with Directive 2014/49/EU of the European Parliament and of the Council and Directive 97/9/EC of the European Parliament and of the Council. You may not receive any return on your investment. This is not a saving product and you should not invest more than 10% of your net wealth in crowdfunding projects. You may not be able to sell the investment instruments when you wish."*

As previously stated, consumer lending falls outside the scope of the Proposal on European Crowdfunding Service Providers for Business. The Consumer Credit Directive applies to credit agreements between a creditor and a consumer. In this regard, in (Article 3(b)), 'credit agreement' means "an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation […]". The concept of 'creditor' is problematic. 'Creditor' means a natural or legal person who grants or promises to grant credit in the course of his trade, business or profession. (Article 3(c)). Consequently, consumers cannot be considered as 'creditor' in the view of the Consumer Credit Directive, as they do not grant or promise to grant credit *in the course of [their] trade, business or profession*. The definition of 'creditor' leads to a few considerations: Consumer Credit Directive is only applicable to business to consumers lending (and it's not applicable to consumer to consumer lending). Supplementary, peer-to-peer lending platforms are no 'creditor' as they do not give nor promise to give credit. Therefore, peer-to-peer lending platforms do not fall within the principal scope of application of the Consumer Credit Directive.

But, Consumer Credit Directive regulates certain duties of credit intermediaries in relation to consumers[14]. It is highly probable that peer-to-peer lending platforms qualify as 'credit intermediary' in the meaning of the CCD. The Consumer Credit Directive stipulate "only certain obligations of credit intermediaries in relation to consumers" with the scope to protecting borrowers. Considering peer-to-peer lending platforms as 'credit intermediary' this imply the pre contractual information duties. Pre-contractual information relevant for addressing credit risk includes: the type of credit; the total amount of credit and the conditions governing the drawdown; the duration of the credit agreement; the borrowing rate, the conditions governing the application of the borrowing rate; the annual percentage rate of charge and the total amount payable by the consume; the amount, number and frequency of payments to be made by the consumer the interest rate applicable in the case of late payments and

[14] Credit intermediary' is defined as "a natural or legal person who is not acting as a creditor and who, in the course of his trade, business or profession, for a fee […]: (i) presents or offers credit agreements to consumers; (ii) assists consumers by undertaking preparatory work in respect of credit agreements other than as referred to in (i); or (iii) concludes credit agreements with consumers on behalf of the creditor" (Article 3(f)).CCD

the arrangements for its adjustment, a warning regarding the consequences of missing payments; where applicable, the sureties required; the existence or absence of a right of withdrawal; (p) the right of early repayment, and, where applicable, information concerning the creditor's right to compensation and the way in which that compensation will be determined.

If peer-to-peer lending platforms are considered as 'credit intermediary', this means that the lending platforms have a duty to assist the consumer in deciding which credit agreement, within the range of products proposed, is the most appropriate for his needs and financial situation Member states shall ensure that credit intermediaries provide adequate explanations to the consumer, in order to place the consumer in a position enabling him to assess whether the proposed credit agreement is adapted to his needs and to his financial situation, where appropriate by explaining the pre-contractual information to be provided , the essential characteristics of the products proposed and the specific effects they may have on the consumer, including the consequences of default in payment by the consumer[15].

## 4. Romania's specificities

In Romania, the lending activity is carried out professionally through credit institutions and financial institutions provided by OUG 99/2006 on credit institutions and capital adequacy as well as by non-banking financial institutions under the conditions established by Law 93/2009 on non-banking financial institutions. The prohibitions in these normative acts concern only the carrying out of the professional activity, without restricting the commercial and civil lending operations that are not circumscribed to this character.

Limits of legal lending in civil relations. In Romania, Law no. 216/2011 on the prohibition of usury activity regulates the issue of "usury", and the usurer appears as the only natural person (unprofessional) who carries out a professional loan with interest, although not authorized (according to Law 93/2009 or GEO 99/ 2009, only legal persons may be authorized to do so). Therefore, usury implies a "business" of giving money with interest, a violation of the banking monopoly and "non-banking financial" in the matter.

It does not import the amount of the interest (it is however limited to the legal interest rate plus 50%, and in case of exceeding this threshold the interest null and void), but only the use of the loan activity as "business", i.e. as a constant source of income and repetitive character. In the initial draft law, the interest rate was an essential element, but the determination of the "excessive" nature was not defined by law. This approach was not, however, agreed by the Legislative Council, which suggested a similar form of the offense already contained in the New Criminal Code.

Therefore, the usury appears to be only the individual (non-professional) who carries out a professional loan with interest, although not authorized (according to Law 93/2009 or GEO 99/2009, only legal persons may be authorized to do so) . Therefore, usury implies a "business" of giving money with interest, a violation of the banking and "non-banking financial institutions" monopoly field. The interest rate is not imported (it is however limited to the statutory interest rate plus 50%, and in case of overrun, this interest rate is canceled altogether), but only the use of the borrowing activity in a use of the loan activity in a "business" as a source of income and with a repetitiveness character.

From Law no. 216/2011 prohibiting usury, it should not be understood that any interest-bearing loan will be banned. In order to constitute an offense, it is necessary to prove the practice of interest-bearing loan "as a job". Loans between unauthorized individuals or between commercial companies and individuals or other legal entities will still remain legal, but within certain limits, subject to the conditions imposed by law. Government Ordinance no. 9/2000 on the legal interest for pecuniary obligations established limits that should have interest in non banking loans to comply with the law. The interest collected or paid by the National Bank of Romania, banks, credit union organizations and the Ministry of Public Finance, as well as the method of their calculation, are established by other specific regulations. The prohibition to set a higher interest rate than the one stipulated in Government Ordinance no. 9/2000 refers only to civil relations.

An additional argument for the validity of the borrowing operation and the charging of interest is represented by the provisions of art. 23 par. 5 of the Fiscal Code which states as the source of the loan and other entities than the credit institutions or the non-banking financial institutions, where the deductible interest rate is limited to the reference interest rate of the NBR for the loans in lei. Therefore, operations are possible, irrespective of the quality of the lender's physical or legal person.

In civil relations interest can not exceed legal interest rate by more than 50% per year. Legal interest in civil matters (i.e. loans not commercially traded) is set at the reference rate of the National Bank of Romania, down 20%.The reference interest rate of the National Bank of Romania is published monthly in the Official Gazette of Romania, Part I, through the care of the National Bank of Romania. In civil relations, the obligation to pay interest higher than the statutory interest plus 50% per annum is null and void. However, the usurers know this, and there are no high interest rates in contracts, but they go from the start to a higher amount than the one borrowed, to which the legal interest is applied.

Finding justification in the new social reality, the new Romanian Criminal Code criminalizes the

[15] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62013CJ0449

patrimonial exploitation of a vulnerable person in art. 247[16]. Two variants of the offence are brought under regulation: a basic and an aggravated one. The Lawmaker provides the specific conditions for the existence of each of the variants of the offence. If the basic form of the offence requires that the passive subject should be in a visibly vulnerable situation before the offence takes place, in the case of the aggravated variant, the state of vulnerability does not exist before the offence, but is caused by the active subject.

## 5. Conclusions

FinTech innovations such as the peer-to-peer lending platforms can be game changers for financial services and beyond. We need to create the framework for innovation to flourish, while managing risks and protecting consumers. There is a need for regulation and reform of legislation to better accommodate consumer needs and to protect their rights in peer-to-peer lending.

To preserve peer-to-peer lending, appropriate legal treatment must sustain and discipline this nascent market. Peer-to-peer loans are disintermediated financial transactions on a small scale — but with grand ambitions. The regulation should target at least four key areas of reform: disclosure, oversight and enforcement, prudential regulation, and borrowers. At the same time, in order to operate properly, crowdfunding needs to have an institution / supervisory authority with attributions in the field. If properly designed, this grand experiment may provide a transparent, consumer-benefiting product where opaque, costly products now dominate.

European Union and Member State's regulators should place strong emphasis on consumer protections in financial market, including the FinTech. The Financial Conduct Authority (FCA) in the United Kingdom issued its regulatory approach to crowdfunding over the internet in 2014. Also, it is not surprising to see that the European Commission to take a more active role in oversight and regulation of peer-to-peer lenders as they expand their product offerings and increase customer base.

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[16] Article 247 Patrimonial exploitation of a vulnerable person, New Penal Code

(1) The act creditor who, while putting borrow money or goods, taking advantage of the state particularly vulnerable debtor, due to age, health, infirmity or relationship of dependency in which the debtor is to him, makes him constitute or convey for himself or for another, a real right or claim value manifestly disproportionate to the benefit shall be punished with imprisonment from one to five years. (2) Putting a person in a state of obvious vulnerability by causing poisoning with alcohol or psychoactive substances in order to persuade it to agree to the creation or transmission of a real right or claim or waive a right, if there was a loss shall be punished with imprisonment for 2-7 years.

# BLOCKCHAIN-BASED SOLUTIONS FOR FINANCIALLY DISTRESSED OR INSOLVENT COMPANIES

**Corina Georgiana COSTEA***

**Abstract**

*The era of technology has been developing numerous instruments constantly, with high impact even upon areas of commercial law. One of these instruments consists of the blockchain technology, which has revolutionized traditional businesses in terms of their functioning, performance and even funding. Funding is one of the best means for companies to deal with their state of financial difficulty or insolvency, which means that the blockchain technology may be able to represent a solution for insolvency prevention or even treatment. Moreover, the blockchain technology may be helpful in other insolvency-related issues, such as debtors' stocks', assets' and contracts' management and may even substitute the traditional process of voting a restructuring plan. This paper aims to identify if and how the blockchain technology may be used as an instrument of companies' insolvency treatment and even financial difficulty prevention, given the fact that so far, it hasn't been widely used for this purpose.*

**Keywords:** *blockchain, technology, innovation, insolvency, funding, smart contracts.*

## Introduction

The blockchain technology has been increasingly used in the past decade, and its properties allowed it to be applied in a various number of fields and industries, such as banking, insurance, online storage and cloud-like services, retail, digital payments, voting processes and many others. Moreover, it may undoubtedly be applied in all business-related matters, such as the accounting industry, stocks', assets' and contracts' management, while providing a new, digital alternative for business funding. Therefore, if the blockchain technology could be applied, in theory, to all business-related matters, the following question arises: Could the blockchain technology serve its purpose in an insolvency proceeding, and, implicitly, in a restructuring process, either preventive or formal? This question is the main issue that this paper will aim to answer, providing the necessary explanations. Blockchain-based insolvency proceedings or preventive restructurings of companies may consist of a new, digital way for the participants to approach corporate liquidity issues. This paper's topic is important not only because it provides blockchain-related explanations, but particularly because it contains a fresh view of preventive and formal corporate restructuring in a digital era. Moreover, we believe that the blockchain technology will definitely be applied in pre-insolvency and insolvency proceedings at some point in the future, therefore the topic of this paper will sometime become a subject of general interest for absolutely every participant in an insolvency proceeding, commencing with the debtors, accountants, insolvency practitioners, creditors, auditors, judges, lawyers, evaluators and so on. We also believe that the blockchain technology will not be applied in practice very soon, not only because of its temporary lack of regulation, but mainly because people, in general, who do not work in the IT industry, do not know anything about it. Applying the blockchain technology in practice will probably take place in the next decade, progressively, as traditional ways of industries' unfolding may be exceeded by future needs. As we will see in this paper, the blockchain's technology implementation in practice is, basically, inevitable, mostly because of the fact that it provides several benefits in businesses, and particularly in insolvency proceedings, one of the most important being the fact that it creates digital trust, which eliminates the need of trust between debtors and creditors in regards to a restructuring plan.

## 1. What is blockchain?

The blockchain technology is a digital platform which records time-stamped transactions of the digital currency called Bitcoin.[1] Bitcoin provides an alternative for online financial transactions, operated by the so-called miners, which are resolving an algorithm through cryptology and mathematics. The first miner who successfully validates the transaction is being rewarded with a small fee, in digital currency. Well-known global companies are beginning to accept digital currencies (Bitcoin and many others), such as Microsoft, CheapAir.com, Bloomberg, Expedia, KFC (Canada), McDonald's (starting in 2019), Burger King (Russia), Amazon (starting in 2019), AT&T, ASOS, Shopify and many others.[2] But the blockchain serves

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[1] Satoshi Nakamoto, *Bitcoin: A peer-to-peer electronic cash system*, https://bitcoin.org/bitcoin.pdf

[2] https://coinswitch.co/news/top-25-websites-and-businesses-that-accept-bitcoins-in-2019

much more purposes than facilitating digital currency transactions. So, what *exactly* is blockchain and what is its connection with pre-insolvency and insolvency proceedings? As its name suggests, a blockchain is basically a digital chain of blocks, the latter consisting of pieces of digital information, that are publicly stored into a chain. In other words, chained pieces of digital information create the so-called blockchain, which can be considered an electronic journal. Since it is not yet regulated, blockchain doesn't have a widely accepted definition, but if we are to provide our own definition, it would be the following: blockchain is an innovative, secure, unalterable, transparent, decentralized and distributed string of unique blocks carrying digital data, chronologically arranged, capable of storing and also creating information consisting of value, such as financial transactions and property, without the need of intermediaries' implication. For example, in a traditional online transaction between a merchant and a customer, the third party is the financial institution which needs to verify the payment. By using blockchain, the third party is eliminated out of the transaction, therefore significantly reducing costs (in this case, the banks' fee). Basically, blockchain serves as a third party, by verifying the transaction (validating the blocks that are connected in the chain) and collecting a very small fee. But still, not only the fee is significantly reduced, but also the necessary time of the payments' validation: if money is being transferred into a foreign account, this transaction could take up to several days; with blockchain, only a few seconds are necessary to confirm the payment. Furthermore, one of the main advantages of using blockchain is the digital trust it offers. When a person initiates a payment onto the blockchain, basically a new, time-stamped block is created and attached to the blockchain. The block contains all transaction-related information, except the identity of the parties, therefore protecting personal data. This protection is needed because the blockchain, or the digital journal of transactions, is public and may be stored by any computer in the world that is connected to the internet. However, even if the blockchain doesn't reveal the identity of the parties involved in a transaction, it reveals other data that could be related to a natural person's identity, therefore being in conflict with the General Data Protection Regulation.[3] "This highlights that, even before the new supranational data protection framework enters into force, it is already partly outdated in respect of its application to distributed ledgers for it simply cannot account for the technology's characterizing features."[4] If somebody tries to alter the data uploaded onto the blockchain, not only that it will be recorded, but also, they need to simultaneously alter the entire history of chains created before the one that it is altered, since the blocks are linked to one another, across millions of computers that hold the public blockchain.[5] This is why the blockchain is presently considered as being one of the most secure digital resources for transactions. So, what is the link between blockchain and insolvency proceedings? The fact that its properties allows it to cover most of the traditional insolvency-related issues, such as assets' tracking and evaluation, establishing directors' liability, cancelation of fraudulent acts or operations, enabling smart contracts (self-enforced contracts), elaborating a feasible restructuring plan, creditors' voting process, litigations and many other traditional insolvency-related shortcomings which may be time-consuming and also generate high costs.

## 2. Types of blockchain

There are mainly three types of blockchain: public blockchains, federated (consortium) blockchains and private blockchains.[6] Public blockchains grant access to any person that wants to connect to the chain, who may generate new blocks and add them into the chain. They remain completely anonymous, and they may read all the transactions that appear on the blockchain. The consortium blockchains is a hybrid blockchain: it combines public and private blockchains and it is managed by a person or a group of persons. Access may be either public or restricted to identified parties. This type of blockchain doesn't provide complete decentralization, in opposition with public blockchains. Private blockchains are only available to identified parties and it is completely centralized. "Likely applications include database management, auditing, etc. internal to a single company, and so public readability may not be necessary in many cases at all, though in other cases public auditability is desired."[7] In relation to the insolvency proceedings, we consider that public blockchains may not serve a common purpose with the confidentiality principles, as all restructuring-related issues would appear available to every participant in the blockchain. One might ask what the purpose of confidentiality and restricted access would be, if creditors already know the state of financial difficulty or insolvency of its debtor. The answer is that a debtor's financial state might only be temporary and publicizing it might irremediably ruin the debtor's reputation. Not every participant in the chain may have permission to add blocks (information) onto the chain, but only authorized persons. Also, restricted access to participants (creditors, debtor,

[3] Published in the Official Journal of the European Union, series L 119, 4th of May 2016.

[4] Michèle Finck, Blockchains and Data Protection in the EU, Max Planck Institute for Innovation and Competition Research Paper No. 18-01, p. 28, available for downloading https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080322

[5] Don Tapscott, *How the blockchain is changing money and businesses, https://www.youtube.com/watch?v=Pl8OlkkwRpc&t=2s*, min. 6.55 – 7.15.

[6] https://blockchainhub.net/blockchains-and-distributed-ledger-technologies-in-general/

[7] Vitalik Buterin, *On Public and Private Blockchains, https://blog.ethereum.org/2015/08/07/on-public-and-private-blockchains/*, published on the 6th of August 2015 <Accessed on the 26th of March 2019>.

insolvency practitioner, judges and other specialists) may clearly define their roles in a restructuring process, therefore preventing any sort of abuse. Therefore, it becomes clear that permissioned blockchains, the ones that offer its participants access to it, are the most suitable for the unfolding of pre-insolvency and insolvency proceedings. The Romanian Law no. 85/2014[8] states that the ad-hoc mandate must remain completely confidential, while the preventive composition partially benefits from the principle of confidentiality. In the case of formal reorganization proceeding, as a form of the general insolvency proceeding, the principle of confidentiality isn't applied. Therefore, private blockchains may be suitable for the ad-hoc mandate, while federated (consortium) blockchains would be suitable for both the preventive composition and formal judicial reorganization. Private and consortium blockchains are both permissioned, which means that they "(…) have clearly defined governance structures compared to public blockchain networks."[9] In relation with the Romanian Law no. 85/2014 regarding pre-insolvency and insolvency proceedings, the governance structures would be the following: in the ad-hoc mandate's case, the governance structure would be composed of the President of the Court and the ad-hoc agent appointed by the Court; in both preventive composition's and judicial reorganization's case, the governance structure would be composed of the syndic-judge and the concordat administrator, respectively the judicial administrator. Basically, governance structures represent the organs applying the proceedings, while the blockchain network's participants would be the debtors and their creditors. Moreover, the blockchain technology would be extremely useful and would facilitate cross-border insolvencies, by stimulating and speeding international cooperation between Courts and insolvency practitioners. In this specific matter, which is proactively approached[10] by the European Union, the benefits of implementing the blockchain technology would mainly be cost reductions and time saving.

## 3. How could insolvency proceedings deploy on a blockchain?

First of all, initiating an insolvency proceeding through a blockchain would be useless if the debtor's activity wouldn't be running already on a blockchain. This premise would ease not only the detection of the debtor's state of insolvency, but it would also make it easier to set this moment in time. In traditional insolvency proceedings, establishing the exact moment when the debtor became insolvent is the main premise of establishing directors' liability. In tradition pre-insolvency proceedings, establishing the moment in time when financial difficulties have appeared is even more complicated. These are present issues which need to be dealt with by debtors, creditors, syndic-judges and insolvency practitioners. In an ideal, digital world, businesses running on blockchain would use this technology for accounting, management, marketing and legal aspects. This means that all data recorded on the blockchain may provide evidence of financial difficulties and insolvency, while also providing the best approaching solutions.

### 3.1. Commencement of pre-insolvency and insolvency proceedings on blockchain

Insolvency may be installed in two ways: either gradually or suddenly. Depending on the jurisdiction in which debtors run their businesses, and mostly on the way each law defines insolvency, businesses may find themselves surpassing financial difficulties and entering directly in insolvency. Blockchain technology may be able to alert directors upon insolvency installation, so that they can take appropriate measures. The first step would be filing for insolvency to the competent Court. If all legal requirements are met, the Court may appoint an insolvency practitioner, who would enable a permissioned blockchain for the deployment of the whole insolvency proceeding. An important observation needs to be highlighted: a blockchain couldn't run insolvency proceedings automatically, because they need human intervention. Updated laws, the particularity of each pre-insolvency or insolvency case, giving participants permission to access the blockchain-based insolvency proceedings are just a few examples justifying human intervention and supervision. Blockchain technologies could only be implemented to ease traditional pre-insolvency and insolvency proceedings, to reduce costs and to save time. Even the commencement of pre-insolvency and insolvency proceedings might be settled, since the blockchain's properties allows it to serve as a tool for electronic dispute resolution.[11] A particular case in the Romanian legal system is the fact that a financially distressed debtor needs to prove its financial difficulties, by providing the Court any document he considers to be necessary. In other words, the law doesn't specify the necessary documentation for proving financial difficulty, but however, this is the main admissibility condition that needs to be fulfilled in order to commence the ad-hoc mandate or the preventive composition proceeding. Using the blockchain technology will not only provide directors' necessary information upon financial difficulties, but it may also identify the causes. Therefore, the blockchain

[8] Published in the Romanian Official Gazette no. 466/25.06.2014

[9] Steven Zheng, *Crypto simplified: Explaining permissioned blockchains*, https://www.theblockcrypto.com/2018/12/10/crypto-simplified-explaining-permissioned-blockchains/ <Accessed 26th of March 2019>

[10] https://e-justice.europa.eu/content_tools_for_courts_and_practitioners-68-en.do <Accessed 26th of March 2019>

[11] For details, see Darcy W.E. Allen, Aaron M. Lane, Marta Poblet, *The Governance of Blockchain Dispute Resolution*, 15 February 2019 Version, available for downloading at https://www.researchgate.net/publication/331155400_The_Governance_of_Blockchain_Dispute_Resolution

technology may be implemented and used for early financial difficulty or insolvency detection, while also meeting all legal requirements for pre-insolvency and insolvency proceedings' commencement.

### 3.2. Assets' management in a blockchain-based pre-insolvency and insolvency proceeding

Assets' management in a traditional Romanian pre-insolvency or insolvency proceeding involve the following: identifying if any assets were sold within a period of 2 years before the commencement of the insolvency proceeding (assets' tracing), evaluation (if they are planned to be sold according to a restructuring plan) and determining if they are essential to the business' activity. Assuming a business would already run on a blockchain, before pre-insolvency or insolvency commencement, assets' management would be much easier handled by the organs applying the procedure. First of all, assets' history would be much more accessible for insolvency practitioners, since the blockchain system could reveal any information about any asset which was registered onto the blockchain. The Romanian Insolvency Law states that judicial administrators or judicial liquidators may lodge with the syndic judge petitions for cancellations of fraudulent acts or operations made by the debtor to the detriment of its creditors' rights over the past two years before the opening of the insolvency proceeding. If the syndic judge admits such a request, the asset(s) need to be reintegrated in the debtor's patrimony, in order to be exploited or sold, therefore increasing creditors' recovery rates. Such an issue is extremely time-consuming and costly in a traditional insolvency proceeding. Blockchain technology would therefore serve as a digital mechanism for dispute resolution that cancels assets' sale and returns it in the debtor's patrimony. This digital operation might save time and money. Moving forward, determining if assets are essential to business' activity is an issue that can be easily handled by insolvency practitioners. However, regarding assets' evaluation, blockchain technology would come in use. This issue is also costly and time-consuming, affecting the proceeding's effectiveness. The main problem implied by costly operations in an insolvency proceeding is the fact that they are being reflected upon creditors' recovery rates, generating tension and distrust, especially when it comes to a restructuring plan. In terms of assets' evaluation though a blockchain system, insolvency practitioners could add new blocks onto the chain, containing the following information: assets' acquisition cost, assets' amortized cost and their useful life cycle duration. Based on these economic parameters, the blockchain may easily determine and reveal assets' market price.

### 3.3. Participants' role in a blockchain-based pre-insolvency or insolvency proceeding

Considering that the blockchain technology is able to approach many aspects of a pre-insolvency or insolvency proceeding, one might ask what participants' role would resume to. We will try to answer this question in the following subsections.

#### 3.3.1. The syndic-judge's role

All pre-insolvency and insolvency Romanian proceeding have one thing in common regarding the syndic judge's role: supervision of proceedings' unfolding. In the ad-hoc mandate, the syndic-judge's attributions are the following: (i) to subpoena the debtor and the ad-hoc mandate, (ii) to verify if the debtor can be subjected to the proceeding; (iii) verifying if the debtor is able to prove its state of financial difficulty; (iv) verifying if the ad-hoc agent is an authorized insolvency practitioner; (v) designation of the ad-hoc agent and establishing its honorary. As we may see, blockchain comes in use only regarding the debtor's financial difficulty, and therefore, the syndic-judge still has legal attributions to accomplish. In both preventive composition and judicial reorganization, the syndic-judge's role is much more complex and cannot be entirely substituted by the blockchain technology. As we stated above, human intervention remains needed.

#### 3.3.2. The debtor's role

Considering that a business would run through a permissioned blockchain system, the fact that it may reveal the installation of insolvency isn't equivalent to the proceeding's commencement. The debtor would still have the obligation to file for insolvency, since its financial state wouldn't be known by the Court. When pre-insolvency or formal insolvency proceedings are commenced, the debtors needs to respect the restructuring plan.

#### 3.3.3. The insolvency practitioner's role

The main attribution of an insolvency practitioner remains the elaboration of a feasible restructuring plan, adapted to both debtor's and creditors' interests. Of course, the blockchain technology may be able to generate a payment graphic, but it could never have negotiations or crisis management abilities. The insolvency practitioner can negotiate with creditors and may restore trust in their debtor. As is the syndic-judge's case, the blockchain technology couldn't substitute all of insolvency practitioners' attributes, especially in relation to the current insolvency framework.

#### 3.3.4. The creditors' role

Even in traditional pre-insolvency and insolvency proceedings, creditors' role is rather passive. They have the possibility to accept or to reject a restructuring plan, in function of their own financial state. Their main role would be voting upon essential aspects of the proceedings, when they are being summoned by the insolvency practitioner.

## 4. Business rescue in a digital era

Every business undergoing a restructuring process needs to benefit from its creditors' trust. Otherwise, as good as the restructuring plan would be, either extrajudicial or formal, it couldn't be implemented. If the insolvency practitioner is a good

negotiator and crisis manager, he would take into consideration the creditors' own financial state and would propose measures that benefits all parties.

### 4.1. Voting a restructuring plan through the blockchain

Once the insolvency practitioner grants access to all the debtor's creditors into the permissioned blockchain, they could acknowledge all pre-insolvency or insolvency related information required in order to vote a restructuring plan. In a traditional pre-insolvency or insolvency proceeding, creditors must go to the Court and request the file, so that they can see the proceeding's evolution. Through blockchain, creditors could have digital access to all permitted information. This is particularly important because trust and transparency are the main premises for a successful business restructuring. Even if traditional voting of a restructuring plan is easy to accomplish by creditors, blockchain technology would allow creditors to see each others' votes.

## Conclusions

This paper has analysed the way that blockchain technology could be applied to business rescue through pre-insolvency and insolvency proceedings, in accordance with the insolvency legal framework. We therefore conclude that blockchain may be applied in practice, at its properties may be useful to detect and even prevent financial difficulties and insolvency, if the business already runs through blockchain. However, not every type of blockchain is suitable for this purpose, since only authorized persons need to create and add new blocks to the chain. If the blockchain technology is to be implemented in the following decade, in business-related fields such as accounting, this paper should serve as a starting point for further research. However, before implementing a technology with such an impact, there are many issues and shortcomings to be covered. Considering that the blockchain is both decentralized and distributed, the first step would be developing a legal framework. Another step would be to make it easy to understand by ordinary people, who do not work in the IT industry. These issues will remain to be approached progressively, and even if it seems hard to achieve, the blockchain technology will revolutionize even the pre-insolvency and insolvency field.

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# ADMINISTRATIVE CONTRACTS IN THE CONTEXT OF THE NEW CIVIL CODE AND THE NEW CIVIL PROCEDURE CODE

**Crina Alina DE SMET***

**Abstract**

*The Romanian law concerning administrative contracts has evolved greatly in the last three decades; the New Civil Code, which came into effect in 2009, and the New Civil Procedure Code, which came into effect in 2010, have important stipulations in the field. The purpose of this paper is to create a short review on the Romanian legislation concerning administrative contracts, to analyze the legal requirements, to identify possible issues in the field and, eventually, to propose improvements. In order to achieve these objectives, the relevant legislation is reviewed, and Romanian authors Romanian authors with recent studies in the field of administrative contracts, such as L. Catana, O. Puie, and A. Tabacu, are cited. The legislation concerning administrative contracts includes organic laws, such as Law 554/2004, Law 98/2016, Law 100/2016, and Law 101/2016, as well as government decisions, such as Government Emergency Ordinances no. 54/2006 and no. 34/2006. Our main findings are that, although the law concerning administrative contracts assimilates this concept to the notion of the administrative act, and although there are examples of administrative contracts which are more thoroughly explained, a clear definition of the administrative contract is missing, which we consider to be a legislative gap which needs to be fixed in the future, when the relevant legislation will be revised.*

**Keywords:** *administrative contracts, administrative acts, civil legislation*

## 1. Introduction

Administrative contracts have undergone a substantial legislative development over the last decades. They needed a major adaptation after the 1989 Revolution, and the French legislation became an inspiration. In the French legal literature, there are three types of administrative contracts, according to O. Puie: those concluded between two public figures, those concluded between a public person and a private person and those concluded between two private persons. Compared to private contracts, administrative ones are subject to additional requirements. Although both types of contracts share the principle of contractual freedom, in the case of administrative contracts there is a subordination to the principle of public interest. Therefore, as O. Puie explains, "at a legislative level, it has been sought to establish a hybrid structure that combines contractual freedom with the need to protect the public interest, which has been achieved by the provisions of Art. 8 par. (3) of the Law no. 554/2004".[1]

In this paragraph, Law no. 554/2004 indicates that litigations occurring prior to the conclusion of an administrative contract or related to the execution or application of an administrative contract, are within the competence of the administrative court to resolve the dispute. On these disputes, art. 8 par. (3) of the Administrative Litigation Act provides that "in the settlement of the disputes referred to in par. (2) shall be taken into account the rule that the principle of contractual freedom is subordinated to the principle of public interest priority".[2]

For a contract to be classified as an administrative contract, it is defined on certain criteria by private-law contracts. By means of case-law, some central elements of administrative contracts emerge. In order for a contract to be an administrative contract, at least a part must be a person of public law. At the same time, another condition for a contract to be classified as administrative, its object must depend on the execution of a public service (for clarification, the case-law has used the notion of "direct participation in the precise (precise) execution of the public service".[3]

This distinction is needed between the two types of contracts because "administration is no longer just in administration: the administrative action has finally come out of the proper public and, even beyond the most decentralized public establishments, it integrates today private individuals".[4]

The principles underlying the award of administrative contracts include: regulation, non-discrimination, free competition, equal treatment, mutual recognition, transparency, proportionality, efficiency in the use of funds, accountability and avoidance of conflicts of interest.

In the Law 554/2004, the subject of the administrative contract was expressly delimited, but it was not defined. Within this law, the administrative contract was assimilated to the administrative act.

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[1] Puie, O. (2014) *Contractele administrative în contextul noului Cod civil și al noului Cod de procedură civilă*. București: Universul Juridic

[2] art. 8, Law no. 554/2004

[3] Puie, *op. cit.*

[4] Puie, *op. cit.*, p. 10.

According to art. 2, the administrative act is an unilateral act, which may be of an individual or normative nature and which was "issued by a public authority in order to execute or organize the execution of the law, creating, modifying or terminating legal relations".[5]

Administrative acts include administrative contracts when they concern valuing public property assets, performing public works, performing public services and public procurement.[6] Therefore, Law no. 554/2004 specifies three types of possible administrative contracts:

- administrative contracts for valuing public property assets;
- administrative contracts for the execution of works of public interest;
- administrative contracts for the provision of public services;
- administrative contracts for public procurement.[7]

However, a distinction must be made between the administrative act and the act of the administration. The administrative act, which includes the concept of administrative contract, is a much wider concept, while the act of the administration is only a part of it.

With regard to the definition of administrative contracts, the lack of clear definition and delimitation in legislation has translated into fragmented norms, focused on certain types of administrative contracts, elaborated due to the obligations arising from a series of European directives. In normative acts, such as Government Emergency Ordinances, more than one type of administrative contracts is specified and defined. For example, O.U.G. (in Romanian, *Ordonanță de Urgență a Guvernului*) no. 54/2006 identifies and defines the concession contract for public property[8], while O.U.G. no. 34/2006 provides a framework for the following types of administrative contracts: public procurement, service concession, public works concession and sectoral contract.[9]

All litigations generated by administrative contracts are within the jurisdiction of the administrative litigation court; however, certain special regulations in the past have established the competence of the common law court in solving the principles related to certain specific administrative contracts.

Moreover, it is worthwhile mentioning the possible solutions in a legal dispute that has an administrative contract as an object. According to art. 18 par. (4) of Law no. 554/2004, the court may give the following solutions if the subject of the administrative action is represented by an administrative contract: it may cancel it, in whole or in part; it may oblige the public authority to conclude the contract if the claimant is entitled; it may impose an obligation in respect of any party; it may, if the public interest so requires, amend the consent of a party; and, last but not least, it may order payment of damages.[10]

## 2. Administrative Contracts in context of the New Civil Code

The new Civil Code has made substantial amendments and additions to the legislation concerning contracts, which also apply to administrative ones. First of all, the definition of contracts has changed. In the old Civil Code, the contract was defined, in art. 942, as "the agreement between two or more persons to constitute or extinguish a legal relationship between them."[11] On the other hand, in the new Civil Code, the contract is defined in art. 1.162 as "the will of two or more people with the intention of creating, modifying or extinguishing a legal relationship."[12] Therefore, with the change of the civil code, administrative contracts may also have the intention of modifying a legal relationship. In addition, the notion of "will" is introduced as the basis for the agreement. The fact that any contracts, including administrative ones, fall under the provisions of the Civil Code is specified in art. 1.167: "All contracts are subject to the general rules in this chapter. Particular rules regarding certain contracts are provided in this Code or in special laws."[13]

According to art. 1.179 of the New Civil Code, the conditions necessary in order to make a contract valid are: the capacity to make a contract, the valid consent of the parties, a possible, determined, legal object and a valid cause for the obligations. Moreover, the same article states that if the law provides for a certain form of contract, „it must be complied with, subject to the sanction provided for by the applicable legal provisions".[14] For example, in the case of public procurements contracts, before signing the contract, the parties have to sign a framework agreement. Law no. 99/2016 establishes the meaning of framework agreements, which is defined as "a written agreement between one or more contracting entities and one or more economic operators which seeks to establish the terms and conditions governing the sectoral contracts to be awarded in a given period, the price and, where appropriate, the quantities concerned".[15]

[5] art. 2, Law no. 554/2004
[6] *Ibidem*;
[7] Law 554/2004
[8] O.U.G. 54/2006
[9] O.U. G. 34/2006
[10] art. 18, alin. (4), Law 554/2004
[11] art. 942, Old Civil Code
[12] art. 1.166, New Civil Code
[13] art. 1.167, New Civil Code
[14] art. 1.179, New Civil Code.
[15] Law no. 99/2016

Moreover, according to the Government Resolution no. 395/2016, the framework agreement has to include the obligations of the parties, especially regarding technical indicators linked to performance and function. The services or the products have to be described, and deadlines should be included as well as the prices. The procurement contract needs to have certain annexes, such as the specification, the offer, the performance guarantee and the association agreement.[16]

In the New Civil Code, it is pointed out in art. 1.187 that making and accepting an offer has to be done in the form requested by law in order for the contract to be valid. Several normative acts have indicated how offers should be made and accepted in the case of different types of administrative contracts. To continue the example of public procurement contracts, Government Resolution no. 395/2016 indicates how public procurement takes place, and what are the duties of both the public authorities and the economic operators, about which the law states that "the economic operator submits the offer, DUAE, qualification documents, answers to requests for clarification only by electronic means when participating in an award procedure that takes place through SEAP".[17]

The new Civil Code law stipulates rules concerning every contract. The law includes aspects of the parties' consent, what may be the object of the contract, but also the cause of the contract. At the same time, it indicates the obligations related to the form of the contract, whether in written or electronic form. In the New Civil Code, there are stipulated the situations in which a contract becomes null, how can it be validated and how it can be interpreted. Normally, contracts produce effects only between parties, but there are situations where the law provides effects for third parties.

The concept of administrative act, to which the administrative contract is assimilated, is mentioned in the New Civil Code in the context of acquiring the right of ownership. Art. 557 par. 2 specifies that an administrative act may have the effect of acquiring a property.[18]

In our opinion, a major and interesting topic for practitioners is the concession of public property, which we shall briefly review next.

Both our Constitution and New Civil Code, together with other regulations, such as Law no. 15/1990 on the merger of State-managed companies into autonomously-managed public companies and trading companies, Law no. 215/2001 on local public administration, O.U.G. no. 34/2006 on the award of public procurement contracts, public works concession contracts and services concession contracts and O.U.G. no. 54/2006 on the regulations of public property concession contract, are governing the usability of the concession of public property belonging to the State or to the territorial entities thereof.

Article 866 NCC enumerates the right of concession among the real rights relating to the public property right, while art. 871-873 rule on its legal status. Yet, such provisions should be correlated with those included in a couple of the above-cited regulations, i.e. O.U.G. no. 34/2006 and O.U.G. no. 54/2006, whose enforceability survived the New Civil Code. Therefore, in the preamble of O.U.G. no. 54/2006 we can read that, in consideration of both the imperative and urgent full alignment of domestic law on concessions with the European Union's regulations and practice, and the recommendation of the European Executive – the Commission – for the full and express repeal of Law no. 219/1998 on concessions, as amended, after the coming into force of O.U.G. no. 34/2006 on the award of public procurement contracts, public works concession contracts and services concession contracts, also considering the provisions of art. 136 paragraph (4) of the Romanian Constitution, republished, passing this emergency ordinance regulating the concession of public property was of a large requirement.

Therefore, now we can distinguish between the legal statuses of the concession of public property, as it is governed by the provisions of O.U.G. no. 54/2006, on one hand, and the public works concession contracts and public services concession contracts, as governed by the provisions of O.U.G. no. 34/2006, on the other hand.

From this point of view, art. 2 of O.U.G. no. 54/2006 stipulates that the provisions of this regulation do not apply to those contracts which are not governed by the provisions of O.U.G. no. 34/2006 on the award of public procurement contracts, public works concession contracts and services concession contracts; in case of contracts awarded under O.U.G. no. 34/2006, for whose implementation an operation of a public property, the operation right for such property shall be transferred "under and pursuant to the procedure enforced for awarding such contract", Meaning that the contracting authority shall enter a single contract under O.U.G. no. 34/2006. Moreover, art. 220 letter c) of the latter provides that its provisions shall not apply if the concession contract has the scope of public property concession, but only when through the scope of such contract the contracting authority intends to acquire the performance of a work or provision of a service, which would classify such contract either as a public procurement contract or as a concession contract whose award is governed by its provisions, namely those of O.U.G. no. 34/2006.

Both ordinances basically aim to provide the performance of business, administrative and legal activities on concession within a competitive, non-

[16] Government Resolution no. 395/2016
[17] art. 123, Government Resolution no. 395/2016
[18] art. 557, New Civil Code.

discriminating and transparent European Union specific environment.

Without going into further details, we shall point out hereinafter several aspects on the public property concession contract, by reference to the provisions included in these special regulations an also by general regulations in this field from art. 871-872 NCC.

**2.1. Notion and effects of public property concession contracts**

Article 871 NCC does not include a definition for the concession contract; the text rules, as of its first paragraph, that a grantee ha the right and obligation, at the same time, to operate the chartered property, in exchange of a royalty and for a limited period of time, also observing the requirements of laws and the provisions of the concession contract. Instead, art. 1 paragraph (2) of O.U.G. no. 54/2006 defines such contract as a written and authenticated contract whereby a public authority (grantor), transfers for a limited period of time to another person (grantee), who acts on its own risk and liability, the right and obligation to operate a public property, for valuable consideration (royalty). Article 3 of such ordinance rules that the scope of such contract may include any goods in the State's public property or owned by its administrative-territorial units according to the Constitution and legal provisions on public property.

Although art. 871 NCC does not specify, when the scope of a concession contract is represented by State's public property, the grantor capacity shall belong to ministries or other specialized bodies of central public administration; if it is represented by County's, City's or Commune's public property, such capacity shall be exercised accordingly by county or local councils, Bucharest City General Council or the local concern public institutions (art. 5). Article 871 NCC rules that any legal or natural person can act in the capacity of grantor. Moreover, art. 6 of O.U.G. no. 54/2006 provides that any Romanian and foreign natural or legal person can be a Grantor. The ordinance also provides that, irrespective of nationality or citizenship of the grantor, the concession contract shall be entered under the Romanian law (art. 7).

In respect of the royalty, calculation and payment shall be established by the relevant ministries or other specialized bodies of central public authorities or by local public authorities and it shall be an income to the State's or local budgets, as applicable (art. 4 of O.U.G. no. 54/2006). Therefore concession contracts are onerous.

Another feature of the contract under discussion is that it shall be entered on a definite period. Indeed, Pursuant to art. 7 paragraph (1) the final phrase of the Ordinance, duration of the concession contract shall not exceed 49 years since its signing date; such duration can only be extended with at most half of its initial term, by the mere agreement of the parties. Concession term shall be established by the grantor based on the concession's operational study. Basically, sub-granting is forbidden, unless expressly provided for by the ordinance (art. 8). The concession contract shall be entered in authentic written form [art. 1 paragraph (2) din O.U.G. no. 54/2006]. Such requirement is for ad validitatem, not for ad probationem purposes

**2.2. Entering procedure and contents of a concession contract**

Article 871 paragraph (3) NCC rules that the concession procedure and also the signing, execution, and termination of concession contracts are subject to the legal provisions. Such general rule is further developed by the provisions included in O.U.G. no. 54/2006 and Methodology thereto. Thus, O.U.G. no. 54/2006 includes rules on the preliminary administrative procedure before the signing of a concession contract, "awarding" of concession contract, which can occur after a tender or following direct negotiation, the contents of the concession contract, how the "concession file" is drafted and also the applicable rules for the control of all operations pertaining to the signing of concession contracts and the settlement of any disputes on concession.

We are interested in the rules of the ordinance which are in fact determining the legal status of the public property in the scope of concession. From this point of view, art. 52 of O.U.G. no. 54/2006 from the section concerning the contents of the concession contract rules that the contract must include a clear provision the types of property that may be used by the grantee under such concession, i.e.:

a) the so-called return property, which were subject to concession and shall rightfully return at the end of the contract, gratuitously and free from any liens, to the grantor;
b) own property of the grantee, which were used by him during concession and which shall naturally remain in his property at the end of the contract.

In consideration of the exercise of the concession right, art. 872 NCC provides that the holder of such right may carry out any material or legal acts required for the operation of granted property. However, under the penalty of absolute nullity, the grantee shall not alienate or burden the granted property or the goods designed for or resulting from concession, as applicable, property which must be returned to the grantor at the end of the contract, irrespective of cause, according to enforceable laws or articles of association.

Instead, art. 872 paragraph (2) NCC allows the grantor to acquire ownership of fruits and also products resulting from the chartered property, within the limits of enforceable laws and articles of association.

In turn, art. 47 paragraph (2) of Enforcement Rules for O.U.G. no. 54/2006 on the public property concession contracts indicates that, during contract implementation, the grantee has the right to use the chartered property and to collect its fruits, according to the nature thereof and purpose established by the parties within the contract. Yet he shall provide efficient, continuous and permanent operation of the

public property in the scope of concession [art. 48 paragraph (1) of Rules). From these legal regulations it results that, based on the concession contract, the grantee shall acquire a real right upon the chartered property, opposable erga omnes\ within the limits of contract provisions, and such right shall be also opposable to the grantor. Yet, since the grantee must return the "return goods" - public property in the scope of concession at the end of the contract, it means that the older thereof has no right to dispose on the chartered property, as required by art. 872 paragraph (1) NCC, under the penalty of absolute nullity of the executed act in breach of such principle.

### 2.3. Demarcation of concession right for certain public property vs. the administration right pertaining to public property

We may find some similitude and important differences between these two rights.

As for the similitudes, we can note that both are real rights originating in the public property right and each represent a specific method of exercising such right.

Moreover, none of such right represent a fragmentation of the public property right.

Yet, important differences are among them. Thus, first of all, administration right may belong only to certain public law subjects – state-managed companies, prefectures, central and local public authorities [art. 868 paragraph (1) NCC], while concession right may belong only to private law subjects, Romanian and foreign natural or legal persons (art. 6 of O.U.G. no. 54/2006).

Secondly, administration right arises only by means of an administrative act of authority issued by the relevant state body - Government, County council, respectively Bucharest City General Council, local council [art. 867 paragraph (1) NCC] -, while concession right arises exclusively based on a contract entered by an between the grantor (owner of public property right) and grantee (beneficiary of the concession) [art. 1 paragraph (2) of O.U.G. no. 54/2006].

Thirdly, in term of prerogatives, the administration right holder may possess, use and even dispose, within certain limits, of the granted good, while the concession right confers to the grantee only the rights of possession, use according to the purpose designed in the contract and collect the fruits or even the products of the chartered good, within the limits of applicable laws and articles of association.

Last, administration right is a real, basically perpetual and inalienable right, while the concession right is a real, temporary and inalienable right.

### 2.4. Termination of concession contract

Pursuant to art. 871 paragraph (3) of NCC, the termination procedure for concession contracts is subject to legal provisions, that is applicable special regulations. The concession contract may be terminated in various ways pursuant to O.U.G. no. 54/2006. Thus, firstly it can end on its expiry date. Actually, the concession contract shall be rightfully terminated on its expiration date, unless it was extended under the parties' agreement for a period which shall not exceed half of its initial term [art. 57 letter a) of the ordinance].

Then, art. 57 letter b) of the ordinance rules that, if required by national or local interests, concession contract can be unilaterally terminated by the grantor. In this case, it shall pay in advance a reasonable compensation to the grantee, as agreed by the parties, or, if such agreement cannot be reached, it shall be established by the court of law.

Should the grantee fail to fulfil its contractual obligations, art. 57 letter c) of O.U.G. no. 54/2006 entitles the grantor to unilaterally terminate the contract and to oblige the grantee to pay compensation for any damages thus incurred by the grantor, if applicable. In turn, the ordinance allows the grantee to use the same possibility with the same consequences should the grantor fail to observe its contractual obligations [art. 57 letter d)].

Finally, the contract may be terminated through the extinction of the concession scope pursuant to a force majeure case or by waiver, in case of the grantee's objective impossibility to operate the property, no compensation being due under such circumstances [art. 57 letter e) of O.U.G. no. 54/2006].

## 3. Administrative contracts in the context of the new Civil Procedure Code

The new Civil Procedure Code does not have specific references to administrative contracts. However, there are stipulations which apply to them. First of all, several articles provide provisions on contracts. For example, art. 289 discusses other categories of inscriptions and specifies that the contracts concluded on standardized or standardized forms or incorporating general conditions shall be considered as private signature, unless the law provides otherwise.[19]

In case of sale at a public auction, the new Civil Procedure Code indicates in art. 778 the conditions for maintaining or terminating contracts, which also apply to administrative contracts. The law stipulates that "settlements and other legal acts relating to the adjudicated good remain in existence or, as the case may be, cease according to the law".

## Conclusions

In this paper, we have presented and analysed the concept of the administrative contract in the Romanian legislation, in which this concept is assimilated to the

[19] art. 778, New Civil Procedure Code

concept of administrative act. However, the laws concerning contracts, as are those in the Civil Code and in the Civil Procedure Code, still apply. Taking this into consideration, in order to analyse the administrative contract in the context of the New Civil Code and the New Civil Procedure

Code, we undertook an analysis of other relevant legislation, such as Government Emergency Ordinances and Government Resolutions, but also of laws such as the law of public procurements. Several laws that apply to administrative contracts were introduced in 2016: Law no. 98/2016 concerning public procurements, Law no. 99/2016 concerning sectoral procurements, Law no. 100/2016 concerning work and services concessions and Law no. 101/2016, concerning remedies in the case of the attribution of public procurement contracts.

Analyzing the relevant legislation, we notice that administrative contracts are assimilated to the notion of administrative act, and that several types of contracts (e.g. of public procurement, of provision of public services) are assimilated to the concept of administrative contracts. However, the Romanian legislation does not include at the moment a clear definition of administrative contracts. This is one of the reasons why other authors, such as L. Catana,[20] are in favor of introducing a law that will establish this terminology in the special legislation.

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[20] Catana, L. (2016) *Teză de doctorat. Actul administrativ asimilat in contenciosul administrativ (rezumat).* București: Universitatea din București, Facultatea de Drept

# PARTICULARITIES ON THE REGULATION OF THE SUE PETITION, IN THE LIGHT OF PRACTICAL DIFFICULTIES AND LEGISLATIVE CHANGES

**Andrei-Radu DINCĂ***

**Abstract**

*According to the Romanian Civil Procedure Code, one of the trial stages of first instance is represented by the written stage in which, as a general rule, the fulfillment of the requirements regarding the petition content is analysed.*

*This stage is a novelty of the new Civil Procedure Code. The purpose of this check is to prevent the introduction of an inform application, as well as for predictability reasons, in order to guarantee the other parties the right of defend oneself, in order to be able to effectively respond to the plaintiff's claims.*

*However, the institution has experienced some interpretation and enforcement difficulties, but also legislative changes that will be the subject of our analiysis.*

**Keywords:** *sue petition, regulation, written stage, inform application, enforcement difficulties*

## 1. Introduction

The new civil procedural law, in force since February 15, 2013, meaning the New Romanian Code of Civil Procedure Code, surprised by a novel legislative element, namely the establishment of a distinct written stage in the first instance court, immediately after the introduction of the sue petition.[1]

At this stage, the parties are mutually aware of their claims and defense, as well as of the means of evidence they intend to administer.[2] The reason for setting up this procedure is, at least on a theoretical level, to increase the efficiency for the trial, to reduce the length of the civil trial, to ensure all procedural guarantees, in particular the right to defense and the principle of contradictory.[3]

As the Constitutional Court of Romania has also decided, in the Decision no. 479 of November 21, 2013, published in the Official Gazette no. 59 of January 23, 2014: "The procedure (...) is the option of the legislator and aims to remedy some deficiencies of the introductory action, so that, at the beginning of the procedure for fixing the first term of trial, it shall contain all the elements provided by Article 194 of the Code of Civil Procedure.

The legislator's purpose is disciplining the parties in a trial and thus respecting the principle of celerity and the right to a fair trial. Such a procedure would not affect the very essence of the protected right, since it is also accompanied by the guarantee given by the right to make a request for review under Article 200 par. (4) of the Code of Civil Procedure. Moreover, the court rules on a matter exclusively concerning the proper administration of justice.

However, as the European Court of Human Rights has repeatedly established, most of the procedural rights, by their very nature, are not "civil rights" within the meaning of the Convention and therefore fall outside the field of application of Article 6 of the European Convention for on Human Rights and Fundamental Freedoms (...).

Therefore, while the admission in principle procedure does not concern the substance of the application, the contested provisions do not infringe the provisions relating to the right to a fair trial, since the special procedure in question does not refer to the substance of the cases, the way Article 6 of European Convention for on Human Rights and Fundamental Freedoms requests, but only on matters of purely legal nature, the examination of which does not necessarily require a debate, with the parties being cited.

Moreover, the procedural means by which justice is carried out also mean the establishment of the rules of the process before the courts, and the legislator, by virtue of its Constitutional role established in Article 126 par. (2) and Article 129 of the Constitutional Law, is able to establish the court procedure, by law. These

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[1] The following provisions of Article 200 of the Code of Civil Procedure are relevant regarding the conduct of the written procedure: "(3) When the application does not meet the requirements of Art. 194-197, the applicant shall be notified in writing of the shortcomings, stating that within maximum 10 days after receipt of the communication, he shall make the ordered additions or modifications, subject to the sanction of petition annulment. It is exempt from this sanction the obligation to designate a common representative, in which case the provisions of Art. 202 par. (3) are applicable.

(4) If the obligations regarding the filling in or modification of the application provided in Art. 194 lit. a) -c), d) only in the case of factual reasons and f), as well as Art. 195-197, are not fulfilled within the time limit stipulated in par. (3), the application is annulled.

(4 ^ 1) The complainant may not be required to supplement or amend the sue petition with data or information which he or she does not have in person and for which the court is required to intervene.

[2] Gabriel Boroi, „Civil procedural law. Third Edition, revised and added'', Ed. Hamangiu, 2016, București, pag. 332;

[3] Gabriel-Sandu Lefter, „Sue petition regulation – a tool for achieving the right to a fair and and a predictible case'', Private Law Magazine, No. 4/2013, pag. 115-116;

constitutional provisions give expression to the principle also established by the European Court of Human Rights, which, for example, in its Judgment of 16 December 1992, *Case Hadjianastassiou v. Greece*, paragraph 33, stated that "the The Contracting States enjoy considerable freedom in the choice of the appropriate means to ensure that their judicial systems comply with the requirements of Article 6 (Art. 6). The national courts must, however, indicate with sufficient clarity the grounds on which they based their decision. It is this, *inter alia*, which makes it possible for the accused to exercise usefully the rights of appeal available to him.''

The possibility of annulling the sue petition is in line with the case law of the European Court of Human Rights, which stated that the sanction of the annulling the application (...) complies with the requirements to be prescribed by law and to pursue a legitimate aim, namely the proper administration of justice (see the inadmissibility decision of April 15, 2014, Case *Lefter v. Romania*).[4]

The written stage is provided only for the sue petition, not for the incidental claims, even if they have the legal nature of a sue petition, because they are introduced or debated after fixing the first term for the trial.[5] Also, the written stage is incompatible with certain procedures, either because the elements of the sue petition are different from those of ordinary law, or there are situations where there is no need for prior judicial preparation.[6]

It should be noted that the rudiments of this written stage also existed in the old regulation, in Articles 114[7] and 114, index 1[8] of the Old Code of Civil Procedure, but there was no possibility for the judge to annul the sue petition in the case of failure to fulfill the missing requirements, only the possibility of suspending the trial.

Regarding the effectiveness of the written stage[9], a part of the doctrine criticized the limits of the judge's appreciation of the sue petition regularity, but also the increased duration for a case, given that, in the old civil procedural law, simultaneously with the filing of the petition for registration, the first term of the hearing was also set.

It was stated[10] that, in practice, the procedure proved to be extremely rigid, among the most often requested requirements in the notifications to complete the petition were the obligation to indicate the personal numerical code for the defendant, therefore the legal provision which establishes the obligation to communicate these data, "only to the extent that they are known", being neglected.

In addition, part of the doctrine[11] claimed that, in all cases where the applicant did not comply with the obligation to complete or amend the action, the court is entitled to annul the application. It was thus considered that the legislator makes no distinction according to the essential or non-essential nature of the requirements set out in Articles 194-197 or whether they are governed by mandatory or non-mandatory rules. In the absence of legal criteria, the importance assessment of the missing element would be discretionary, left only to the judge's discretion, and if an item is qualified as non-essential, there would be no reason to request the applicant to modify or complete the application.

Indeed, the sanction of the sue petition annulment may occur both for non-compliance with the intrinsic requirements of the petition and for the extrinsic requirements provided by Articles 194-197 of the Code of Civil Procedure. That is why, in principle, the analysis of the elements of the sue petitions concerns any of these aspects, and not just those provided by Article 196, under the penalty of nullity.

However, in order to examine the limits of the judge's discretion in the written procedure, account must be taken of the reason for establishing this stage. It is intended to communicate to the other party an application which allows him to make a complete defense, so that the sue petition annulment will only take place insofar as, because of the ill-formed petition, the conduct of the civil process would be difficult, and the opposing party could not defend itself against a

[4] Traian Cornel Briciu, Claudiu Constantin Dinu, ,,Civil procedural law. Second Edition, revised and added'', Ed. Național, 2018, București, pag. 293;

[5] Gheorghe Florea, ,,New Code of Civil Procedure, commented and annotated. Vol I. – art. 1-526'', Ed. Universul Juridic, 2016, București, pag. 737;

[6] G.-S. Lefter, *op. cit*, pag. 117;

[7] Article 114 of the Old Romanian Code of Civil Procedure provided as follows: "(1) Upon receipt of the sue petition, the President or the Judge replacing him shall verify that he meets the legal requirements. Where appropriate, the complainant is required to complete or amend the application and to file, in accordance with Art. 112 par. (2) and Art. 113, the application and certified copies of all the documents on which it bases the application.

(2) The claimant shall complete the application immediately. When filling is not possible, the application will be registered and will be given a short term to the complainant. If the application was received by post, the complainant will be notified in writing of its shortcomings, stating that it will make the necessary additions or amendments by the deadline. (...) "

[8] Article 114, index 1, paragraph 1, of the Old Romanian Code of Civil Procedure provided as follows: "The President shall, as soon as he establishes that the conditions laid down by the law for the sue petition are met, shall fix the trial term which, under his signature, is notified for the present applicant or his representative. The other parties will be summoned according to the law. "

[9] Andrei Pap, ,,Diverting the sue petition regulation procedure from the purpose for which it whas regulated in the NCCP. Incidents of judicial practice'', www.juridice.ro;

[10] Elena Ablai, ,,The sue petition regulation – an instrument for imposing a procedural discipline or a filter to prevent the trial?'', www.avocatura.com; For other examples, see also Bogdan Ionescu, ,,Law no. 310/2018. Panorama of amendments and additions to the Code of Civil Procedure'', Ed. Universul Juridic, București, 2019, pag. 57;

[11] Viorel Terzea, ,,New Code of Civil Procedure annotated'', Ed. Universul Juridic, București, 2016, pag. 425; G.-S. Lefter, *op. cit*, pag. 118-119;

claim with such vices. In other words, the sanction of the petition annulment must be proportionate to the reasons justifying it, and the court is supposed to analyze the proportion for the missing elements affect the proper conduct of the proceedings, so that it cannot communicate the petition to the defendant and, as a consequence, it is necessary to annul the request for summons in the written stage.[12]

## 2. Legislative changes regarding the written stage

The Romanian legislator made changes regarding the regularization procedure, through Law no. 310 of December 17, 2018 for amending and completing the Law no. 134/2010 on the Code of Civil Procedure, as well as for amending and completing other normative acts.[13]

Thus, Article 200 (4) has been amended in order to restrict the cases in which sanctioning the petition annulment in the written stage may be applied, meaning failure to state legal reasons or the evidence.

In such cases, the court still has the obligation to verify the fulfillment of the sue petition requirements provided by Articles 194-197 of the Code of Civil Procedure, but it can not annul the application anymore.[14]

As it regards the first case, namely the failure to indicate the legal grounds, before the amendment of the Code of Civil Procedure by Law no. 310/2018, it was considered that the absence of the legal grounds does not justify the sanction of invalidity except to the extent that there is proven an injury which cannot be annulled in other way than by the annulment of the petition. Also, if the factual exposition is sufficient to imply the existence of a legal rule, the court should frame the litigious deeds in order to be lawful. Also, the applicant may not be able to indicate the law applicable to his claim, in the context in which legal aid is not compulsory in Romania.[15] Other authors have argued that a sue petition which does not include the legal grounds does not generate a procedural injury which cannot be removed except by the annulment of the procedural act.[16]

However, the legislative amendment is necessary, in the context of a widespread judicial practice of annulling the petitions for failure to state reasons.

The rationale behind this legislative change is that only the factual reasoning is essential, not the legal grounds, the latter being the subject of the court's qualification, and that cannot be done without a contradictory debate.[17] Also, according to Article no. 22 paragraph (4) of the Code of Civil Procedure, it is the judge who gives or restores the legal classification of the trial acts and facts, which often involves a contradictory debate that can not be assured at the written stage.

However, the repeal of this annulment case is effective only at the written stage, the judge still being able to order the petition annulment under the common law. Thus, the judge has the role of establishing the exact legal classification of the trial acts and facts, only after having put this issue to the attention of the parties. Therefore, we appreciate that the solutions provided by the doctrine and the judicial practice before the amendment of the Code of Civil Procedure by Law no. 310/2018 are maintained, meaning that the lack of legal grounds leads to the annulment of the petition if the judge is effectively prevented from proceeding with the qualification and settlement of the application, the legal reasons not being clearly stated or contradictory[18]. This situation will not concern the written stage, but only after the completion of this procedure after contradictory debates.

Law no. 310/2018 repealed the basis for the petition annulment for failure to file evidence. The reason for introducing this amendment is the fact that the absence of evidence by the complainant entails the loss of the right to propose evidence. In addition, part of the doctrine[19] and the judicial practice considered that the sanction of annulment for the sue petition could not have acted insofar as the applicant had requested at least one evidence under procedural regularity, for example the offense report or even a copy of the identity card, for the attestation of the applicant's identity. The sanction of the petition annulment could also have been operating in the case of using a formula which is equivalent to the non-indication of the evidence, "any evidence useful to the case" or simply "witnesses" without indicating their names and addresses.[20]

Thus, the court cannot consider the applicant what type of evidence to submit at the written stage, but only at the end of that stage, under Article 203 of the Code of Civil Procedure, when the first term of the trial is set, the judge is able to provide measures to

[12] G. Boroi, *op. cit*, pag. 351-352;

[13] Published în The Romanian Official Gazette no. 1074/18.12.2018;

[14] Nicolae-Horia Ţiţ, Roxana Stanciu, ,,Law no. 310/2018 to modify and complete the Law no. 134/2010 regarding the Code of Civil Procedure'', Ed. Hamangiu, Bucureşti, 2019, pag. 49;

[15] Gheorghe-Liviu Zidaru, ,,Some issues regarding the sue petition regulation and the new regulation of stamp taxes'', www.juridice.ro;

[16] Gheorghe Florea, op.cit, pag. 741;

[17] Traian-Cornel Briciu, Mirela Stancu, Claudiu-Constantin Dinu, Gheorghe-Liviu Zidaru, Paul Pop, ,,Comments on the amendment of the new Civil Procedure Code by Law no. 310/2018. Between the desire for functionality and the trend of restoration'', www.juridice.ro;

[18] Delia-Narcisa Teohari, Gabriel Boroi (coordinator), ,,New Code of Civil Procedure. Comment on articles. Second edition, reviewed and added'', Vol. I, Ed. Universul Juridic, Bucureşti, 2016, pag. 573; The Minute of the Civil Departments Presidents' Meeting in Iasi, 7-8 May 2015,pct. 10, www.inm-lex.ro;

[19] Gheorghe-Liviu Zidaru, op. cit; G. Boroi, *op. cit.*, pag. 354;

[20] G.-S. Lefter, op. cit, pag. 128;

administer the evidence or to carry out the process according to the law.

However, we appreciate that, in the absence of some evidence, there still may be certain situations under which the judge would be able to order the annulment of the sue petition. We consider the situation of the documents provided by Article 194 letter c) of the Code of Civil Procedure, respectively the fiscal certificate or the land book extract, in the case of immovable property, insofar as failure to do so makes it impossible to determine the object of the claim or its value.[21] However, in this case, the annulment will also take place for not indicating the object or its value, and not for not stating the evidence.

Also, the lack of proof for the representative status, under Article 194 letter b) of the Code of Civil Procedure could lead to the petition annulment in the written procedure, at least at a theoretical level, but it was rightly considered that it would be more useful to fix the first term of trial and to grant a time limit for this irregularity removal, under Article 82.[22]

Even in the context in which the legislator has understood to remove this requirement from those which may lead to the petition annulment under Article 200 of the Code of Civil Procedure, we consider that there are no significant changes in the applicant's procedural conduct, except in terms of easier access to a court, in order to analyze the substance of the claim.

On the other hand, for the plaintiff, in the case of rights that need to be exercised within a certain time-limit laid down by law, Article 2.539 par. (2) of the Romanian Civil Code provides that the limitation of the substantive right to action is interrupted if the petition has been annulled by a final judgment if the applicant, within six months of the date on which the decision of rejection or annulment has become final, introduces a new application, provided that the new application is admissible.

Under the new rules, the applicant would no longer be able to benefit from the above-mentioned provisions if he did not indicate the evidence he requested, as the provisions of Article 204 par. (1) of the Code of Civil Procedure remain fully applicable, and it allows the plaintiff to indicate only new evidence at the first term, in relation to those already indicated in the petition.[23] Thus, the applicant will not request evidence which he intends to use directly at the first hearing, as the penalty of right loss, provided by Article 254 par. (1) of the Code of Civil Procedure generally operates.

It should also be noted that in Romanian law, in the absence of evidence, the sue petition will be dismissed as unfounded, and not as unproven. Therefore, we appreciate that sanctioning the right to propose evidence at the written stage is a sufficiently vigorous sanction to establish a certain procedural discipline for the parties. Even if there is no longer any risk for the plaintiff to have his petition filed without a substantive analysis, there is an even greater risk of looking at the merits of the application, in the absence of proposed evidence within the law prescribed time limit.

We note that the New Code of Civil Procedure does not regulate an often found situation in practice, caused by the failure to conduct a written procedure or superficial petition analysis by judges followed by observing its regularity, although it contains some shortcomings related to the provisions of Articles 194-197 (in particular by requesting testimony without indicating the names and addresses for the witnesses).

In that situation, it is clear that the court does not fulfill its obligation to apply the provisions of Article 200 of the Code of Civil Procedure, by not considering the applicant's shortcomings of its own petition and, thus, communicates it to the defendant in order to lodge a contestation. On this occasion, we need to point out that a possible regularity statement in a non-contentious procedure does not prevent the defendant from claiming petition irregularities in court. The question then arises: how the court will proceed, seeing the claim with unfulfilled shortcomings at the first hearing, and the defendant invokes those shortcomings?

We consider that, in this situation, at the first hearing, the court will continue to apply the sanction of annulment under the conditions of the common law or the sanction of right loss, with certain nuances.

Under Article 178 par. (3) of the Code of Civil Procedure, unless the law provides otherwise, the relative nullity must be invoked by contestation for the irregularities committed before the commencement of the trial, if the contestation is mandatory. Thus, if the defendant does not claim the petition irregularity of the or the applicant's right loss to propose certain evidence by contestation, we believe that the court might consider the plaintiff to fill the petition shortcomings at the first hearing, as a corollary of respecting the applicant's right of defense, in spite of the court's omission to consider the complainant to remedy the petition's shortcomings.

However, if the defendant invokes the petition irregularity, the applicant is, however, in a position to remedy the petition deficiencies himself, even though they have not been observed by the court, since possible sanctions of invalidity or right loss may only be applied at the first hearing that the parties are lawfully summoned. Therefore, the court would no longer be able to apply the sanction of annulment at the stage of sue petition regularization, because once this phase is over, the trial can no longer return to the initial stage.[24]

[21] See also Mihaela Tăbârcă, „Civil procedural law. Supplement containing comments of Law no. 310/2018'', Ed. Solomon, Bucureşti, 2019, pag. 117;

[22] G. Boroi, *op. cit.*, pag. 353;

[23] Mihaela Tăbârcă, ,*op.cit,* pag. 114; G. Boroi, *op. cit.*, pag. 397;

[24] G.-S. Lefter, *op. cit.*, pag. 130-131;

If, in the present case, there is an absolute nullity cause regarding the petition, in the sense of Article 178 par. (1) of the Code of Civil Procedure, the defendant or the court may, at any time, invoke the irregularity of the application even if it has not been remedied in the written procedure.

However, we appreciate, as a *de lege ferenda* proposal, that legislative clarification is required from the legislator, and our proposed solution could underpin this regulation.

Another amendment to Article 200 par. (4) is related to the repealing of the phrase 'given in the council chamber'. In this regard, we draw attention to the fact that, in reality, this does not represent a substantive change in the legislator's view of the way in which the procedures in the written stage take place, because the nature of the written procedure is still non-contentious.

Thus, from the time of filing of the petition to the court and until observing its regularity, followed by the filing of the petition to the defendant, the latter has no knowledge of the trial, so we can talk about the applicability of Article 527 of the Code of Civil Procedure, being the case of a petition that is not intended, at this stage, to establish an adversarial right to another person, since no other person is still involved in this procedure.

As to the non-contentious nature and the provisions of Article 532 of the Code of Civil Procedure, which is fully applicable in addition, it follows that, despite the deletion of the phrase 'given in the council chamber', the further annulment of the petition will still be made in the council room.

Another argument is the legislative technique, in the context in which, through Law no. 310/2018 was also amended and Article 402 of the Code of Civil Procedure, which no longer provides for the obligation to pronounce the judgment in public hearing.

Another argument in the sense that the legislative amendment is only apparent is the legal logic: the provisions of Article 200 par. (7) have not been amended, which means that the review of the appeal, namely the request for review of the annulment will also take place in the council room.

We therefore appreciate that this legislative change is only about the general aspect of the legal text, without any practical significance.

We are reporting another legislative amendment, namely the new paragraph 4, index 1, of Article 200 of the Code of Civil Procedure, which expressly provides that the claimant cannot be required to supplement or amend the sue petition with data or information which he does not personally dispose and for which the court is required to intervene.

This new legal provision aims to moderate certain trends observed in judicial practice, such as the possibility of annulling the petitions for the mere fact that the applicant did not indicate the data or information requested, although he had indicated that he cannot obtain this data personally.

In fact, there are certain situations in which the parties cannot access certain databases, and the court is able to take the necessary steps, these issues being considered by the legislator through the legislative amendment.

In the doctrine before this legislative amendment, it was rightly assumed that if the plaintiff proves that he has failed to find the defendant's domicile or any other place to be summoned, the court would be able to consent to public summoning or to carry out checks in databases or other electronic content systems held by public authorities and institutions, but the sue petition annulment will not occur.[25]

Moreover, the applicant can not rely on this legal provision if he is required to take action and he fails, even though he would have been able to obtain those information personally (for example, a Trade Registry extract, a land book extract, his own personal numeric code). However, if the plaintiff proves that although he has taken care to obtain the necessary information and the competent authority has refused for legitimate reasons (for example, general data protection) or even if the refusal is abusive, in this case the court can no longer ask the plaintiff to complete the information, but the court itself is going to collect this information.

The written stage has undergone a new amendment by removing the obligation to submit a response for contestation, as it can be seen from the new wording of Article 201 par. (2) and (3). In the old regulation, the plaintiff had the obligation to file a response for contestation, and the new text merely provides the possibility of responding, but the 10-day period after the communication in which this act of procedure can be filed, is maintained, under the same sanction, the right loss to submit this act.

We appreciate this amendment to the Code of Civil Procedure, given that most of times the issues raised in the response didn't bring something new, but the plaintiff reiterated the argument in the initial petition. Also, the deadline for submitting the response was within the written procedure and, in practice, extended its duration. As a result, it lengthened the first hearing date. Under the new circumstances, within 3 days of filing the contestation, the judge will directly determine the first term of the trial and communicate the response to the contestation, instead of running a 10-day deadline, only for the response to contestation.

In the new regulation, the plaintiff enjoys the same right to submit a response, but without being an obligation in the same time. Moreover, the plaintiff may continue to invoke any contestation irregularity or procedural pleas regarding the defendant's contestation and the first hearing to which the parties are legally summoned.[26]

[25] G. Boroi, *op. cit.*, pag. 352;
[26] Traian-Cornel Briciu, Mirela Stancu, Claudiu-Constantin Dinu, Gheorghe-Liviu Zidaru, Paul Pop, *op. cit.*;

## Conclusions

Law no. 310/2018 aimed to correct some of the New Romanian civil procedural law shortcomings, and the new legislative amendments are, in part, the expression of the need for modernization or restoring the legal provisions functionality.

However, it can be noticed that most of legislative amendments in Law no. 310/2018 aim approaching to the Old Civil Procedure Code provisions, and this phenomenon can be explained, in part, by the existence of a real need and, in part, by the resistance to change. Even the waiving of the obligation to submit a response to the contestation, which was the subject of the present study, is an approach to the old legislation, which did not regulate this procedural act.

Indeed, even at the time of the new legislation issue, there were critical voices about the written procedure, and opinions were expressed in the sense that this stage prolonged the trial duration, neglecting the obvious usefulness of this filtering stage, in terms of shortening and streamlining the stage of the judicial investigation. In fact, in the case of the written stage there was only the necessity of making some corrections in order to make the act of justice more effective, aspects, largely done by the latest legislative changes, at least in the aspects considered in our approach.

In conclusion, we welcome the amendments to the New Civil Procedure Code in the matter of sue petition regulation, especially regarding procedure acceleration and creation of additional procedural safeguards for the plaintiff in order to achieve the final stage of the written procedure and to reach settling on the merits of the case.

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# SIMULATED CONTRACTS BETWEEN THE OLD AND NEW CIVIL CODES OF ROMANIA

**Adrian-Gabriel DINESCU**[*]

**Abstract**

*The world which gave birth to the New Civil Code is significantly different than the world of the 19th century of the Old Civil Code, as the development of social relationships has been tremendous in the last century, many more people participating actively in society and thus having more incentive to resort to the complex mechanism of simulation in order to mask their true intentions. Thus, the lawmaker of 2011 in Romania has been a lot more careful to describe the effects of simulation between the parties of the simulated contracts, especially in regard to the third parties who acted in good faith. In trying to protect these latter, five articles of the New Civil Code govern these complex relationships which stem, basically, from an instinctual tendency of humans to lie. Also, through-out the 150 years in which the Old Civil Code (inspired by the Napoleon Code of France of 1804) has been in force, tomes of legal literature tried to remedy its obvious deficiencies. In the New Civil Code these suggestions and conclusions, as well as many ideas which stem from court rulings have been assimilated into law. This short paper tries to give a short analysis on these changes and to glimpse at the way the legal professionals involved in interpreting the law will assimilate them.*

**Keywords:** *simulation, apparent contracts, sham contracts, effects of simulation, differences between the Old and New Civil Code*

## 1. Introduction

The Old Civil Code of Romania had a long live, approximatively 150 years, between 1865 and 2011, suffering under numerous types of regimes, from authoritarian monarchies to communist dictatorships.

Despite frequent attempts at adopting new Civil Codes[1], the Napoleonian Civil Cod survived until 2011, when a New Civil Code came into force, in an attempt to further the social, cultural and legal development of Romania.

This New Civil Cod has been inspired by numerous other legislations, such as the Quebec Civil Code, the Italian Civil Code etc., the lawmaker trying to assimilate the best of all worlds in an attempt to solve the many legislative hurdles that Romania has had to face, especially after the fall of the communist regime.

Thus the New Civil Code came into force on the 1st of October, 2011, and it is a work of grand proportions, introducing many new institutions but also trying to be in line with traditions our country has had for centuries. This is why in a lot of areas, the New Civil Cod has assimilated the law literature and the jurisprudence of the Romanian courts, trying, and mostly succeeding, in making the Civil Code understandable to the layman and useful for the law professional.

The area of interest to us is regarding simulated contracts or simulation in general, which the Old Civil Code described succinctly at art. 1.175. The New Civil code offers a much more comprehensive description of the institution at art. 1.289 – 1.293.

In this short paper we shall try to ascertain whether the New Civil Code is a change of paradigm or whether it is merely a change of form, a codification of the criticisms of the Old Civil Code.

## 2. Definition of the institution of simulation and general consequences

Before we try to analyze the differences between the two Codes we think it necessary to try to give a short definition on the institution of simulation and of the simulated contracts.

To simulate is nothing else than to lie about something, to present a distorted truth. Why would a person want to simulate an action? To gain some advantages, of course.

To simulate in contractual matters is nothing less than to elaborate a public contract, which is presented to the outside world as true and which contains an apparent agreement, whilst between the parties, a secret agreement is drawn, the true expression of their will, and which is adversely different than the apparent contract.

Thus, the simulation mechanism works with these concepts: apparent contract (public, but false, known generally to third parties, does not contain the true will

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[1] There have been a few attempts by the lawmaker to elaborate new Civil Codes, more in tune with the times: the Civil Code of 1940, the Civil Code of 1980, the Civil Code of 2004.

of the parties), concealed, hidden contract (contains the true will of the parties, the secret contract, known and producing effects only between the parties, generally not known by third parties) and general agreement to simulate – the simulation mechanism.[2]

Contractual parties usually resort to simulation to hide their true intensions, as these latter ones are either not permissible by law or would impede upon their desired goals. Simulation usually brings advantages. Indeed, parties usually resort to simulated contracts to try to gain some sort of advantage over third parties (creditors, successors) or try to circumvent the law[3].

There are three types of simulated contracts:

a) simulation by interposing another person as contractual party – this type of simulations is usually used by parties who, by law[4] or by private norm, cannot have a contractual relationship regarding a certain right. A "strawman" thus is inserted within the "equation" in order to seem than the right has been passed not to its true successor according to the will of the parties, but to the strawman. The secret contract, however, expresses the fact that the respective right has been passed to its true successor.
b) Simulation by changing the nature of the contract or of some its components – this type of simulation usually entails the concealment of a type of contract which is either not permissible by law or which is detrimental to the interests of the parties. For example, a donation contract of a house is simulated to be a lease contract, in order to hide the property right of the real buyer from his creditors. In this fashion, property of the house is apparently withheld by the donor, while in manifesting their true intent, the parties, through the secret agreement, acknowledged that property of the house shall be transferred to the other party. Parties can also simulate only some aspects of the contract regarding the price, conditions etc., harming the interest of certain third parties.[5]
c) Simulation by fictitious contract. The parties who want to evade their creditors usually hide their intentions through the use of simulation in which they fictitiously relent ownership of a certain right in favor of another person, while, in reality, retaining ownership through the means of the true agreement as part of the simulation. This true agreement entails that ownership has not passed to the other party, but has stayed with the initial owner.

Now that we have briefly shown the types of simulations which the law literature has elaborated through-out the history of Romanian and Continental law, we ought to state that the Romanian lawmaker did not choose to sanction this complex operation with nullity, but had a rather more tolerant approach – **inopposability**. Indeed, other legislations have been a lot harsher towards the operation. For example, Hungarian law does not tolerate such lies and sanctions the operation with nullity, this nullity having effect on third parties as well. Spanish law, also, sanctions the apparent contract with nullity. German and Austrian lawmakers have also not been tolerant of this operation.

Inopposability means that while the true will of the parties, as expressed in the secret, but true contract produces consequences between the parties, it cannot produce consequences in regard to third parties, with the exception of the situations in which the true will of the parties creates advantages for the third party.

This sanction of inopposability also means that neither the apparent contract, nor the hidden one are null and void. The true will of the parties produces consequences only between them, whilst only the apparent, but deceitful, contract produces consequences before third parties.

This is the main effect of simulation in the Romanian legislation: only the false and simulated will of the parties produces consequences in regard to third parties.

The reader can easily imagine that this complex sanction applied to the simulation operation will have complex consequences, as well, in regard to third parties who might be interested in using the concealed contract for their own interests.

## 3. Simulated contracts in the Old and New Civil Code. Differences. Effects and consequences.

The Old Civil Code contained merely one article concerning the complex mechanism of simulation: art. 1.175 which entailed that the secret contract that modified a public contract produces consequences only in regard to the contractual parties and their personal successors, but cannot produce consequences in regard to other persons.

Thus, from this succinct article spawned a myriad of interpretations from the professional law literature as well as from the Romanian courts. In principle these effects have been in accordance with the interpretations given by the French courts and the French law

[2] A. Menyhard, E. Veress, New civil Codes în Hungary and Romania, ed. Springer, 2017, p. 169, published on Google books.

[3] F. Baias, "Simulația – Studiu de doctrină și jurisprudență", ed. Rosetti, Bucharest, 2003, p. 163.

[4] In the Romanian legal system judges cannot buy certain rights which are pending judgement, and thus, having this special status and interdiction, judges usually refer to simulation through the participation of a "strawman" who buys the respective right, while the true agreement states that ownership of the right will not be the strawman's but the true contractual party, the judge – at. 1.653 Romanian Civil Code. In this case, the entire simulation will be null and void according to the New Civil Code which copies the old provisions of the Old Civil Code.

[5] Fiscal simulations, unfortunately, are quiet common in Romania, as parties usually try to conceal the true price of the transaction from the state in order to pay less taxes. While the Romanian lawmaker has, in general, been quite tolerant of simulated contacts, in this case the contract is null and void, as the state has to have leverage over people who try to skimp on taxes.

literature, as the Old Civil Code was thoroughly inspired form the French Code of 1804.

The New Civil Code tries to delve more thoroughly into the matters of simulation through the use of five articles: art. 1.289 – art. 1.293 C.civ.

Whatever the changes may have been, the definition, in principle, of the mechanism and the effects of simulation have remained the same: the secret contract can only produce effects between the parties of the simulation, and cannot produce effects against third parties.[6]

Thus, the New Civil Code has retained the tolerant approach towards the act of simulating, not choosing the powerful sanctions other lawmakers chose (the entire operation being null and void), like in the Hungarian legislation.

In justifying this decision, the Romanian lawmaker expressed that the tolerant tradition of the Romanian people is incompatible with harsh sanctions such as nullity. The Romanian lawmaker expressed that this sanction can only be applied when law explicitly forbids the parties to resort to contractual simulations. In other words, the law has to sanction the simulation mechanism *per se*, otherwise it will be permissible in the Romanian legislation.

We believe that this approach is a pragmatic one, as the lawmaker could see that the effects on innocent third parties could be terribly harsh if the simulation would be null and void. Also the Romanian lawmaker accepted that simulations are not necessarily a heinous crime, but rather an adaptation of contractual parties to certain situations.[7]

Also, in principle, to hide the true nature of the contract, either in regard to its clauses, or in regard to certain aspects, or even its own fictitiousness, it not always fraudulent, the simulation can actually have quite noble aspirations. For example, a person wishes to gratify another person who has proven himself to excel in his field of study, but wants to retain his anonymity – the anonymous philanthropist. In this instance, he will have interest in resorting to the simulation mechanism, hiding himself before a "strawman".

Thus, the New Civil Code has maintained the legality of simulation, in principle, the lawmaker sanctioning the operation only in special cases or situations.

In the Romanian legal system, the simulation is considered to be neutral - it does not have a certain positive or negative meaning. The mechanism of simulation cannot validate a certain invalid contract and, *vicevera*, cannot invalidate a valid agreement[8].

In our discussion about the differences between the Old Civil Code and New Civil Code, at art. 1.289, the New Civil Code, after decades of conflict between different law authors and between the law literature and courts, concluded that the secret, but true contract must not honor the mandatory conditions of validity regarding form. Thus, the real contract must only honor the substantial requirements, as all contracts do. In other words, in the case of simulation, the simple and valid will of the parties is enough to form the contract, irrespective of special mandatory conditions concerning form.[9]

This is an extremely important mention in the new legislation, putting an end to all debate regarding this subject and positioning the Romanian legislations as one of the most tolerant legislations in Europe.

Even the Italian legislation which inspired the Romanian simulation legislation has stricter provisions in regard to this matter, requiring the true contract between the parties to adhere to the legal provisions regarding substance as well as form.

For example, if two parties – A and B – want to conceal their true will of donating a product from A in favor of B, they can resort to the simulation mechanism and enter into a sham, apparent agreement of sale. The parties are incentivized to choose a sale agreement as it has many advantages: the heirs of the donor cannot contest the legality of the sale if their reserve is reduced, B's creditors lose the ability to claim the amount that was the price of the product etc.

According to art. 813 C.civ., the donation is subject to special form requirements - all donations should hold the authentic form.

But, this donation being a part of the simulation mechanism, being the true, but hidden contract, does not have to abide by the special form requirements and thus the parties, just through their will, can legally wrap the donation contract into a sale contract.

Secondly, articles 1.290 and 1.291 are new introductions into the Romanian civil legislation, showing how the simulation mechanism can harm the interests of third parties: objective successors (persons who acquired assets from the parties of the simulation) and creditors.

These two articles are the innovations of the Romanian lawmaker in the New Civil Code and they mainly transpose into law the conclusions of the Romanian courts as well as the law literature.

Art. 1.290 stipulates that the secret contract cannot be enforced by the contractual parties, their personal and objective successors[10], nor by the creditors of the apparent seller against third parties

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[6] F. Baias, art. 1.289 and the following in "*Noul Cod civil. Comentariu pe articole*", ed. CH Beck, Bucharest, 2012.

[7] See also, regarding the Old Civil Code - C. Hamangiu, I. Rosetti – Bălănescu, Al. Băicoianu, *"Tratat de Drept Civil Român"*, ed. Ciornei, Bucharest, 1928, p. 853.

[8] G. Chivu, "*Simulația în teoria și practica dreptului civil*", ed. Argonaut, Cluj-Napoca, 2001, p. 36

[9] F. Baias & other authors, "*Noul Cod civil. Comentariu pe articole*", ed. CH Beck, Bucharest, 2012, the analysis at art. 1.289 C.civ.

[10] The personal successor is the universal successor of a party, the person who continues the personality of the defunct after the event of his demise. The personal successor is the general heir of all rights of obligations. The objective successor, on the other hand, is the person that

who, in good faith, have gained rights from the apparent acquirer. The secret agreement is effective between the parties of the simulation.

This article is a summary or a conclusion of 100 years of terrible ordeal concerning the effects of the mechanism of simulation and gives the ultimate favor to the third party – the possibility of ignoring the true will of the parties captured in the true contract, and giving them the benefit of basing their decision on the apparent, but sham, contract.

This is a great benefit, in general, for third parties, as they usually gained rights or assets from an apparent acquirer exactly because, having knowledge only of the apparent contract, they, in good faith, considered the apparent owner to be the true one.

This is the typical sanction of simulation: the true will of the parties shall not take effect against third parties who acted in good faith.

Also, worth mentioning is the fact that the Romanian lawmaker stipulated the notion of "good faith" or "good will", an idea previously only present in law literature or court rulings.

In general, in the case of simulation, a third party is of good faith when this party is rightfully ignorant of the true contract, of the true will of the parties and, acting upon this good will, enters into agreements with the apparent owner of a specific right.

Good faith also implies that the third party entering into agreement with the apparent owner checked all public registries ensuring that the party he contracts with is the true owner of the right. For example, if the third party acquires a house, then he must check the land registry in order to ensure that the seller is the true proprietor of the house. If he acquires the house from another person than that shown in the land registry, then he may be considered to have bought the house "in bad faith".

Moreover, art. 1.291 of the New Civil Code, regulates the relationships between the simulation parties and the creditors, as well as between the creditors themselves.

Art. 1.291 par. 1 of the New Civil Code stipulates that the secret contract is not effective against the creditors of the apparent acquisitor who, in good faith, registered their foreclosure proceedings in the land registry or obtained a seizure of the asset object of the simulation.

It must be noted that this norm is not necessarily groundbreaking in the general regulation of the contract simulation, but it is a novelty addition as it clearly offers the inopposability solution only with certain conditions: to be given this huge benefit, the creditor of the apparent acquirer must uphold some special conditions. He must have registered the foreclosure proceedings in the land registry or obtained a seizure of the asset object of the simulation.

If these special requirements are not met, then the secret contract will be effective against the creditor of the apparent acquisitor, and thus he will not be able to hide under the "cape" of inopposability. This norm is a faithful copy of the Italian provisions who offer the same solution in this case.

The main victims of the simulation are not, usually, the creditors of the apparent acquisitor, but they have an incentive to begin foreclose proceedings against their debtor, seeing that he has gained new assets from the apparent seller.

However, these creditors are not preferred by art. 1.291, unless the very special conditions presented above are met. Otherwise, if they did not obtain a judicial seizure of the asset or they have not registered the foreclosure, then they will be have to bear the effects of the true contract.

If the creditor of the apparent acquisitor is not the true victim of the simulation mechanism, then who is this true victim?

Finally, we reached an important point in which the modern Romanian lawmaker chose a different path than the legislator of 1865: art. 1.291 par. 2 New Civil Code stipulates that if the creditor of the apparent acquisitor comes into conflict with the creditor of the apparent seller, the latter will have prevalence, as, in our opinion, he is most of the time the real target of the simulation, the reason why the parties resorted to this complex scheme: in order to reduce the number of assets the creditor can use to satisfy his claim.

However, there is one condition: that the claim of the creditor of the apparent seller is previous to the claim of the creditor of the apparent acquisitor.

If the claim of the creditor of the apparent seller was born after the claim of the creditor of the apparent acquisitor, then there is no reason to protect the first, as he has become creditor knowing full well the assets that his debtor had.

In this latter case, the creditor of the apparent acquisitor will prevail over the creditor of the apparent seller, as the second one fights against a loss and the first fights for enrichment. Time and time again the Romanian legislator has considered that between fighting against loss and fighting for enrichment, the first one will always prevail.

The solution chose by the Romanian legislator in the New Civil Code is again in tune with the Italian Civil Code, at art. 1.416, being also a 180 degree turn from the court rulings and the law literature of the Old Civil Code.

We think that this solution is just and is a welcome improvement.

Finally, at art. 1.292 of the New Civil Code, the legislator stipulated that proof of simulation can be made between parties only through the means put forth by normal contractual law, with the exception of the illicit simulation, when parties can use any and all means of proof. Proof of the simulation can be made by third parties through any means.

only gain a certain right or asset. Of course, he will have to suffer all the obligations in connection to that asset as well being party to all conventions limiting a particular right over that asset.

## 4. Conclusion

Contract simulation is a complex mechanism, tolerated to a certain degree in Romanian legislation, under the Old Civil Code, as under the New Civil Code.

However, the New Civil Code has departed from some old opinions of the Romanian courts or of the Romanian law literature and chose new remedies to try to bring order between the conflicting interests of the simulation parties as well as the third parties.

The New Civil Code is, without a doubt, an improvement concerning the regulation of simulated contracts, offering concrete stipulations and being careful not to harm the interests of third parties who acted in good faith, a lot more than the stipulations of the Old Civil Code.

This is natural, as the world which gave birth to the New Civil Code is significantly different that the world of the 19th century, of the Old Civil Code, the development of social relationships has been tremendous in the last century, many more participating actively in social activities and thus having more incentive to resort to the complex mechanism of simulation.

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# SHORT ESSAY ON THE LEGAL EFFECTS OF SIMULATED CONTRACTS IN REGARD TO THIRD PARTIES

**Adrian-Gabriel DINESCU**[*]

**Abstract**

*The simulation is a lie born out of the will of the parties to evade showing successors or third parties the truth. The Romanian legislation has a tolerant approach towards simulation, and permits it, in general. The New Civil Code does not sanction the mechanism of simulation with nullity, but offering the rather milder sanction of inopposability. This short paper will strive to give a short analysis on the effects of this simulation upon the third parties – the objective successors and the creditors of the parties. The New Civil Code has numerous stipulations in order to regulate these complex effects as to avoid harming the interests of these third parties who usually act in good faith and gain rights from the parties of the simulation. These parties should and are protected by law, exactly because they acted in good faith. The objective successor of the apparent acquisitor will be protected against the true will of the parties, as, in general this true will harms his interests. Also, this paper will analyze the special situation of the creditors of the apparent seller and of the apparent aquisitor, as their situation can vary according to the person they come into conflict with.*

**Keywords:** *simulation, sham contracts, good faith, third parties and creditors, inopposability*

## 1. Introduction

Simulated contracts are quite an often occurrence in our modern era, as more and more people are participating actively in the civil circuit, acquiring goods and services and trying to fulfill their interests.

The Romanian legislator, observing this increase in activity, in order to better protect individuals from the chaos of private initiative increased regulation. The typical example is the New Civil Code which is packed with stipulations. However this influx of legislation can cause a vicious circle as people, seeing all these norms which limit their possibility to engage in trade and other commercial activities, resort more and more often to the complex mechanism of simulation to hide their true intents.

The simulated contract, containing in its mechanism a duality of contracts - a public but sham contract and a secret, but true one - is well known to its parties, as they voluntarily committed to resort to this "lie". More problematic is the effect of this mechanism on third parties who acted in good faith and contracted with one of the parties of the simulation.

Thus, we consider essential in drawing up a short analysis on the effects of simulation upon these third parties, distinguishing between third parties who acted in good faith and those who manifested bad faith.

## 2. Types of third parties

First of all we must assess what participants form this category of "third parties" as to distinguish them from the parties who elaborated the simulated contract.[1]

The third parties, in general, are considered to be the people who are rightfully ignorant of the simulated contract, who do not know the existence of the hidden contract - the objective successors of the parties as well as the creditors.

The first category, the objective successors, are persons who inherit assets or rights from another person, but these rights and assets are individually determined and not part of an universality of goods. The objective successor thus gains these rights from the people who owned them previously and must adhere to all obligations linked to these assets or rights.

This category is in opposition to the subjective successor who is merely a continuation of the personality of a person who ended his existence. The subjective successor gains the universality of the rights and obligations of a personal, being also named a "universal successor".

The creditors of a person, unlike all other types of parties or successors of these parties, have merely a general claim on the assets of their debtor, all these assets comprising the entire collateral of the creditor. In case of default by the debtors, the creditor can foreclose on any of the assets of the debtor.

The major problem of the creditor is that he only has this general claim on the assets of the debtor and thus he must pay close attention to him and ensure that the debtor does not enter into fraudulent agreements in order to reduce the number of assets and thus harming the interests of the creditor.

It has also been said that, along with the objective successors, the creditors are more often than not the direct

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[1] For an analysis of the "*third parties*" in simulation see also F. Baias, "*Simulația – Studiu de doctrină și jurisprudență*", ed. Rosetti, Bucharest, 2003, p. 141.

victim of the intention of the parties to simulate[2], the debtor trying through all means to reach a state close to bankruptcy or even bankruptcy in order for the creditor to be unable to fulfill his claim.

## 3. Effects of the simulation regarding third parties

The Old Civil Code had very succinct stipulations regarding this issue, for it had only one article dealing with the problem of simulation and its effects on the third parties, including the creditors and objective successors.

At art. 1.175 C.civ., the Old Civil Code merely stated that the secret contract, as part of the simulation mechanism, cannot be enforced against third parties.[3]

The New Civil Code, however, which came into force on October 1st 2011, has a much more elaborate take on the norms concerning the effects of the simulation against third parties.

Art. 1.290 C.civ. stipulates that the simulation cannot be enforced by the parties, their personal successors, their objective successors, nor by the creditors of the apparent seller against third parties who manifesting good faith gained rights from the apparent acquisitor.

Art. 1.291 par. 1 of the New Civil Code stipulates that the secret contract is not effective against the creditors of the apparent acquisitor who, in good faith, registered their foreclosure proceedings in the land registry or obtained a seizure of the asset object of the simulation.

It is worth mentioning that the simulated agreement made up by the parties is not, in the Romanian legal system, subject to nullity, but merely the true will of the parties, the true contract, is inopposable to the third parties who, in good faith, gained rights from a sham owner.

This is in opposition to quite a number of law systems in Europe who deal much more "violently" with this type of fraudulent behavior, declaring the entire simulated operation as null and void and incapable of producing effects against any person.

### 3. 1. What is good faith in matters of simulation?

Entire treaties have been written regarding the notion of "good faith", and in our short essay we cannot even hope to give an accurate and complete definition on this complicated affair.

We shall mention, however, that acting in good faith a person must follow only the paths that the law has permitted him to take and must act seeking only just and reasonable goals.

A person acted in good faith in matters of simulation when he was rightly ignorant of the simulation mechanism. This does not mean that he was negligent or he ignored the existence of the simulation with malice, for his own unjust reason, but rather undertook all means at this disposal to make sure that the apparent contract which he himself bases his decisions on is the true contract, containing the true will of the parties.

For example, if he acquired a house from a seller, only if he acted with good will, in good faith, and he took all the necessary measures, including checking the land registry, as to ensure that the seller is the true owner of the house, will he receive the benefit of inoposability in case the person who sold him the house was only a "strawman" or an apparent owner.

If he was of bad faith, if he knew that the person who sold him the right, was nothing more than an apparent owner, than he will not be protected when the true owner claims his right.

### 3.2. Inopposability of the secret contract in regard to objective successors

Thus, the objective successor, in order to gain the benefits awarded by art. 1.290 C.civ. must always manifest good faith and must enter into an agreement with the apparent acquisitor only manifesting this good will.

The objective successor, thus, gained rights from the apparent acquisitor who himself gained these rights from the apparent seller.

For us to better understand these stipulations we must define the notions of "apparent seller" and "apparent acquisitor".

Simulated contracts, usually, take three forms:

- simulation through the interposing of a third person, a so called "strawman" who although is mentioned as part of the agreement, is merely a front in order to present to the "outside" world an apparent and untrue contract.
- simulation through fictitiousness. The parties of the simulation enter into an agreement which is only apparently real, but in true fact, it is merely a sham contract, the true agreement between parties stating the unreal character of the transaction.
- simulation through disguise. The parties apparently choose a type of agreement (for example, a sale contract), although in reality they chose another type of contract (for example, a donation contract). They simulate reality in order to better protect their interests against limiting factors such as third parties or even the law, when the latter does not permit them to enter into the real agreement.

The "apparent seller" is party to simulation and chooses to fictitiously enter into an agreement with the "apparent acquisitor", all these parties knowing full well that the apparent contract is a sham one.

The real contract may be a contract in which the parties merely have leased the asset. The parties may have even resorted to a fictitious act, where the true

[2] F. Baias, "*Simulația – Studiu de doctrină și jurisprudență*", ed. Rosetti, Bucharest, 2003, p. 154.
[3] See also G. Chivu, "*Simulația în teoria și practica dreptului civil*", ed. Argonaut, Cluj-Napoca, 2001, p. 78.

owner is still the "apparent seller" who held onto his rights fully.

It is irrelevant for the objective successors the nature of the contract. The only thing that matters is that they, in good faith and considering the apparent contract, entered into an agreement not with the true owner of the right, but with merely an „apparent aquisitor" and thus with a non-owner.

In the absence of art. 1.290, their position might have been quite precarious, as they would have been extremely vulnerable against the „apparent seller", the true owner of the right.

But this is exactly where art. 1.290 comes in and protects the objective successors from losing their right – if they entered into an agreement with the „apparent aquisitor" and in good faith gained rights from this person who is not the true owner, the true contract, the real but hidden one, cannot be effective against them – they can ignore the true will of the simulation parties.

This is the typical sanction of the simulation mechanism – the true intent of the parties of the simulated contract is not effective against the third party who contracted in good faith the apparent aquisitor.

Thus, the third party, the objective successor of the apparent aquisitor, is protected from losing his right, although he did not enter into agreement with the real owner of that right.

All this is because he manifested good faith and accepted the apparent contract as true.

Of course, between the parties of the simulated contract this situation is difficult, as the apparent acquisitor, knowing full well that he is just a sham owner, chose to sell further on this right in order to gain pecuniary advantages, harming in a deliberate manner the ownership right of the apparent seller, the true owner.

The parties of the simulated contract will have to sort this complex legal situation for themselves, as this is completely irrelevant for the objective successors who gained rights from the apparent acquisitor, in good faith.

They will be able to keep the rights they acquired, as if they had entered into an agreement with the true seller.

### 3.3. Inopposability of the secret contract in regard to creditors

As we mentioned above, the creditors merely have a general claim on the assets of the debtor, they, generally speaking, have no special position or special guarantee concerning these assets and thus are prone to all kinds of fraudulent behavior by the debtor who tries to evade them and not satisfy their claim.[4]

This is why debtors enter constantly into fraudulent agreements, including resorting to simulation in order to trick these creditors into thinking they have no assets.

Knowing full well this behavior, the Romanian lawmaker stipulated that the secret agreement born between two parties who hide their true intentions through a sham, apparent contract cannot be effective against third parties, including creditors.

This conclusion can be extracted by interpreting the stipulations at art. 1.289 – 1.291 C.civ. It is worth mentioning that the norms at art. 1.290 and 1.291 in the New Civil Code are special applications of the general rule enshrined at art. 1.289 C.civ. They are nothing more than the materialization of the will of the lawmaker to put an end to several debates concerning the effects of simulation in regard to third parties.

Thus, the main rule will be that the parties and their personal successor cannot oppose the secret agreement in regard to creditors, as they are third parties to the mechanism of simulation.

However, although the legislator has not made this distinction, we must further our study and see if it matters if the claim of the creditor is previous to the simulation or if the claim was born after the secret agreement.

*In the case of the creditor of the apparent seller:*

If the creditor's claim is previous to the simulated contract, then the above shown articles are fully applicable, even if the creditor knew that his debtor would enter into the secret agreement because he couldn't do anything about it, he cannot prevent his debtor into entering secret agreements.

It if the creditor's claim is born after his debtor entered into the secret agreement, than his good faith is essential, because if he knew about the simulation, then he accepted the role of creditor knowing the full extent of his debtor's assets. In this case, he will have interest in claiming that the true contract is the one effective between parties, as this contract is the one containing the true will of the parties.

If he didn't know and couldn't of known about the real contract, then he is of good faith and can act in any way he considers fit, but he mostly will act in the same way, having interest in bringing forth the true contract, as this one ensures that the will of the simulation parties is the true one and that the assets he could foreclose upon are still in the possession of his debtor.

Anyway, in general, the sanction which the law enshrines in this case is not nullity, of course, but rather the creditor, having interest, can ask that only the true contract be effective against him, as it is the true contract.

This is one of the cases in which a third party, does not ask for inopposability of the true will of the parties, but rather for the inopposability of the sham contract, having interest in maintaining the true intent of the parties.

*In the case of the creditor of the apparent acquisitor*

[4] See also F. Baias & other authors, "*Noul Cod civil. Comentariu pe articole*", ed. CH Beck, Bucharest, 2012, the analysis at art. 1.290-1.291 C.civ.

This creditor will, in general, have an interest to ensure that the sham contract will prevail over the true one in relation to any other person.

This is because the creditor of the apparent acquisitor gained rights from the apparent buyer and thus has interest to maintain the apparent contract as it offers him more assets to foreclose upon in case his debtor, the apparent acquisitor, can't settle his claim.

However, the creditor of the apparent acquisitor must have entered into an agreement with the apparent acquisitor, in good faith, ignorant that his debtor has an asset which is the object of a simulation.

If the creditor of the apparent acquisitor knew that the respective asset is, in reality, not his debtor's, than he will have the status of creditor of bad faith concerning the simulation and will now be able to ask for the benefit of inopposability.

It may be even the case that the creditor is in collusion with the parties of the simulation, being himself a party and trying to further the dishonest and fraudulent activity in order to harm the interests of other creditors or objective successors.

In this case, of course, the creditor will be held by the true contract which contains the true will of the parties, as he was truly aware of its existence.

However, is the creditor of the apparent acquisitor is of good faith he will be able to prevent the effectiveness of the real, but hidden contract, but only under the special conditions of art. 1.291 C.civ. : the secret contract is not effective against the creditors of the apparent acquisitor who, in good faith, registered their foreclosure proceedings in the land registry or obtained a seizure of the asset object of the simulation.

Thus, unlike the protection offered by the Romanian lawmaker for the creditor of the apparent seller, the legislator offered the special benefit of inopposability for the creditor of the apparent acquisitor only if he fulfills the conditions mentioned above because of one important factor : the creditor of the apparent buyer will fight to obtain an extra benefit, another asset for him to foreclose upon, while the creditor of the apparent seller will fight to prevent a loss, than of an asset. Between these contrary interests, naturally, the Romanian law maker preferred the person who is fighting to prevent a loss, rather than the person fighting to win further benefits.

### 3.4. Effects of the simulated contract between third parties

The lawmaker of the New Civil Code has not only included norms to settle the relationship between the parties of the simulation and third parties, but also between third parties.

Art. 1.290 stipulates that the true contract cannot be opposed by the creditors of the apparent seller against the third parties, objective successors, who gained rights from the apparent acquisitor.

So in this case, the law states that the objective successors of the apparent acquisitor are preferred rather than the creditors of the apparent seller simply because the first ones, in good faith, gained rights in light of the apparent contract, while the creditors of the apparent seller will bring forth the true will of the parties. This true will manifested in the true, but hidden contract, cannot be made effective against the objective successors who entered into an agreement with the apparent acquisitor considering, in good faith, that the sham contract is real.

On the other hand, art. 1.291 par. 2 stipulates that when there is conflict between the creditors of the apparent seller and the creditors of the apparent acquisitor, the first ones are preferred if their claim is previous to the sham contract.

Indeed, this position of the lawmaker is contrary to the previous one, giving priority not to the creditors of the apparent acquisitor who considered, in good faith, the apparent contract to be the real one, but rather to the creditors of the apparent seller.

This is because, as mentioned above, the creditor of the apparent seller is generally the direct "victim" of the simulation and he fights against a loss, while the creditor of the apparent acquisitor fights only to enrich the assets of this own debtor.

## 4. Conclusions

The typical effect against third parties of the simulation is usually inopposability of the true will of the parties, as the sham, but apparent contract will be the only one to be effective against these third parties because it is the only one who is shown to the world and any person, entering into an angreement with the parties of the simulation will know only of the apparent contract and not of the true will of the parties.

Thus, the Romanian lawmaker gave this important benefit to the third parties taking into consideration that they acted in good faith and deserve to win against the fraudulent intent of the parties who chose to "lie" in order to protect their interests.

However, as we have seen, difficulties may appear when third parties have conflicting interests, some having interests to uphold the real, but hidden contract, while others choosing to uphold the sham, but apparent contract.

In this situation the New Civil Code offers us just solutions, trying to curtail the myriad of interpretation given in the past by the Romanian courts as well as the Romanian law literature.

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# EU FACILITATES NEW RULES FOR CROSS-BORDER MOBILITY OF COMPANIES

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**Abstract**

*Legal certainty is needed in the Company Law area, and this could be obtained if all the factors act jointly to achieve this aim by introducing division and conversion regulation, improving legal framework on mergers and in this manner create for company law the possibility to interact properly with EU legal framework specially designed to ensure that cross border operations will not be used in abusive way.*

*The proposed Company Law Package by the European Commission which consists of two proposals for Directives amending Directive (EU) 2017/1132:Directive as regards the use of digital tools and processes in company law and Directive as regards cross-border conversions, mergers and divisions will achieve its best results only when both instruments could work together, complementing each other. Online solutions for European businesses so that they cut costs and save time and the choice of where to do business and how to grow or reorganise their businesses for honest entrepreneurs should push for a fairer modern Single Market. For the first time in European Union law, rules are provided for cross border conversions and divisions and the regime of cross border merger is improved, the legal framework being adapted to the economic and social realities.*

**Keywords:** *conversions, divisions, freedom of establishment, artificial arrangement, safeguards for employees*

## 1. Introduction

On 25 April 2018 the European Commission adopted the "Company Law package", which consists of two proposals for Directives amending Directive (EU) 2017/1132, the Directive as regards the use of digital tools and processes in company law ('digitalisation') and Directive as regards cross-border conversions, mergers and divisions ('mobility')[1].

The proposed rules of Mobility directive aim to regulate the uncontrollable behavior of companies, which are using some sequential operations to achieve a final scope, freedom of establishment, because of the lack of provisions in the field of conversions and divisions[2]. Legal certainty is needed in the Company Law area, and this could be obtained if all the factors act jointly to achieve this goal by introducing division and conversion regulation, improving legal framework on mergers and in this manner create for company law the possibility to interact properly with EU legal framework specially designed to ensure that cross border operations will not be used in abusive way.

The following paper is an introductory one and intends to look at the content of the Proposal with a special regard to conversions and divisions providing an overview of the safeguards for employees and also of " artificial arrangement" concept red in conjunction with freedom of establishment under art.49 of TFEU.

## 2. Content

### 2.1 Artificial arrangement and freedom of establishment

As article 49 TFEU[3] provides "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital".

In cross border mobility area, the ECJ has addressed the issue on the basis of the freedom of establishment under Art. 49 TFEU in a series of

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[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:241:FIN

[2] For instance, a company might divide at national level and merge cross-border with another company or create a new company abroad and transfer part of their assets and liabilities to newly created company. Also in the absence of clear rules on cross border conversions, a company could also be wound – up and created a new one in another MS

[3] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN

judgments in the last decade[4]with a special concern in the matter of the obstacles which Member States can raise in the case of a cross border transfer, the problem of the transfer of seat being already on the legislative agenda since 1997 .[5]One of the important topics in this area is possible circumvention of the rules through an artificial arrangement aimed at obtaining undue tax advantages or unduly prejudging the rights of minority shareholders, creditors or employees. As European Parliament stated in its Explanatory Statement to the Draft Report on the proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions drawn by Committee on Legal Affairs[6], *"the creation of artificial arrangements, so-called „letterbox-companies", „shell-companies" or „front subsidies" needs to be prevented. Letterbox-companies are artificial creatures of company law, which is therefor the appropriate and best place to tackle their formation as such. They are established by registration in a Member State while conducting its business in other Member states, with the aim to avoid national tax laws, social security contributions, collective agreements, employee participation laws or other national laws affected"*.

The proposed Directive does not provide for a definition of " artificial arrangement" which at this stage we consider it was a wise regulatory choice. The text only indicates in Article 86 c para 3 that the kind of artificial arrangement that could lead to a refusal of the competent authority to authorise cross border operation must be aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority members. As in Cadbury Schweppes case was observed , restricting freedom of establishment on the ground of prevention of abusive practices, must have the objective to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory. However the proposed grounds ( undue tax advantages and undue prejudice caused to employees, creditors or minority members) are vague, not allowing to Member States much flexibility regarding the needed control in their own legal systems. Also, with the instruments already provided by Article 6[7] of Council Directive (EU) 2016/1164of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, the question whether an ex-ante examination of possible tax abuse is really needed may rise.Nevertheless, some difficulties could also appear while competent authorities should have to carry out an extensive assessment of the possible aims of a the cross-border conversion.There may be other corporate schemes that could be considered "artificial arrangement", without targeting the effective economic activity in the destination Member State or other forms of evasion or circumvention of company's obligations.

On the other hand, considering the ECJ case law "the fact that it [a company] has its registered office and its activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct" (*Centros*, C-212/97, para 29). Therefore, even a letterbox company is entitled to enjoy the freedom of establishment, provided that it does not infringe any law. The ECJ held that the freedom of establishment is applicable when the registered office alone, without the real head office, is transferred from one Member State to another if the Member State of new incorporation accepts the registration of a company even without the exercise of an economic activity there: in that case Article 49 TFEU does not require such an economic activity as a precondition for its applicability.[8]

The proposed rules on Mobility Directive found a compromise solution on the matter and introduced rules ensuring a scrutiny of the legality of the cross-border operation ( conversion and division) in two phases. During the first phase, limited to one month, the competent authority would examine whether the cross-border operation is lawful determining if all conditions laid down in the Directive and in national law are fulfilled, including the solvency of the company, the approval of the operation at a general meeting and if employees, minority shareholders and creditors are protected. During this phase, the authority would also determine whether there is an artificial arrangement. If at the end of a one month period the authority has no objections, it would issue a pre-conversion certificate or would refuse to grant a pre-conversion certificate if it is certain that the cross-border conversion/division is

[4] C-81/87 Daily Mail, C-212/97 Centros, C-208/00 Überseering, C-167/01 Inspire Art, C-411/03 Sevic, C-196/04 Cadbury Schweppes, C-210/06 Cartesio, C-378/10 VALE Építésikft, C-371/10 National Grid Indus BV, C-106/16 Polbud - Wykonawstwo

[5] Proposal for a Fourteenth European Parliament and Council Directive on the Transfer of the Registered Office or the de facto head office of a company from one Member State to another' of 20 April 1997

[6]Draft Report on the proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions( COM(2018)0241 – C8-0167/2018 –2018/0114(COD))Committee on Legal Affairs, http://www.europarl.europa.eu

[7] *Article 6* General anti-abuse rule

1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.

2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

[8] C-106/16 Polbud - Wykonawstwo

unlawful. Alternatively, if at the end of this period it has serious concerns that the conversion/division may be unlawful, it would inform the company that it will carry out an in-depth examination as regards the existence of abuse as referred to above.The assessment of the legality of cross-border conversions/divisions by the competent authority of a departure Member State in respect to the procedure governed by the respective national laws is provided by Articles 86m and 86n for conversions and Article 160o and 160p as regards the legality of the cross-border division and in this case it will be conducted by the competent authority of a Member State to which jurisdiction the company being divided is subject.

Member States shall ensure that competent authorities may consult other relevant authorities with competence in the different fields concerned by the cross-border conversion or divisions. The competent authority shall examine the draft terms of the operation, the reports referred to in Articles 86e, 86f and 86g, as appropriate, information on the resolution of the general meeting to approve the conversion referred to in Article 86i, all comments and opinions submitted by interested parties in accordance with Article 86h(1) and an indication by the company that the procedure referred to in Article 86l(3) and (4) has started, where relevant.The assessment shall conduct to the issuance of the pre operation certificate if it is determined that the conversion or the division falls within the scope of the national provisions transposing the Directive, that it complies with all the relevant conditions and that all necessary procedures and formalities have been completed.The same result is reached in situations when the competent authority determines that the cross-border conversion does not meet all the relevant conditions or that not all necessary procedures and formalities have been completed and the company, after being invited to take the necessary steps, complies with the legal requirements.Where the competent authority has serious concerns that the cross-border conversion constitutes an artificial arrangement it may decide to carry out an in-depth assessment and shall inform the company about its decision to conduct such an assessment and of the subsequent outcome.As provided by Article 86 c para 3 and Article 86 m of the Proposal, Member States shall ensure that the competent authority of the departure Member State shall not authorise the cross-border conversion where it determines, after an examination of the specific case and having regard to all relevant facts and circumstances, that it constitutes an artificial arrangement aimed at obtaining undue tax advantages or at unduly prejudicing the legal or contractual rights of employees, creditors or minority members. Article 160o para 7 provides for divisions the same treatment, ruling that where the competent authority has serious concerns that the cross-border division constitutes an artificial arrangement referred to in Article 160d(3), it may decide to carry out an in-depth assessment in accordance with Article 160p and shall inform the company about its decision to conduct such an assessment and the subsequent outcome. In the in depth assessment procedure, as described in Article 86n and corresponding Article 160p for divisions, the competent authority of the departure Member State carries out all relevant facts and circumstances and shall take into account at a minimum the following: the characteristics of the establishment in the destination Member State, including the intent, the sector, the investment, the net turnover and profit or loss, number of employees, the composition of the balance sheet, the tax residence, the assets and their location, the habitual place of work of the employees and of specific groups of employees, the place where social contributions are due and the commercial risks assumed by the converted company in the destination Member State and the departure Member State, elements which may be only considered as indicative factors in the overall assessment and therefore shall not be considered in isolation. The in-depth examination must be concluded and a final decision must be taken within two months. However, as stated in recital 22, this in-depth assessment should not be carried out systematically, but it should be conducted on a case-by-case basis, where there are serious concerns as to the existence of an artificial arrangement. After having received a pre-conversion certificate, and after verifying that the incorporation requirements in the destination Member State are fulfilled, the competent authorities of the destination Member State should register the company in the business register of that Member State. It should not be possible for the competent authority of the destination Member State to challenge the accuracy of the information provided by the pre-conversion and pre-division certificate. In the case of conversion, the converted company should retain its legal personality, its assets and liabilities and all rights and obligations, including rights and obligations arising from contracts, acts or omissions(from Article 86b para (6)'converted company' means the newly formed company in the destination Member State from the date upon which the cross-border conversion takes effect and the term " newly" could lead to the idea that the two companies are different but the legal personality will be retained in conversion cases).

Scrutiny of the legality of the cross-border conversion/division by the destination Member State regards that part of the procedure which is governed by the law of the destination Member State.For this purpose, the company carrying out the cross-border conversion/division shall submit to the authority of the destination Member State the draft terms of the cross-border conversion/division approved by the general meeting.In the case of cross border division, the scrutiny of legality regards the recipient companies governed by the law of another Member State and the compliance with provisions of national law on the incorporation of companies .For both cross border operations, the competent authority from the destination Member State shallconfirm receipt of the

pre-conversion certificate issued by the competent authority from the departure Member State and issue a decision to approve the cross-border conversion as soon as it has completed its assessment of the relevant conditions, accepting the pre-conversion certificateas conclusive evidence of the proper completion of the procedures and formalities under the national law of the departure Member State.

**2.2. Safeguards for employees**

In the Impact Assessment accompanying the Proposal[9], European Commission underlined as an objective for the initiative the harmonization of procedures and safeguards which are considered necessary to facilitate cross-border operations while preventing their use for abusive purposes.In terms of stakeholder protection, harmonised procedural rules for conversions and divisions will result in a predictable and reliable legal framework for employees, creditors and minority shareholders.

The proposed safeguards include for all cross-border operations (cross-border mergers, divisions and conversions) a new report prepared by the company's management to the employees and the possibility to provide an opinionon it ( the opinion is already possible to be provided under Article 124 of Directive (EU) 2017/1132 of the European Parliament and of the Councilof 14 June 2017relating to certain aspects of company law(codification) for cross border mergers)and different and stronger rules on employees participation.

The report should explain in particular the implications of the proposed cross-border conversion/division on the safeguarding of the jobs of the employees, material changes in the employment relationships and the locations of the companies' places of business and how each of these factors would relate to any subsidiaries of the company.The provision of the report should be without prejudice to the information and consultation proceedings instituted at national level following the implementation of Directive 2002/14/EC of the European Parliament and of the Councilor Directive 2009/38/EC of the European Parliament and of the Council.As provided in Article 86 f and Article 160h, the report shall be made available, at least electronically, to the representatives of the employees of the company carrying out the cross-border conversion/being divided or, where there are no such representatives, to the employees themselves not less than two months before the date of the general meeting that approves the operation.The report shall also be made similarly available to the members of the company being divided.The opinion of the representatives of their employees, or, where there are no such representatives, from the employees themselves, as provided for under national law, shall be appended to the report.

Another protective provision, inspired from Article 133 para 7 of Directive ( EU)2017/1132 was extended also to conversions and division envisagingthat during 3 years following the cross-border division or conversion, the company would not be able to perform a subsequent cross-border or domestic operation which would result in undermining the system of employee participation.

For cross-border divisions and conversions, the existing rules on employee participation in cross border mergers are maintained but with some differentiation compared to cross-border mergers, aimed to discourage the potential misuse of the operation in order to avoid the employee participation rules throughout the division of the company into smaller ones or by using the changes in the law applicable to it. There are two different legal sources to draw from as regards the protection of employee participation in existing EU legislation.

The provisions governing the European company (SE) were adopted on 8 October 2001, as a turning point in the history of European corporate law. Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees are both the result of long years debates between Member States concerning a transnational form of company partnership The Regulation sets out the corporate-law principles for the SE, while the SE Directive supplementing the SE Regulation provides for the involvement of employees in such an SE.

As a next step the Council of the European Union adopted Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. The Directive provides for the requirements under corporate law and under the legal framework governing employee participation rights that must be met in the event of cross-border merger of companies established under different laws and with different legal forms. The provisions of the Directive on mergers have been included in Article 133 of Directive (EU) 2017/1132.

On the one hand, there are rules in directive 2001/86/EC supplementing the Statute for a European company regarding employee participation, on the other hand, there are slightly modified rules in place for the current cross-border merger regime in Article 133 of directive 2017/1132 relating to certain aspects of company law.The concept underlying the compromise achieved by the SE Directive as regards the involvement rights of employees is the "before-and-

[9] Commission Staff Working DocumentImpact AssessmentAccompanying the documentProposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company lawandProposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions

after-principle." This stipulates that the involvement rights that employees enjoyed in the founding companies prior to the SE being established are not to be lost as a consequence of the foundation of the SE and will serve as the basis on which to negotiate the employees' participation rights (the principle of protecting acquired rights).

Negotiations are pursued by the representatives of the company and the employee on how to structure the involvement rights of employees in the SE

In the event of the negotiations failing, a statutory standard rule applies that serves to secure, for the most part, the employee involvement rights existing in the enterprises forming the SE.

The Proposal provides that the companies would be obliged to negotiate an employee participation system in case of the cross-border division or conversion even if the company being divided or carrying out a cross-border conversion would not be operating under the employee participation system.According to Article 86l, the company resulting from the cross-border conversion shall be subject to the rules in force concerning employee participation, if any, in the destination Member State.

However, the rules in force concerning employee participation, if any, in the destination Member State shall not apply, where the company carrying out the conversion has, in the six months prior to the publication of the draft terms of the cross-border conversion an average number of employees equivalent to four fifths of the applicable threshold, laid down in the law of the departure Member State, which triggers the participation of employees within the meaning of point (k) of Article 2 of Directive 2001/86/EC. Also the rules in force in the destination Member State should not apply where the national law of the destination Member State does notprovide for at least the same level of employee participation as operated in the company prior to the conversionorprovide for employees of establishments of the company resulting from the conversion that are situated in other Member States the same entitlement to exercise participation rights as is enjoyed by those employees employed in the destination Member State.Maintaining a similar rationale, Article 160n provides for cross border divisions the same approach, stating that each recipient company shall be subject to the rules in force concerning employee participation, if any, in the Member State where it has its registered office with similar exceptions as for conversions as regards the provisions in national law of the recipient companies.

Even the proposed rule regarding the four fifths threshold could serve to prevent the circumvention of employee participation rights it will be still possible for the representatives of the enterprise unilaterally to cause the failure of the negotiations.In such case standard rule applicable would be meaningless since the threshold for employee participation rights in the original Member State has not been reached.

### 3. Conclusions

The proposal aims to establish clearer rules and adjustments of company law to cross-border mobility of companies in the EU, maintaining the balance between procedures on cross-border operations that need to exploit more the potential of the Single Market and the protection against abuse of employees, creditors and minority shareholders. Recent studies showed that between 2014 and 2016, there was a minimal rise of cross border transfers of seat each year, with 44, 46 and 53 CBSTs respectively a rise being registered in 2017 to 134 CBSTs.[10] On political level, trade unions and the European Parliament were not totally satisfied by the Proposal, militating for a stronger regime for information and consultation rights addressed to the workers, including the involvement of the European Work Council if existing, for a strengthen regime of board-level participation rights for employees, after the cross border restructuring and for stopping the cross border operation aimed to circumvent tax rules or employer obligations. One must admit the existing differences in the Proposal between the procedures of the cross-border merger on the one hand and the crossborder conversion and division on the other may affect the attractiveness of the latter and also that not in all instances the rules on cross-border conversions, mergers, and divisions are internally harmonised which could have been a desirable approach.

In a more positive note, as stated in other analyses of this topic[11], ECJ's judgments decisions on freedom of establishment of companies identify the role for Community secondary legislation rather than remove the need for it and the Proposal is a first welcomed major step in this area. A provisional agreement was reached with the European Parliament on 13 March on the directive that facilitates EU companies' cross-border co+nversions, mergers and divisions and on 27 March Member States' ambassadors, sitting in Coreper, endorsed this important compromise. The future papers on this matter intend to scan the agreed text starting from the initial provisions of the Proposal trying to explain the need and feasibility of the common ground found by the co legislators in this area.

[10] Biermeyer, Thomas and Meyer, Marcus, Cross-border Corporate Mobility in the EU: Empirical Findings 2018 (September 21, 2018). Available at SSRN: https://ssrn.com/abstract=3253048 or http://dx.doi.org/10.2139/ssrn.3253048

[11] Davies, Paul L. and Emmenegger, Susan and Ferran, Eilis and Ferrarini, Guido and Hopt, Klaus J. and Moloney, Niamh and Opalski, Adam and Pietrancosta, Alain and Roth, Markus and Skog, Rolf R. and Winner, Martin and Winter, Jaap W. and Wymeersch, Eddy O., The Commission's 2018 Proposal on Cross-Border Mobility – An Assessment (September 27, 2018). European Company and Financial Law Review Forthcoming; Oxford Legal Studies Research Paper No. 25/2018. Available at SSRN: https://ssrn.com/abstract=3257846 or http://dx.doi.org/10.2139/ssrn.3257846

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# THE LEGAL DIFFICULTIES GENERATED BY THE ALTERATION OF THE PROVISIONS REGARDING THE HEARING OF WITNESSES BY THE COURT WITHIN THE CIVIL PROCEDURAL CODE

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**Abstract**

*Since Law no. 310/2018 has altered the legal provisions of the Civil procedural code regarding the way in which witness testimony is to be obtained, a certain number of difficulties have been generated due to the fact that the actual hearing of witnesses has to occur in a radically different manner, thus imposing on the court some obligations which may prove troublesome in the future. The paper aims to establish some proper practices, in terms of ensuring for all parties a fair trial whilst also abiding by the new legal solutions.*

**Keywords:** *Civil procedural code Problems Witness Testimony Hearing Proper Conduct of the Court*

## 1. Introduction

### 1.1. What matter does the paper cover?

The article shall endeavour to establish a preliminary point of view regarding the effects of Law no. 310 which was adopted in 2018 on the plaintiff, the defendant but also on what it implies for the judge should it apply the new provisions to the letter.

It shall also attempt to identify potential solutions needed to avoid legal difficulties generated by the new alterations to the Civil procedural code, including interpreting the text in accordance with the other relevant legal provisions, analysing the opportunity of a *de lege ferenda* effort and ultimately the necessity of implicating the Constitutional Court of Romania into the matter at hand.

### 1.2. Why is the studied matter important?

The study matter is paramount because there are a great deal of cases in which witnesses are heard by the court. It should always ensure that witness testimony is obtained in a legal mannor and in accordance to both the national legal provisions but also the European Court of Human Rights case law. The impact of witness testimony on the outcome of trials cannot be refuted and hence the necessity of identifying a workable legal method of administering the evidence, in circumventing potential problems which may arise.

### 1.3. How does the author intend to answer to this matter?

It is hoped to reach the objective of offering a very detailed outlook on the effects of the alteration via the analysis of the legal texts which are applicable, the point of view of both the legal authors which have analysed the effects of the new alterations but also that of prominent legal authors who have offered a clear perspective on the institution in general prior to the new law. By analysing the consequences of the altered legal text in-depth, it is hoped to achieve some results in offering the reader a viable option in terms of applying the specific legal provisions.

### 1.4. What is the relation between the paper and the already existent specialized literature?

The specialised literature has addressed the institution of witness testimony in general and there are also some legal authors who have attempted to shed some light on the new modifications. The paper shall attempt to utilise their insight and further advance the topic in gaining a perspective as detailed as possible of what it means for future trials for the judge to enforece the will of the legislator.

## 2. The legal applicable texts

Firstly, our national Civil procedural code[1] outlined in Article no. 321 the initial legal framework regarding the method in which the hearing of witnesses took place: " *Each witness will be listened separately, and without the presence of those who are have been yet heard.*

*(2) The order of hearing witnesses shall be fixed by the President, taking into account the request of the parties.*

*(3) The witness shall first answer the questions of the chairman and then the questions asked, with his consent, by the proposing party as well as by the opposing party.*

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[1] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Gazette of Romania no. 247 of April 10, 2015.

*(4) After the hearing, the witness shall remain in the sitting room until the end of the investigation, except if the court decides otherwise.*

*(5) At the hearing, the witness shall be allowed to freely express his testimony, without being allowed to read a previous written answer; but he can employ the use of notes, with the President's approval, but only to specify figures or names…".*

The procedure was also regulated in Article no. 322 and 323 of the Civil procedural code[2]: " *Witnesses can be asked again if the court finds fit.*

*(2) Witnesses whose statements do not fit can be confronted.*

*(3) If the court finds that the question raised by the party can not lead to solving the case, is offensive or tends to prove a fact whose proving is forbidden by the law, it will dismiss it. The court will,* ***at the request of the party****, shall write down both the question and the reason why it was not approved.*

*Art. 323. - (1) The testimony shall be written by the clerk, after the dictation of the president or the delegated judge, and shall be signed on each page and at the end of it by the judge, the clerk and the witness, after he has become aware of the contents. If the witness refuses or can not sign, it will be mentioned at the end of the minute.*

*(2) Any additions, deletions or changes in the testimony must be approved and signed by the judge, the clerk and the witness, under the sanction of not being taken into account.*

*(3) Unfilled places in the statement must be barred with lines so that no additions can be made.*

*(4) The provisions of art. 231 par. (2) shall apply accordingly. "*

However, with the advent of Law[3] no. 310 passed in 2018, certain alterations have been made to these legal texts: " *(1) Each witness will be listened separately, and without the presence of those who are have been yet heard.*

*(2) The order of hearing witnesses shall be fixed by the President, taking into account the request of the parties.*

*(3) The witness shall first answer the questions of the chairman and then the questions asked, with his consent, by the proposing party as well as by the opposing party.*

*(4) After the hearing, the witness shall remain in the sitting room until the end of the investigation, except if the court decides otherwise.*

*(5) At the hearing, the witness shall be allowed to freely express his testimony, without being allowed to read a previous written answer; but he can employ the use of notes, with the President's approval, but only to specify figures or names.*

*(6) If the court finds that the question raised by the party can not lead to solving the case, is offensive or tends to prove a fact whose proving is forbidden by the law, it will dismiss it.* ***In this situation, the court will write down the name of the party and the question asked and the reason why it was not approved.***

***(7) If the question is approved, the question, together with the name of the party who formulated it, followed by the witness's response, shall be literally recorded in the witness statement according to the provisions of Art. 323 par. (1).***

*Art. 322. - (1) Witnesses may again be asked, if the court finds fit.*

*(2) Witnesses whose statements do not fit can be confronted.*

*(3) 'repealed'*

*Art. 323. - (1) The testimony shall be written by the clerk,* ***who shall record the witness's statement in a exact and literal manner****, and shall be signed on each page and at the end of it by the judge, the clerk and the witness, after he has learned of the contents . If the witness refuses or can not sign, it shall be mentioned at the end of the statement.*

*(2) Any additions, deletions or changes in the testimony must be approved and signed by the judge, the clerk and the witness, under the sanction of not being taken into account.*

*(3) Unfilled places in the statement must be barred with lines so that no additions can be made.*

*(4) The provisions of art. 231 par. (2) shall apply accordingly. "*

Also, very relevant to the issue at hand are the findings of the Constitutional Court of Romania[4] in terms of the similar obligation to write down the exact testimony of the defendant during a criminal trial:" *465. In analyzing the criticized legal text, the Court notes that it provides the obligation to* ***literally record the suspect or defendant's statements by the judicial body or by the court****. According to the Explanatory Dictionary of the Romanian language, "exactly" has the meaning "exactly the same", and "literally" has the meaning "that is done, is reproduced word by word, letter by letter; textual, exact". Therefore, the statement must be worded word for word reproduces exactly what the suspect or defendant conveys.*

*466. However, under the procedural provisions mentioned above there are sufficient safeguards to properly record the suspect's or the defendant's statements, and Article 110 (2) of the Code of Criminal Procedure provides that if he should agree with the content of the written statement, the suspect or defendant shall sign it, and if there are any additions, corrections or explanations to be made, they can be indicated in the end of the statement, followed by the*

[2] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Gazette of Romania no. 247 of April 10, 2015.

[3] Law no. 310/2018 for amending and completing the Law no. 134/2010 on the Civil Procedure Code, as well as for amending and completing other normative acts published in the Official Gazette of Romania no. 1174 of November 25, 2008

[4] DECISION no.633 of 12 October 2018 on the objection of unconstitutionality of the provisions of the Law for amending and completing the Law no. 135/2010 on the Criminal Procedure Code, as well as for amending and completing the Law no.304 / 2004 on the judicial organization

*signature of the suspect or the defendant. The newly introduced obligation appears not only as excessive and burdensome for the authorities but it is likely to create difficulties in the enforcement work, with consequence of delaying or blocking the act of justice.*

*467. The Court therefore considers that the criminal procedural provisions in force contain sufficient safeguards to respect the rights of the defense suspect or defendant, so that the provisions of art. I, item 55, related to paragraph (1) of the Code of Criminal Procedure, are unconstitutional with respect to the phrase "exactly and literally", which is likely to prejudice the parties right to a fair trial, within a reasonable time. "*

## 3. The opinion of the legal authors

Bozeșan was among the first to notice that it is the obligation of the court to request to the clerk to write down the question of the party *ex oficii* and not only when it is formally solicited by one of the parties.[5]

He has also commented regarding another key difference, in terms that it is the obligation of the court to literally write down witness testimony but without being able to raise any criticisms regarding this change.[6]

In terms of in which cases is the judge obligated to proceed according to the new guidelines, it has been noted that in relation to article 26 paragraph 2 of the Civil procedure code the administration of evidence is to be conducted in accordance to the law at that particular moment in time. [7]

A collective of prominent authors have put together a study regarding the modifications to the Civil procedural code[8] stating that that the new alterations are applicable even to cases iniated prior to the entry into force of the law when it comes to the procedure regarding witness testimony.

They have also delved into the necessity of using technical support in order to further ensure that the procedure is followed as smoothly as possible: " *In any case, we believe that it would be appropriate either for witness testimony to be recorded audio-video and technical storage support would constitute the means of proof, which would alleviate some inconveniences of the re-examination of testimony by the superior court, respectively whether the judge sums up the witness's statement as a precedent or gives it a more concise and intelligible form, as the parties and the witness himself can of course challenge, as before, the concrete way of dictating and recording the witness's statement.* "[9].

Traditionaly, other important legal authors[10] have refrained from expressing any views regarding the necessity for the solution to be implemented by the legislative authorities.

The most prominent author[11] in the field has offered a most useful definition of the testimony: " The testimony, could be defined as the oral statement made by a natural person, before the court, regarding **to a precise and pertinent fact he is personally aware of**. ".

## 4. The interpretation of the author

Firstly, the analysis should begin with the actual definition of the testimony provided by the most prominent author in the field who has clearly and explicitly stated that is deals with precise and pertinent facts that the witness has come into contact.

Despite the fact that the definition has been provided by the author prior to the alterations made to these legal texts it is still very much applicable even to the new situation.

This one first important issue, which can be derived from the opinion of the legal authors in full accordance to the legal text, is the fact **that the court is called upon to decide what specific issues in the witness speech can be integrated** in the *stricto sensu* notion of testimony.

Indeed, the parties should be allowed to express their views regarding the opportunity to write down certain facts which could prove more relevant further on in the trial.

However, the judge is the soul actor in this particular play which is allowed to decide how much of what the witness speaks about can be actually integrated in the witness testimony.

This is paramount, and is one of the reasons why the article deals with this aspect first.

There can be no doubt that the judge should be allowed to censor or limit what the witness actually speaks about, in terms of limiting the number of words in the witness testimony so as to ensure a proper

[5] Bozeșan, V. ( 2019), „ *Codul de procedură civilă actualizat la 10 ianuarie 2019*", ed. Solomon, București, p. 108
[6] Bozeșan, V. ( 2019), „ *Codul de procedură civilă actualizat la 10 ianuarie 2019*", ed. Solomon, București, p. 108
[7] Bozeșan, V. ( 2019), „ *Codul de procedură civilă actualizat la 10 ianuarie 2019*", ed. Solomon, București, p. 109
[8] *Traian Cornel BRICIU, Mirela STANCU, Claudiu Constantin DINU, Gheorghe-Liviu ZIDARU, Paul POP,,, Comentarii asupra modificării noului Cod de procedură civilă prin Legea nr. 310/2018. Între dorința de funcționalitate și tendința de restaurație", last modification 12.02.2018. https://www.juridice.ro/essentials/2901/comentarii-asupra-modificarii-noului-cod-de-procedura-civila-prin-legea-nr-310-2018-intre-dorinta-de-functionalitate-si-tendinta-de-restauratie#_ftn3*
[9] *Traian Cornel BRICIU, Mirela STANCU, Claudiu Constantin DINU, Gheorghe-Liviu ZIDARU, Paul POP,,, Comentarii asupra modificării noului Cod de procedură civilă prin Legea nr. 310/2018. Între dorința de funcționalitate și tendința de restaurație", last modification 12.02.2018. https://www.juridice.ro/essentials/2901/comentarii-asupra-modificarii-noului-cod-de-procedura-civila-prin-legea-nr-310-2018-intre-dorinta-de-functionalitate-si-tendinta-de-restauratie#_ftn3*
[10] *Răducanu, G., Dinu, M., „ Fișe de Procedură Civilă ", Ed. Hamangiu, București, 2016, p.208*
[11] Boroi, G. (ed.), (2013), „Noul Cod de Procedură Civilă Comentat, vol.2 " [The Commented New Civil Procedural Code, vol. 2 ], București: Ed. Hamangiu, p. 639.

continuity and a trial which lasts a reasonable amount of time.

Failure to do so can and would actually result in chaos in the courtroom, since most often than not witnesses do not know what the judge is actually interested in.

For example, the witness may choose to express his views regarding the relationship between the plaintiff and the defendant in general whereas the judge **may be interested in details regarding a specific period**.

It should come as no surprise for the reader that the judge is still entitled to this right, namely to decide which aspects of the witness statement can actually be referred to as witness testimony.

In terms of the obligation for the court to write down all the questions addressed to the witness by each party in particular, it's application is very clear but it's consequences are more than open to discussion.

This is when the opinion of the Constitutional Court of Romania becomes extremely relevant. When it was asked to provide insight into whether or not the obligation to literally write down the accused' statement word for word was in fact unconstitutional.

There is no reason why this line of thinking is not applicable also for the civil trial.

The right of the parties for both a fair but also swift trial as stated in article 6 of the Civil procedure code is clearly infringed upon with the advent of this new alteration.

One mal-intended party may choose to create chaos in the courtroom by addressing a great number of questions to the witness so as to obligate the judge to make the clerk write down each and every one of them.

Should the judge refrain from doing so would result in a direct breach of a clearly formulated legal provision.

However, should the judge apply that legal provision as formaly as possible would also result in an infringement of the rights provided by article 6 of the parties to enjoy a trial in a period as short as possible.

It is a significant issue, able to generate far more legal difficulties than it would have solved.

One possible solution would be to alter it in terms of a *de lege ferenda* effort on the part of the legislative authority.

Should it not occur in a reasonable amount of time, another, more direct approach would be to address the Constitutional Court of Romania.

Given the fact that during the criminal trial this was viewed as a problem and the provisions were blatantly considered as unconstitutional a similar solution for the civil trial would seem appropriate.

The problematic provisions are also applicable in cases which have been initiated prior to entry into force of Law no. 310 adopted in 2018, since the administration of evidence is to be conducted in accordance to the legal provisions at that actual moment.

A scenario can be conceived in which should the plaintiff have known about the problem created by the alteration, he would not have resorted to addressing the court with that particular claim and might have sought to resolve the legal conflict in another way, such as adressnig a mediator.

However, since the solution is legally binding, the party is obligated to suffer consequences that he may not have accepted or even known prior to addressing the court.

It is thus also a question of a lack of predictability for the law and one could argue that it could be viewed as an infringement into the right to a fair trial.

Indeed, the court is entitled to apply a fine, as a sanction for the party who chooses to exercise it's legal rights without *bona fide* but this has no bearing on its obligation to make sure that every word spoken by the witness is to be jotted down on a piece of paper.

Also, the necessity for such a alteration is not stringent, given the fact that the whole proceedings are audio recorded. Should any omission committed by the court occur, which may affect on outcome of the trail, it can be easily by simply analysing the audio material later on, during the appeal.

The parties are free to request a copy of the audio file. They are also able to appeal the solution of the first instance court. They need only indicate a specific issue which the witness has pointed out but which the court omitted to analyse in passing it's judgement.

The system initiated after the adoption of the Civil procedure code worked.

New alterations, without a proper analysis, provided is extremely detrimental for all the participants in the trial.

Moving on to the opinion of the legal author in terms of employing technical support so as to make sure that the trial takes place smoothly, can be viewed as a very welcomed idea.

It should be implemented as fast as possible in terms of purchasing for all the courts in Romania dictation software so as to make it easy to abide by the new provisions, should they remain unchanged.

The provisions also make it more difficult for the court to address its control questions to the witness, since everything has to be written down.

Thus, the lawyer of one of the parties, in future cases will have direct access to the method in which the judge verifies the credibility of the witness. He can anticipate what those control questions would be and he can use the information in future trial so as prepare the witness for addressing them in the hopes of validating his credibility, despite it lacking.

Overall, these provisions are detrimental in this respect and in the long term may affect the right of the parties to a fair trial in the future since a most important tool of the judge, namely the process of verifying the credibility of testimonies may be hindered severely.

This is not in the best interests of any of the parties and can lead to very problematic situations in which the witness who is not expressing the truth has

been prepared prior to his testimony to answer those specific control questions which are to be addressed by the diligent judge.

Thus, it would be far easier for the witness to pass this most important checkpoint during the trial and later to provide false testimony, which would greatly disadvantage the opposing part.

Consequently, the legislator, without knowledge, may have hindered these very necessary efforts left in the care of the judge and may have severely damaged the right to a fair trial for future parties who will be at the mercy of false testimonies and malevolant lawyers.

Thus, it becomes very clear that the actions previously mentioned must be taken by both the judge and the other diligent participants in the trial in addressing this issue, which has the potential to create very problematic outcomes that are not in the interests of anyone.

It is normal for the plaintiff to initiate the trial but also for the defendant to participate in it, knowing that the judge has an arsenal of methods at its disposal intended to verify the authenticity of the witness testimony.

## 5. Conclusions

### 5.1. Summary of the main outcomes

As the analysis is about to be concluded, it is evident that some of the alterations are unuseful and should be rectified as soon as possible, either by means of a new modifying law or with the intervention of the Constitutional Court of Romania.

For the moment the effects of the modifications are somewhat limited but as time passes by it will become more evident that in the long term its effects are ill.

Now is the time to act to address the issue at hand and minimise the effects as much as possible in order to protect the rights of the party who sooner or later may suffer an infringement.

### 5.2. The expected impact of the research outcomes

It is hoped that the reader of the article shall endeavour on his own to analyse the effects of the alterations and reach his or her own conclusions regarding the issue at hand.

Should he find the conclusions offered in the paper as valid, it is expected that he joins the effort of addressing the alterations particularly in terms of minimising the negative impact as much as possible. Time is of the essence.

### 5.3. Suggestions for further research work.

Future research work could be focused on potential modifying efforts undergone by the legislator or even the applicability of a potential decision of the Constitutional Court of Romania regarding this issue.

As time passes by, new potential effects which have not been taken into consideration in the early stages after the law was adopted could be the subject of further research in terms of analysing the outcome for both the defendant and the plaintiff, but also what it means for the court to obey its legal obligations stemming from the altered Civil procedural code.

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# THE LEGAL DIFFICULTIES GENERATED BY THE ALTERATION OF ARTICLE NO. 200 OF THE OF THE CIVIL PROCEDURAL CODE

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**Abstract**

*After Law no. 310/2018 modified Article no. 200 of the of the Civil Procedural Code, various difficulties have arisen in practice, due to the fact that the new provisions, in paragraph no. 4 no longer state that the action can be annulled by the court for breach of fulfilling the obligations it established for the claimant during a non-public hearing. Thus, according to some legal opinions, the Court is thus obligated to cite all the parties so that they may give their conclusions on the matter. On the other hand, it has been stated that the Court has no obligation to cite any of the parties upon deciding whether or not to annul the claim. The paper aims to determine which course of action is in accordance to the new provisions and ensures the right to a fair trial for all the parties.*

***Keywords:*** *Articole no. 200 Of the Civil Procedural Code Problems Public Hearing*

## 1. Introduction

### 1.2. What matter does the paper cover?

The paper is intended to provide an accurate description of the main effects standing from the alterations of article no. 200 of the Civil procedure code in terms of analysing the legal texts themselves, the opinion of some noteworthy legal authors.

Finally it shall endeavour to establish some good practices regarding it's application, despite the fact that the modifications are relatively recent. The paper has tried to utilize the first opinions regarding the issue at hand while trying to comprehend the thinking behind the alterations themselves as they have unfolded.

Indeed, there are some positive aspects which have emerged after the decision of the legislative authority to alter these provisions which are also about to be properly analysed.

However, there are also some negative aspects which are derived from the decision to alter the procedure which require a critical eye and a proper interpretation in terms of circumventing potential legal difficulties which may arise.

### 1.2 Why is the studied matter important?

The studied matter is of great importance because there are a huge number of cases in which the court is about to annul the claim.

It is vital for it to proceed in this manner without any dangers of infringing upon the fundamental rights of all the parties involved in the trial.

Even at it's early stages, the keys must be handled with due diligence by the court and no effort should be spared in analysing the alterations and establishing good practices regarding the application of the sanction.

The fact of the matter is that the moment when the claim is annuled, the plaintiff may suffer some very harsh consequences but the way in which the court applies the legal provisions can have a significant impact.

The article in itself attempts to handle rather a new topic, without significant jurisprudence behind it but it shall attempt to surprise the main issues at hand in establishing a legal avenue useful and beneficial for all the participants in the trial.

### 1.3 How does the author intend to answer to this matter?

The author shall identify both the initial form of the article and its final form after the operation and shall attempt to identify some opinions regarding the issue at hand, despite the fact that it is rather early to do so.

However some authors have already tackled the issue early on and can provide a relevant foundation for constructing a proper analysis on the subject.

It shall also analyse potential *de lege ferenda* solutions and it shall also deal with the opportunity of addressing the Constitutional Court of Romania regarding the constitutionality of the new provisions, in how they shall affect the constitutional rights of all the parties involved.

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Finally, some relevant conclusions shall be provided so as to allow for the reader to invest his own efforts into identifying a useful legal pathway.

Indeed, there are some discussions and difficulties which are to be tackled in the paper as a direct consequence of the policy employed by the legislative authority in this particular situation, but the author shall at least attempt to clarify the issue at hand as best as possible.

**1.4. What is the relation between the paper and the already existent specialized literature?**

The paper shall attempt to address the few opinions already expressed in the specialised literature and shall try to reconcile the opposition in them so that the relevant legal texts may be applied in equity.

The authors which are to be analysed have dealt with the issue on some specific level but it is hoped to conduct a more complex analysis of the legal situation created after the adoption of Law no. 310 in 2018. A collective of authors has already provided a most welcomed outlook on all the alterations brought forth by the law, but the paper shall try to complete the work with new ideas regarding what it is needed to avoid the opposing case law by the courts regarding this particular issue.

## 2. The legal applicable texts

Firstly, our national provisions outlined in Article no. 200 of the Civil Procedural Code[3] constitute the **initial** legal framework regarding the annulement procedure in the cases when the party failed to comply to the request made by the court: " *The court to whom the case was randomly assigned shall promptly check whether the claim is within its competence and whether it meets the requirements of art. 194-197.*

*(2) Where the case is not within its competence, the claim shall, by decission given without the summons of the parties, be sent to the competent specialized body or, where appropriate, the specialized section of the competent court. The provisions on noncompetence and conflicts of jurisdiction apply by analogy.*

*(3) Where the application does not meet the requirements of art. 194-197, the applicant shall be notified in writing of the shortcomings, stating that within maximum 10 days after receipt of the communication, he shall make the additions or modifications ordered, under the sanction of cancellation of the request. It is exempt from this sanction the obligation to designate a common representative, in which case the provisions of art. 202 par. (3).*

*(4)* ***If the obligations for completing or modifying the application are not fulfilled within the time limit stipulated in paragraph (3), by decission, given in the council chamber, the application can be annuled.***

*(5) Against the termination of the annulment, the complainant will only be able to make a request for a review to solicit the cancellation measure.*

*(6) The request for re-examination shall be made within 15 days from the date of communication of the rulling.*

*(7) The request shall be settled by a final decision given* ***in the council chamber by another judge of that court,*** *designated by random assignment, who will be able to revert the annulment measure if it has been wrongly taken or the irregularities have been removed within the time allowed according to par. (3).*

*(8) In the event of admission, the case shall be sent back to the initially invested judge.*"

In 2018, the legislative authority has sought to alter these specific provisions, by instituting certain changes regarding the specified article: " *In Article 200, paragraph 4 shall be amended and shall have the following content:*

*"(4)* ***If the obligations regarding the filling in or modification of the application provided in art. 194 lit. a) - c), d) only in the case of factual reasons and f), as well as art. 195 - 197, are not fulfilled within the time limit stipulated in paragraph (3), the application shall be annulled by way of a rulling.*** *"*

*In Article 200, after paragraph (4), a new paragraph, para. (41), with the following wording:*

*"(41) The complainant may not be required to supplement or amend the request for legal action* ***with data or information which he or she cannot personally obtain and for which the court is required to intervene****."*[4]

Lastly, another article of great importance to the study is article 532 of the of the Civil Procedural Code which states that: " *The request shall be judged in the council chamber, with the citation of the petitioner and the persons shown in the application, only if the law so requires. Otherwise,* ***the judgment is made with or without a citation, at the discretion of the court.***

(2) The court may order, of its own decission, any measures which are of use to the case. It has the right to listen to any person who can bring the matter in question, as well as to those whose interests may be affected by the judgment. "[5]

[3] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Gazette of Romania no. 247 of April 10, 2015.

[4] Law no. 310/2018 for amending and completing the Law no. 134/2010 on the Civil Procedure Code, as well as for amending and completing other normative acts published in the Official Gazette of Romania no. 1174 of November 25, 2008

[5] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Gazette of Romania no. 247 of April 10, 2015.

The general provisions[6] regarding the obligation of the court to cite the parties and to conduct all proceedings during a public hearing are: " Art. 14. - (1) The court may decide on an application only after the citation or appearance of the parties, unless the law stipulates otherwise… Article 15 - Oral proceedings shall be dealt with unless the law provides otherwise, or where the parties expressly request the court to make the case only on the basis of the documents submitted to the file... Art. 17. - Judgment sessions are public, except for cases provided by law. "

Article[7] no. 22 establishes a clear obligation for the court to determine the legal applicable texts, should the parties fail to indicate the proper ones: " The judge gives or restores the legal classification of the acts and facts inferred for the judgment, even if the parties have given them another name. In this case, the judge is obliged to bring the exact legal qualification to the parties."

Lastly, article 6 of the Civil Procedural Code[8] states that " Everyone has the right to a fair, timely and foreseeable hearing of his case by an independent, impartial and lawful court. To this end, the court is obliged to dispose of all the measures allowed by the law and to ensure the speedy conduct of the trial. (2) The provisions of paragraph (1) shall also be applied in the forced execution phase. "

## 3. The opinion of the legal authors

Bozeșan was very clear regarding the fact that the omission to mention that the procedure regarding the annulment of the claim for failure to fulfill the obligations established by the court is to occur in a non-public proceeding **represents an error committed by the legislative authority**. It is mandatory for the court to proceed in this fashion, in terms of analysing the fulfilment of the obligations in a non public setting, just as it has been done prior to the modifications.[9]

One of the reasons why the author considers that the annulment should be decided in a non public setting is because the whole procedure in itself is of a non-contradictory nature, in relation to article 532 of the Of the Civil Procedural Code. Firstly, the plaintive has not yet received a copy of the claim, and he may not need to express his point of view regarding the fulfilment of the obligations established by the court for the claimant. Verifying whether or not the claimant has respected the obligations has nothing to do with the rights and obligations which are about to be decided before the court. The sanctions for the initial irregularities of the claim are of a purely formal nature in regards.[10]

Another important aspect is the impossibility for the court to obligate the plaintiff to provide specific information regarding the case for which the intervention of the court is ultimately necessary. However, there clearly remains the necessity for the claimant to fulfill his obligation of due diligence in terms of undertaking all the legal and possible avenues in order to complete his claim with the necessary data mentioned in article 194 of the of the Civil Procedural Code. [11]

Another prominent collective of authors[12] have stated that: " Regarding the elimination of the phrase "given in the council chamber" we appreciate that the modification is based on the correlation with the new form of art. 402 which, as we shall see, no longer requires the judgment to be delivered at a public hearing, so that the exception to that rule would no longer be justified. Unfortunately, the current legislator was mistaken because the expression "given in the council room" was meant the actual place of the judgment, not the place where the solution is to be passed. "

Despite being a most regrettable mistake it has laid the groundwork for the discussions which are to be analysed during this article in terms of interpreting the legal texts so as to ensure for all parties a fair and reasonable trial.

Gabriela Răducan and Mădălina Dinu[13] have also analysed the provisions and clearly established that the annulment procedure is to take place in the council chamber.

The collective[14] has also argued ,,that does not mean, however, that the judgment will now take place in a public hearing. The analysis procedure is, by definition, a non-contentious one, which is to be settled in the council

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[6] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Gazette of Romania no. 247 of April 10, 2015.
[7] Law no. 134 of July 1, 2010 regarding the Civil Procedure Code, republished in the Official Gazette of Romania no. 247 of April 10, 2015.
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[12] ***Traian Cornel BRICIU, Mirela STANCU, Claudiu Constantin DINU, Gheorghe-Liviu ZIDARU, Paul POP,,*** *Comentarii asupra modificării noului Cod de procedură civilă prin Legea nr. 310/2018. Între dorința de funcționalitate și tendința de restaurație"**, last modification 12.02.2018. https://www.juridice.ro/essentials/2901/comentarii-asupra-modificarii-noului-cod-de-procedura-civila-prin-legea-nr-310-2018-intre-dorinta-de-functionalitate-si-tendinta-de-restauratie#_ftn3***
[13] Răducanu, G., Dinu, M., „ Fișe de Procedură Civilă ", Ed. Hamangiu, București, 2016, p.154
[14] Traian Cornel BRICIU, Mirela STANCU, Claudiu Constantin DINU, Gheorghe-Liviu ZIDARU, Paul POP,„ Comentarii asupra modificării noului Cod de procedură civilă prin Legea nr. 310/2018. Între dorința de funcționalitate și tendința de restaurație", last modification

chambers, and which seeks to establish the procedural framework correctly, without presenting a litigious matter in terms of establishing any adverse right in contradiction with the defendant, especially since he does not even know that he has been sued for the simple reason that he has not yet been summoned. Therefore, we consider that by removing from the text the phrase "given in a council room" was intended only to suppress a statement that the legislator considered unnecessary to the new configuration of bringing the judgment to the attention of the public. It is obvious that by amending art. 200 par. (4) of the Civil Procedural Code, the legislator wanted only to remove the possibility to annul the application for failure on the applicant's part to fulfill the obligations stipulated in art. 194 lit. d) and e) of the Of the Civil Procedural Code, without any intention to modify the rules of the regularization procedure.".

The opinion of the above cited collective was also shared by the most prominent author in the field.

Prof. Boroi[15] argued that the annulment procedure is to take place withourt the citation of the parties.

In terms of splitting the two procedures regulated by Article no. 200, the collective[16] has stated that *"Moreover, from the global interpretation of art. 200 Of the Civil Procedural Code, there is no logical argument for the whole annulement to be split between the cancellation phase of the request which would be conducted during a public hearing and, on the other hand, the re-examination procedure to be made in a council chamber, according to the provisions of art. 200 par. (7) of the Civil Procedural Code.*

*In conclusion, we appreciate that, regardless of the deletion of the phrase "given in the council chamber" (4) of art. 200, the annulement shall take place in the council chamber*."

Also, the new provisions after paragraph no. 4 have been the subject of a proper analysis[17]: *"The second amendment of art. 200 of the Civil Procedural Code consists of introducing a new paragraph, par. (4 dash 1), according to which: "the claimant may not be required to supplement or amend the request for legal action with data or information which he or she does not personally posess and for the procurement of which the court is required to intervene*".

*We appreciate the benefit of this clarification of the duties of the claimant in the regularization procedure, in the sense that he will not be guilty of any fault in situations in which he is not in possession of data or information requested by the court and for which it is necessary to intervene…The meaning of this rule is that the applicant will be sheltered from the event of excessive or even abusive application by the court of the sanction provided in art. 200 par. (3) and (4) of the Civil Procedural Code [53]. The claimant is not relieved of the obligation to provide that date or information which, even if he does not own it, can obtain it without the intervention of the court, based on other legal provisions (e.g. land registry extract, data on registered companies in the general trade registry, other data mentioned in a public register, in relation to which there is the possibility to obtain information by any person). Obviously, we do not deny that in practice there are situations in which a particular authority or institution unduly refuses the release of information or a record, although the law compels it to do so (often invoking secondary norms such as orders, internal regulations, etc.). In those situations the plaintiff must prove that he has endeavored to obtain that information in order to be exempted for the application of the sanction."*.

The collective[18] has concluded that ,, *this procedure seeks to discipline the parties in the process, with the practical application of the principle enshrined in art. 6 of the Civil Procedural Code on a fair trial and within an optimal and predictable manner, without affecting the substance of the right to adress the court, taking into account the fact that a possible annulment of the petition is subject to judicial review by means of a request with the application of art. 200 par. (5) - (7). "*

Also, we note that the Constitutional Court also found that the procedure for the regularization of the application has the role of relieving the courts of incomplete applications, so as to prepare the judgment in all its aspects. This procedure also provides protection for the defendant, who is served with all the relevant documentation so as to be able to mount his defence. Unlike art. 200 of the current Code of Civil Procedure, the old regulation of the 1865 Civil Procedure Code, stated that in order to remedy incomplete requests, it was necessary to grant new terms during the judgement, which in most cases led to the prolongation of the trial, thus affecting the optimal and predictable term. At the same time, it involved the incurring of new costs by both the

12.02.2018. https://www.juridice.ro/essentials/2901/comentarii-asupra-modificarii-noului-cod-de-procedura-civila-prin-legea-nr-310-2018-intre-dorinta-de-functionalitate-si-tendinta-de-restauratie#_ftn3

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[17] Traian Cornel BRICIU, Mirela STANCU, Claudiu Constantin DINU, Gheorghe-Liviu ZIDARU, Paul POP,„ Comentarii asupra modificării noului Cod de procedură civilă prin Legea nr. 310/2018. Între dorința de funcționalitate și tendința de restaurație", last modification 12.02.2018. https://www.juridice.ro/essentials/2901/comentarii-asupra-modificarii-noului-cod-de-procedura-civila-prin-legea-nr-310-2018-intre-dorinta-de-functionalitate-si-tendinta-de-restauratie#_ftn3

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parties and the court. Moreover, the procedural means by which justice is to be carried out imply the establishment of procedural rules regarding the process before the courts, the legislator, by virtue of its constitutional role enshrined in art. 126 para. (2) and art. 129 of the Basic Law, being able to establish by law the procedure before the court. These constitutional provisions themselves give expression to the principle enshrined in the European Court of Human Rights Case Law, which, for example, in its judgment of 16 December 1992 in Hadjianastassiou v. Greece, paragraph 33, stated that "the Contracting States enjoy great freedom in choosing the means to enable the judiciary to comply with the requirements of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.".".

## 4. The interpretation of the author

First of all, the initial thinking behind the initial form of article no. 200 was to leave the court a reasonable margin in terms of appreciating whether or not the minimal conditions were met in order to be able to communicate the claim to the other party so as to allow it to mount a reasonable form of defense.

Given the fact that in the past, the only possible sanction available to the court consisted in suspending the trial for failure on the claimant's part in ensuring that the basic conditions were met to move forward with the judgement.

However, in order to reach this specific point, the court needed to communicate to the other party a very informal request, which sometimes was limited to a single page, without any mention of any legal applicable texts, thus rendering the other party into a virtual impossibility of defending himself. It is clearly evident that the defendant's rights were infringed upon severely since he usually paid for legal fees even though the claim brought before him was so informal that even the court was unable to ascertain what it was required of it.

After the new Civil Procedure Code was adopted, the legislative authority instituted the new sanction of annuling the initial informal claim without the need to communicate it prior to employing this solution by the court. A very elegant solution, it exempted the other party from resorting to legal counsel or even suffering legal costs in the initial stages of the trial.

However, like any other solution, it resulted in creating problems for one of the parties which in most cases was the claimant. There were cases in which the court wrongly annuled the claim for failure to fulfill obligations such as indicating the correct social security number of the defendant, even though the claimant provided his correct address, which would have permitted the court to properly communicate the documentation and also summon him for the trial.

Despite being relatively limited, this particular tendency to annul the claim for this reason lead to the modifications of article no. 200.

Thus, in terms of the addition of paragraph 4 dash 1, it is evident that it was intended to counteract the tendency of annuling claims far too easily by some courts, so as to ensure the right to a fair trial for the claimants whose action should have been communicated to the other party and should have enjoyed a proper analysis during a normal trial.

No authors who expressed some concerns regarding the thinking behind this new addition, particularly the purpose for which it has been adopted were identified.

However, some discussions regarding the impossibility for the court to annul the claim for failure to indicate the legal applicable texts are in order.

Thus, it is rather a simple conclusion to reach that some defendants will find it very difficult to mount a proper defence in cases in which they are unable to establish which legal texts they are accused of breaching.

Indeed it is the obligation of the court to determine the legal avenue that is available to both parties in terms of reaching a clear and equitable solution in the case.

Despite this, there will always be instances in which the parties fail to determine the legal basis for the litigation.

To intervene *ex oficio* can easily be interpreted as a decission to help one of the parties and thus creating a detrimental situation for the other.

It is not the task of the court to help the claimant to such an extent, sometimes even more then his own legal counsel, just because the legislative authority has established such an obligation for the judge.

Moreover, the impossibility of annuling the claim by means of Article 200 for failure to indicate by the plaintiff what legal provision are applicable will clearly lead to situations in which the defendant is unable to counteract the claim brought before the court by the other party **at least until the judge establishes the legal applicable text**.

After this moment, even though the legal text established by the court as applicable would clearly render the initial claim as inadmissible or without merits **the fact remains that up until this point the summoned defendant has been in a situation on deciding whether or not to sustain legal fees.**

For those diligent defendants who wish to participate in an active way in the trial and therefore appeal to legal consel or engage in other cost the fact that the informal claim has reached this point may be seen as an infringement into their right to a fair trial.

This conclusion is even more clear in the cases in which the court has established the applicable law, but **is unable to provide the defendant another term to organise his defence according to the actual legal situation since there are no provisions which allow this**.

Indeed the situation may not be very common but in the cases in which it occurs it is evident that the defendant may suffer clear breaches to his right to a reasonable and effective defence.

It is thus very clear that the alterations regarding the impossibility for the court to annul the claim for this particular reason is a mistake in the part of the legislative authority and should be remedied as soon as possible.

Moving on with the analysis of the modifications of articles no. 200, the removal of the phrase *„in the council chamber*" in paragraph 4 clearly stands out.

Indeed, Bozeșan[19] may be right in his opinion that it is only an oversight of the legislative authority.

However, oversight or not, the alteration is able to create a number of situations in which the judge is obligated to intervene so as to avoid any infringements in the right to a fair trial of the parties involved.

Firstly, since the legislative authority has removed the phrase *in the council chamber* one can interpret this measure as a willingness on it's part to obligate the court to annul the claim **during a public session**.

Further on, it can be interpreted in terms of a decision to move away from the initial interpretation of the legal texts regarding this procedure in terms that it is non-contradictory and governed by article 532 of the Civil procedure code.

Since the interpretation may lead to such a conclusion, namely that we are no longer dealing with a non-contradictory procedure, it should therefore take place in a public setting. It is thus evident that it is necessary to summon all the parties even to this procedure.

The interpretation in itself may seem very unreasonable, given the implicit obligation to summon the defendant to present his opinion regarding the sanction of annuling the initial claim even though no other prior documentation has been provided.

Thus, for example in cases in which the claimant has failed to provide enough copies of the initial claim and the supporting documentation, interpreting the legal tax in this manner would also imply the obligation for the court to copy all available documentation and communicate them to the defendant so as to present his opinion on the matter. This would thus render article no. 195 of the Civil Procedural Code without effects - *„ The request for legal action shall be made in the number of copies provided in art. 149 para. (1).*"

Just as problematic would be too summon the claimant for this procedure, given the fact that he has chosen a very passive stance on the case, by failing to fulfill his obligations.

Also, given this alternative interpretation which is allowed by the formulation of the text that it is no longer a council chamber procedure, the general texts provided by article 14, 15 and 17 of the Civil Procedure Code regarding the obligation for the court to summon the parties and allow for an oral proceeding during a public hearing come into play, with very binding legal consequences.

The interpretation can we developed further on, in terms of the possibility for the claimant to invoke a breach in his right to a fair trial as stated in article 6 of the Civil Procedure Code during the re-examination procedure of the sanction to annul the claim by the court. Given the fact that he wasn't summoned to the procedure when the claim was annulled, **he may invoke the argument that he was unable to provide a proper defence so as to persuade the court otherwise**.

Overall, interpreting the modifications as indicated above is not an unreasonable undertaking and **could occur in some situations in which the judge may choose to interpret the law in a very formal way.**

However, a more accurate interpretation has been made by all the above cited authors in the article for the reasons which are to be developed.

Firstly, it is indeed the case of or non-contradictory procedure, in full accordance with article 532 of the Civil Procedure Code since the scope of the analysis carried out by the court deals with ascertaining whether or not the conditions for going to court are met.

The procedure in itself does not tend to lead to a conclusion regarding the existence or non-existence of the rights which are the subject of the trial but merely tends to allow for the trial to enter into the public stage in which arguments may be presented by all the parties involved.

Simply verifying if all the paperwork is in order and all the obligations of the trial have been properly handled by the claimant does not mean that the procedure in itself is a contradictory one.

Indeed, the claimant who feels that his action has been wrongfully annuled may choose to solicit a reexamination of the sanction applied by the judge by another of his colleagues, which also constitute another procedure that has a clear non-contradictory nature. Moreover, this last one is expressly mentioned as to occur in the council chamber and there are no objective reasons for which the regime for the two should be separated.

[19] Bozeşan, V. ( 2019), „ *Codul de procedură civilă actualizat la 10 ianuarie 2019*", ed. Solomon, Bucureşti, p. 108

Thus, paragraph no. 7 of article no. 200 clearly states that the re-examination procedure shall occur in a council chamber, being no reason to separate the verification procedure into two different stages, one in a public hearing and another in a non-public one.

Also, there is no reason to involve the defendant into the trial at this point since for the arguments presented above it is not in his best interests to intervene at this point in the trial.

Legals fees, which may stem from participating in a hearing at this stage of the trial may not be requested in this particular setting, merely via a new and separate trial, since there are no legal provisions which may deal with this type of situation.

Thus, the judge, despite the alterations to the legal text, is to proceed according to the previous procedure in terms of applying the sanction in a non-public setting, namely during a council chamber procedure.

It is evident that proceeding in a different way, by means of interpreting the new alterations in terms that a public hearing should be conducted is a grave error, which should be avoided at all costs since it is not in the interests of any of the parties involved for the court to act in such a manner.

Moving on to the alterations in paragraph 4 dash 1, regarding the impossibility for the court to annul the claim should the plaintiff not have personal access to the information needed for the trial to move forward, they are of great importance. Situations in which the court has annulled the claim without any fault by the plaintiff will be avoided. This alteration in itself is very protective for the plaintiff, however, in order for it to work, it requires that he may prove he has previously addressed the competent authorities regarding to identify the relevant information.

Again, it is mandatory for the court to respect the plaintiff's right to a fair trial and the solution provided by the alteration of this article is equitable and most welcomed.

## 5. Conclusions

### 5.1. Summary of the main outcomes

Indeed, whatever the reasons why the legislative authority has chosen to adopt the solutions previously analysed it is imperative for practitioners to employ all possible methods in order to ensure that the legal text is applied in a manner which does not infringe upon the constitutional rights of either party.

Both the plaintiff and even the defendant can and should always indicate the legal text they consider as applicable, so as not to render the defence of the other party a mere guessing game, to be decided by the court.

The court itself should be willing to grant another term for the opposing party after establishing the legal provisions which are to be applied to solve the case **whenever it has been expressly requested.** This is to ensure that the opinion of all the participants is taken into consideration and their point of view is properly grasped by the judge.

Some other ideas which might help the situation would be to address the Constitutional Court of Romania *ex oficio* by the judge who is in a situation in which the impossibility to annul the claim may cause serious problems for the other party, who may be left to guess the legal articles it is accused of breaching. The request to the Constitutional Court should raise the issue of the potential unconstitutionality of the provisions regarding the impossibility for the court to annul the claim for failure to indicate the legal applicable texts.

The decision to remove the phrase *in the council chamber* should not be interpreted as the establishment of a new obligation for the court to annul the claim in a public setting, after all the parties have been summoned to the procedure.

This interpretation is erroneous and may tend to create burdensome situations for the defendant, would could suffer legal fees to mount a proper defence.

Also, summoning the plaintive after already indicating to him what obligations require his attention would mean that he is given two opportunities to complete his claim, situation which can never be considered as acceptable and which would render paragraph 4 of Article 200 as inapplicable.

Finally, the paragraph added after paragraph 4 should be interpreted in the sense that the plaintiff is obligated to prove before the court that he has fulfilled all of his obligations **prior to soliciting the judge to intervene in order to obtain the needed information necessary** for the continuation of the trial. Otherwise, there would be situations in which the role of the judge would be extended far too much and would also raise questions such as what sanction can be applied to the court for not fulfilling it's newly established obligation.

### 5.2. The expected impact of the research outcomes

The aim of the article is to endeavour to shed light on the subject, in order to present for the reader all the consequences which may stem from applying the altered provisions.

It is thus hoped to provide him or she with a useful interpretation, in full accordance with the necessity to ensure the right to a fair trial for all the parties involved in the trial.

**5.3. Suggestions for further research work.**

Given the previously presented idea of addressing the Constitutional Court of Romania regarding the constitutionality of the new provisions, future research could focus on the answer it gives to the dilemma presented before it. It could also focus on *de lege ferenda* proposals, upon applying the provisions by practitioners after some time and analysing the effects of the alterations on more cases.

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# INVESTMENT SERVICES AND ACTIVITIES AGREEMENT ON CAPITAL MARKET

**Cristian GHEORGHE**[*]

**Abstract**

*Investment services and activities on the account of the investors shall be supplied under a contract drafted in accordance with Capital Market Laws.*

*Intermediaries (investment firms) hold the market access monopoly to trading systems of the regulated market or multilateral trading systems. Contracting them is the only way for investors to have access (indirectly) to trading through market orders.*

*The legal framework shaped by the contract regarding investment services and activities is the premise, the mandatory and preliminary condition for the sale or purchase of financial instruments. The contract of investment services and activities is thus a sine qua non for trading on the capital market.*

**Keywords:** *capital market, investment services and activities agreement, regulated market, trading system, investment firm.*

## 1. Investment services and activities.

Investment services and activities have a legal demarcation. The main services for investors are: reception and transmission of orders in relation to one or more financial instruments, execution of orders on behalf of clients, portfolio management, investment advisory services, underwriting of financial instruments and placing of financial instruments on a firm commitment basis or without a firm commitment basis. Along with these main services the law also sets ancillary services which consist of safekeeping and administration of financial instruments for the account of clients, granting credits to an investor to allow him to carry out a transaction, advice to undertakings on capital structure, foreign exchange services connected to the provision of investment services, services related to underwriting.[1] Main services includes also services and activities that exceed the provision of customer services: dealing on own account, operation of an MTF (multilateral trading facility) or operation of an OTF(organized trading facility). Contemplating these services and activities it is easy to extract the essence of the investment services and activities agreement: performing legal acts and deeds regarding the financial instruments or following the order of the client.

## 2. Legal nature of the investment services and activities agreement.

At the declarative level, although the legislator is not legally consistent, the intermediary (services provider) works on behalf of the client, suggesting the existence of a legal relationship based on a full power of attorney (mandate with representation).

The effects of the intermediary's activity will be reflected in the client's assets by the purchase or sale of financial instruments. Investment firms (SSIF in Romanian Capital Markets Laws) will undoubtedly work on their client's account. European rules use this formula, the client's account, to compare with the transaction that employs the SSIF's own funds, dealing on own account. Therefore "execution of orders on behalf of clients" means acting to conclude agreements to buy or sell one or more financial instruments on behalf of clients and "dealing on own account" means trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments[2].

The execution of stock transactions takes place through stock exchange mechanisms, on behalf of the intermediary. Orders are executed by intermediaries (investment firms) in the multilateral market system in their own name (between two initial SSIFs, then between each SSIF and the CCP (central counterparty clearing house, a specialized legal entity of the regulated market mechanism)) with the effects being made on clients' accounts.

The agreement concluded between investment firms and clients seems to be, from the perspective of the entire mechanism of the conclusion and execution of the market orders, as a mandate without representation.

In fact, the conclusion of transactions by the intermediary exclusively on behalf of the client would compromise the stock market celerity, would mean the multiplication of the legal relations between the specialized market participants (market operator, central securities depository (CSD), central

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[1] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, Annex I, Section A and B.

[2] Directive 2014/65/UE (MiFID II), Art. 4 para (1) no 5.

counterparty (CCP)) with the number of investors participating in the stock exchange.

Otherwise, direct legal relationships only concern investment firms which deal in their own name and the rest of the capital market specialized participants.

Investors just take advantage of these pre-existing legal relationships as the investment firms works on their own behalf as part of the legal relationship with the trading market institutions. The intermediary provides services to the client and concludes legal acts in his own name but on the client's account.

The service provider generally carries out proprietary trades. However, the service provider may act in the name of and on account of the client.

## 3. A priori assessment of the adequacy and appropriateness of the services and activities offered to investor.

The investment firm shall collect information from the clients about their knowledge and experience regarding financial investments in order to determine their financial skills, provide appropriate warnings about the risks inherent in transactions on capital market and provide client tailored services.

Pursuant to the regulations, the client shall be classified in the retail or professional clients category[3] and shall be informed of its right to ask for a different categorization, under the conditions defined in the regulations. The client shall also be informed of the consequences which could result concerning its degree of protection[4].

*Retail clients* are afforded the most regulatory protection while *professional clients* are considered to be more experienced and able to assess their own risk and make their own investment decisions so they are afforded less regulatory protection.

According to Capital Markets Laws, the following shall be regarded as *professionals* in relation to all investment services and activities and financial instruments: entities which are required to be authorised or regulated to operate in the financial markets (as well as credit institutions, investment firms, insurance undertakings, collective investment schemes and management companies of such schemes, pension funds and management companies of such funds and other institutional investors), large undertakings meeting two of the following size requirements, on a proportional basis: balance sheet total at least 20.000.000 Euro, net turnover at least 40.000.000 Euro, own funds at least 2.000.000 Euro, national and regional governments, public bodies that manage public debt, central banks, international and supranational institutions (such as the World Bank, the International Monetary Fund, the European Central Bank, the European Investment Bank and other similar international organisations) and other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financial transactions[5].

Any clients not falling within this list are, by default, retail clients. Even if they are on the list above such entity can ask for a higher level of protection where it deems it is unable to properly assess or manage the risks involved.

Clients may be treated as professionals on request following some identification criteria as well as: frequent significant transactions, portfolio size or financial expertise[6]. Such clients may waive the benefit of retail client status only where the following procedure is followed: they must state in writing to the SSIF that they wish to be treated as professional clients (either generally or in respect of a particular investment service), SSIF must give them a written warning of the protections and investor compensation rights they may lose and they must state in writing, in a separate document from the contract, that they are aware of the consequences of this professional status.

*Eligible counterparties* are entities (to which a credit institution or an investment firm provides the services of reception and transmission of orders on behalf of clients or execution of such orders) as well as: investment firms, credit institutions, insurance companies, UCITS and UCITS management companies, pension funds and their management companies, other financial institutions authorised or regulated under Union law or under the national law of a Member State, national governments and their corresponding offices including public bodies that deal with public debt at national level, central banks and supranational organisations[7].

The retail client has the right to request the different classification of professional client but he will be afforded a lower level of protection. SSIF is not obliged to accept this request. Also the professional client has the right to request the different classification of retail client in order to obtain a higher level of protection. The eligible counterparty has the right to request a different classification of either as a professional client or retail client in order to obtain a higher level of protection.

If the client stops providing the information requested by the regulations to the investment firm, the latter would no longer be in a position to assess the appropriateness of the financial instrument and shall

[3] Annex II, Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

[4] Art. 25, Directive 2014/65/EU.

[5] Directive 2014/65/EU, Annex II.

[6] Ibidem. The client has carried out transactions, of significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters, the size of the client's financial instrument portfolio exceeds 500.000 Euro, the client works or has worked in the financial sector for at least one year in a professional position.

[7] Ibidem, Article 30 para (2).

draw the client's attention to the risks it could incur due to the inappropriateness of the financial instrument compared to its profile.

Regarding order execution, the investment firm shall not be required to collect the information needed for client's assessment if the service is provided at the client's initiative (and if the investment firm warns the client prior to the execution of orders that no assessment the appropriateness of the service or the financial instrument is provided).

### 3. Execution policy.

Best execution principle implies the investment firm's obligation to take all reasonable measures, during order execution, to obtain the best possible outcome for its clients, under the conditions defined by regulations[8].

Where an investment firm (SSIF) executes an order on behalf of a retail client, the best possible result shall be determined in terms of the total consideration, representing the price of the financial instrument and the costs relating to execution (which shall include all expenses incurred by the client which are directly relating to the execution of the order).

For the purposes of delivering best possible result where there is more than one place to execute an order for a financial instrument, in order to assess and compare the results for the client that would be achieved by executing the order on each of the execution place, the SSIF's own commissions and the costs for executing the order on each of the eligible execution places shall be taken into account in that assessment[9].

However, if the client asks investment firm for a quotation for a financial instrument transaction, such firm shall not apply its execution policy. Investment firm, acting as counterparty for its client, shall not be substituted for its client in deciding the best way to carry out such a transaction.

If the investment firm agrees to accept an order including a specific instruction given by the client, it shall execute the order in accordance with that instruction. The client is clearly informed that the investment firm was prevented from carrying out the measures stipulated in the execution policy in respect of the conditions imposed in the clients' instruction.

If the client places a limit order relating to shares accepted for trading on a regulated market and this order is not immediately executed under the conditions prevailing on the market, the investment firm shall take measures to facilitate the order execution as quickly as possible, by making it immediately public in a form easily accessible to other market participants[10].

When the investment firm provides the service of reception-transmission of orders, the entities to which client orders are transmitted for execution are selected on the basis of ensuring the best possible execution. Unless otherwise specified by the client, he shall consent to the executing of his orders outside a regulated market or a multilateral trading facility by signing the investment services agreement.

The execution policy of the investment firm shall be disclosed entirely and separately to the client.

By submitting an order to the SSIF (investment firm) the client explicitly acknowledges to the investment firm's execution policy.

### 4. Order confirmation.

For the order execution service, the client shall receive a confirmation on a durable medium (fax, letter or email) at the latest on the first working day following the order execution (if the firm receives confirmation of the execution from a third party, at the latest on the first working day following the reception of the confirmation from this third party).

The confirmation shall contain all the information such as the name of SSIF (the investment service provider) issuing the confirmation, the client's name, the date, type and nature of the order, the name, the volume and price by unit of the financial instrument, the venue of execution.

The client is informed that, given the time taken to send the confirmation, it should generally arrive within 24 hours. The client is therefore asked to notify the firm if said confirmation has not been received within 48 hours of the order having been passed.

Periodic reports shall include details about price, costs, speed and manner of execution for individual financial instruments[11].

Investment firms shall be able to demonstrate to their clients that they have executed their orders in accordance with the investment firm's execution policy according to the law.

### 5. Conflicts of interest.

SSIF (investment firm) has a written policy aimed at preventing, identifying and, also, managing in an equitable manner any conflict of interest that may arise during the provision of investment services and activities. The conflicts may arise between the interests of the SSIF and its clients, or between the interests of two or more of its clients.

The expanding range of activities that many SSIFs undertake simultaneously has increased potential for conflicts of interest between those different activities and the interests of their clients.

SSIFs shall take effective steps to identify and manage conflicts of interest and mitigate the potential

[8] Art. 27, Directive 2014/65/EU.
[9] Art. 27 para (1), Directive 2014/65/EU.
[10] Art. 28 para (2), Directive 2014/65/EU.
[11] Art. 27 para (3), Directive 2014/65/EU.

impact of those risks as far as possible. Where some risk of detriment to the client's interests remains, clear disclosure to the client of the general nature and sources of conflicts of interest to the client and the steps taken to mitigate those risks should be made before undertaking business on his behalf[12].

## 6. Clients' obligations

The investor who is party to the investment services and activities agreement undertakes to pay the SSIF the remuneration due to it in respect of the activities and services provided. Furthermore, the client shall compensate SSIF for any expense or damage likely to be (directly or indirectly) borne by the latter.

The investor shall provide SSIF full evidence regarding his identification, the identification of his shareholders, representatives, managers, agents and ultimate beneficiaries of the transactions in compliance with the regulations regarding anti money laundering and the financing of terrorism.

## 7. Distance agreement.

A distance contract means any agreement for the purpose of services and investment activities concluded between an investment firm (S.S.I.F.) as a provider and an investor as a beneficiary of services and investment activities, in the context of a system of sales or service and distance investment activities organized by the SSIF which, for the purposes of that contract, uses only one or more means of distance communication[13] .

Such distance communication represents any means which, without requiring physical presence of the parties (SSIF and the beneficiary of services and investment activities) may be used for the purpose of achieving the agreement of the parties.

The investor has a 14 day term from the day of conclusion of the distance contract to terminate the contract without having to justify the termination decision and without incurring punitive fees.

In the case of unilateral denunciation, the investor may be required to pay the services rendered up to that date, according with the terms of the agreement.

The right of withdrawal from a distance contract shall not apply to investment services and activities the price of which depends on the fluctuations in the financial markets that may occur during the withdrawal period of the contract[14].

## Conclusions.

The investment services and activities agreement shall govern relations between the investor and the SSIF (investment firm) in relation to the supply by the service provider of investment services as defined in MiFID II (Directive 2014/65/EU, Annex I) and national law (Law no 126/2018, Annex 1).

The service provider shall reveal his business on the exchange and commodity markets, as well as financial instruments, securities, money market instruments, unit trusts and types of derivatives instruments that it deals with.

SSIF shall indicate regulated markets, multilateral trading facilities (MTF) or organized trading facilities (OTF) where the transactions are carried out on.

SSIF carries out proprietary trades or it may act in the name of and on behalf of the client.

The investment services and activities agreement shall apply to all transactions concluded by the SSIF carried out at the client's order.

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[13] Art. 60 para (3), (4), Law no 126/2018.

[14] Art. 60 para (8), Law no 126/2018 Fluctuations may be generated by: money market instruments, securities participation in collective investment undertakings, futures contracts, including similar contracts with final settlement in funds, forward rate agreements (FRA), interest rate swaps, exchange rates and shares or options.

# UNIVERSITY TEACHERS' ATTITUDES ABOUT UNETHICAL INFORMATION TECHNOLOGY USE: A REVIEW

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**Abstract**

*Continuous confrontation with changes in technologies involves building new attitudes towards ethical issues of IT use. There is increased interest in investigating students' attitudes towards ethical information technology use in particular, and less those of teachers. The major aim of the study is to achieve a systematic review of the studies over the past twenty years on the investigation of the factors that explain the university teachers' attitudes towards the unethical use of information technologies. The specific objectives of the present study are to explore the existing literature on factors influencing unethical information technology use in higher education in terms of two areas of interest: (a) research into investigations on the direct effects of external and internal factors on unethical conduct in higher education; (b) research into investigations on the effects of technology on teachers' unethical conduct. The analysis of current studies reveals that most factors influencing ethical decision-making to a significant extent are internal. We need, first and foremost, strong interior springs to resist the temptation of fraud and less of the external resources. Based on existing studies, we can not extract the specific differences related to technological factors influencing unethical conduct in higher education*.

**Keywords:** *factors, higher education, technology use, unethical information*

## 1. Introduction

This study is part of a wider research project aimed at developing an unethical information technology use (UITU) model for higher education teachers. We are currently at the first stages of our approach, therefore a review is absolutely necessary in building a rigorous scientific path.

Regarding the concept of unethical information technology use, answers have been provided more to the question of why teachers engage in unethical conduct rather than to how and under what circumstances such actions are being carried out. The unethical use of Information and Communication Technology (ICT) by students and teachers is a major challenge in educational institutions (Johnson & Simpson, 2005; Özer et al., 2011). Over the last 30 years, a great deal of research has been undertaken to elucidate ethical decision-making in different contexts. There are studies in organizational, educational, marketing, business. Many of them have explored the construction of explanatory models of decision makers. Some of the patterns are more general, such as those that explain the relationship between intention and behaviour, others are more contextual. The purpose of this article is to achieve a review of the research over the past 20 years on the investigation of the factors that explain the attitude towards the ethical use of information technologies for university teachers.

It is necessary to develop a theoretical model of understanding the factors influencing the attitude towards the unethical use of IT, by reference to the previous approaches: the model of unethical usage of information technology (Chatterjee, 2005), the attitude toward ethical decision model (Leonard & Cronan, 2005), the HV general theory of ethics (Hunt & Vitell, 2006), unethical behavioural model in the Social Networking Sites context (Jafarkarimi et al., 2016), and the casual model for ethical behavioural intention of information technology (Seif, 2016). The motivations of this approach are further presented. First of all, building a possible model of UITU factors in higher education must take into account the impressive theoretical and empirical accumulations in this field. However, we may ask ourselves how far we can extrapolate a series of conclusions from various fields in the university field. There are many studies that explain cheating at students, or explain decision making in general, but are they valid for teachers as well? Our intention is to delineate a series of specific information that will lead us to build a model for a specific (university) context, also within an information technology environment. Therefore, we should also take into account the general theories explaining the relationship between attitudes, intent and behaviour, as well as more specific and different variables (teachers in higher education, multiple roles, information technology use). Secondly, the IT fraud in the university environment is quite widespread, but it has been mainly researched in relation to students.

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The main objective of the present study is to explore the existing literature on factors influencing UITU in higher education in relation to two areas of interest: 1) Research on examining the direct effects of each factor on unethical conduct in higher education; 2) Research on examining the cumulative, comparative effects of each category of factors on unethical conduct. The research questions are:

- Can we extract, based on the analysed studies, the specific differences related to factors influencing UITU in higher education?
- What is the influence of the Internet and technologies resources on teachers' unethical attitude and unethical behaviour as revealed by studies? Is information technology a relevant external factor in ethical decision?

## 2. Method

The systematic review of the literature is an explicit, comprehensive and reproducible method for identifying, evaluating and synthesizing some of the existing issues in several completed and recorded works produced by researchers and practitioners (Fink, 2005). A rigorous analysis of the literature review, according to the author, should be systematic as a result of the use of an explicit methodological

approach in explaining the procedures through which it was achieved and made comprehensive, to include all relevant studies in the field of unethical information technology use.

Okoli and Schabram (2010) present eight major steps, each of which is necessary for a systematic literature review: setting the goal for reviewing the literature, drafting the protocol and conducting the training, identifying the most relevant studies and articles in the field, selecting significant studies and excluding unreliable ones, quality assessment based on clear criteria, extraction of necessary data, synthesis of studies, writing the review analysis. According to Rousseau et al. (2008), the systematic literature review allows a comprehensive accumulation, transparent exploration and reflexive interpretation of all empirical studies pertinent to a specific question.

This systematic literature search began in august 2018 and was completed in November 2018. A literature search in the databases Google Scholar and Science Direct was performed using the following keywords: "factors unethical conduct", "unethical attitudes higher education" and "higher education unethical attitude Information and Communication Technology". The stage of selecting relevant studies consisted in covering by hand all the articles on one or several of the three areas of interest specified in the main study objective.

## 3. Results

The presentation of the research results is done by reference to the two areas already mentioned. For each of them, the most useful elements to support answers to research questions have been integrated into tables.

*Issue 1: Research on exploring the direct effects of each factor on unethical intention and unethical conduct*

a) The relation between individual factors and unethical choice

Table 1 presents a systematic analysis of the main categories of individual factors that emerged from studies as being related to the ethical decision of teachers.

**Table 1.** Individual factors and unethical choice for teachers

| Individual factors | Authors | Findings |
|---|---|---|
| Cognitive moral development | Johnston and Lubomudrov (1987) | The level of moral reasoning of teachers influences teachers' understanding of classroom rules. |
| | Diessner (1991) | The expressed moral reasoning of teachers (after Kohlberg) is at the conventional level. Moral reasoning indicates a preference, 30-50% of time, for postconventional, principled thinking. |
| | Chang (1994) | Most teachers are at the conventional level. |
| | Cummings et al. (2001) | Students – prospective teachers display lower moral reasoning than students from other specializations. |
| Personal system of values | Hyytinen & Löfström (2016) | The views of university professors on the responsibility for research integrity, the teaching methods used and the need to intervene vary. |

| | | |
|---|---|---|
| Moral philosophy | Kish-Gephart et al. (2010) | Relativistic moral philosophy was positively related to unethical choice. |
| Ethical orientation (deontologism, utilitarianism, relativism and selfishness) | Deering (1998) | The ethical orientation of teachers depends on the cultural context in which they work. |
| | Melo (2003) | Early teachers join the utilitarian framework. |
| | GökÇe (2013) | The value of justice has the most powerful effect on the ethical reasoning of teachers. |
| Machiavellianism | Kish-Gephart et al. (2010) | Machiavellianism positively influences unethical choices. |
| Locus of control | Kish-Gephart et al. (2010) | External locus of control was also positively related to unethical choices. |
| Ethical sensitivity | Sparks and Hunt (1998) | There is a significant negative relationship between ethical sensitivity and formal ethical training of participants in research. |
| | Kuusisto et al. (2012) | Finnish teachers perceived themselves as having a high level of ethical sensitivity. |
| Job satisfaction | Kish-Gephart et al. (2010) | Higher job satisfaction was related to a lower likelihood of unethical choices. |
| Demographic variables (gender, age, education) | Akdemir et al. (2015) | Men are more likely to carry out non-ethical activities in the virtual environment than women. |
| | Beycioglu (2009) | Future female teachers were more concerned with ethical issues than men. |
| | Kreie and Cronan (1998) | Women are more conservative in their judgments than men. |
| | Hodges et al. (2017) | Senior teachers tend to self-plagiarize more than juniors. |

The preliminary conclusion is that there are not many recent studies on internal factors that could lead to an unethical choice. Studies on teachers' moral reasoning, ethical orientation, Machiavellianism, locus of control need to be extended an updated to cover a wide range of cultural contexts. With direct reference to the purpose of our research, there is a lack of studies focused on university teachers.

b) The relation between external factors and unethical choice

Table 2 synthesizes the main categories of external factors that explain teachers' unethical choice.

**Table 2.** External factors and unethical choice for teachers

| External factors | Authors | Findings |
|---|---|---|
| Ethical climate type (egoistic climates, benevolent climates, principled climates) | Kish-Gephart et al. (2010) | An egoistic climate increases the likelihood of unethical choices; benevolent and principled ethical climates decrease the likelihood of unethical choices. |
| Ethical culture | Kish-Gephart et al. (2010) | The strength of ethical cultures in organizations is negatively related to unethical choices. |
| Codes of conduct (code existence, code enforcement) | Kish-Gephart et al. (2010) | Existence of a code of conduct is not negatively related to unethical choices; enforcement of a code of conduct is negatively related to unethical choices. |
| Years of experience in computer use | Beycioglu (2009) | Future teachers who have up to five years of experience with personal computers take into account ethical behaviour more than teachers with over five years of experience. |
| Domain of teaching and subjects taught | Tiong et al. (2018) | Various forms of academic deviations have higher prevalence among medical |

| | | |
|---|---|---|
| | | academics compared to their counterparts in non-medical settings. |
| | Beycioglu (2009) | The judgments of teachers who teach science or computer science were less ethical than those who teach social sciences. |
| Training in other cultural spaces | Lei and Hu (2015) | Teachers trained in other countries had a subtler understanding of the transgressional intertextualities present in plagiarism than did teachers trained in their native countries. |
| | Hodges et al. (2017) | Participants from non-Western contexts have not plagiarized more than Westerners in the abstracts of a conference. |

Among the sources examined, the meta-analysis Kish-Gephart et al. (2010) was of particular interest to our study, because it also examined the cumulative, comparative effects of each category of factors on unethical conduct. To establish the cumulative effects of external factors, the authors concluded: five of the six variables had simultaneous and significant unique impacts on either unethical intention or unethical behaviour. Strength of benevolent climate, principled climate, and code enforcement explained significant variance in unethical intention. Only ethical culture did not account for unique variance in either unethical intention or unethical behaviour beyond these other predictors.

Issue 2: Studies on ICT and unethical choice

**Table 3.** Factors in ICT context

| Authors | Findings |
|---|---|
| Al-Rafee and Cronan (2006) | Attitude toward digital pirating is influenced by beliefs about the outcome of behaviour (cognitive beliefs), happiness and excitement (affective beliefs), age, the perceived importance of the issue, the influence of significant others (subjective norms), and Machiavellianism. |
| Haines and Leonard (2007) | Gender has the most profound effect on ethical decision-making in IT context; ego strength also having a strong effect; locus of control has a negligible effect. |
| Leonard and Haines (2007) | Along with other factors, computer-mediated group discussion may influence individual's ethical behavioural intention. |
| Cronan and Al-Rafee (2008) | Attitude, past piracy behaviour, perceived behaviour control, and moral obligation explained 71 percent of the intention to pirate variance. |
| Akdemir et al. (2015) | Prospective teachers are more likely to perform unethical behaviours in virtual environment than real life. Men are more likely to perform unethical behaviours in the virtual environment than women. |
| Akbulut et al. (2008) | The factors constituting common types of e-dishonesty among undergraduate students are: fraudulence, plagiarism, falsification, delinquency, and unauthorized help. |
| Şendağ et al. (2012) | The extent of involvement in e-dishonesty practices was significantly greater among freshmen than graduate students; a significant relationship between involvement in e-dishonesty and the rationale for e-dishonesty. |

## 4. Conclusions

Our review has led to the formulation of two main final conclusions. The first is that in the context of ICT, most factors that contribute significantly to ethical decision-making are internal. Therefore, measures to reduce fraud need to work on these internal factors of attitude. First of all, we need strong interior springs to resist the temptation of fraud, and less external resources. The second conclusion is that studies on IT as an external factor of ethical decision-making in higher education are still in incipient stage. Although some general models have been developed, we cannot yet extract, based on empirical evidence, the specific differences about technological factors influencing the unethical conduct in higher education. Authors present studies with contrasting results, where technological resources either lead to positive attitudes, if they support transformational learning, or to negative attitudes, with tools for fraud being available. We need to approach both situations more thoroughly, so that we can outline an explanatory model of factors influencing unethical information technology use in higher education.

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# IS THE ANNUAL LEAVE AN *AD INFINITUM* RIGHT?

**Bogdan IONIȚĂ***

**Abstract**

*In 2015, the Romanian Labor Code was amended in order to transpose a vast and constant CJEU case law in this field, providing that in the event the employee, for justified reasons, cannot take the annual leave during the year in which it was accrued, the employer is under the obligation to grant the employee the untaken leave days, with his consent, in a reference period of 18 months, calculated from the start of the year following the one in which the right to annual leave was accrued.*

*In the same context, the Labor Code expressly provided for the accrual of annual leave in certain cases where workers cannot perform work due to objective reasons, such as, but not limited to medical leave and maternity leave.*

*The above cited regulation gave rise to endless debates in the legal literature regarding aspects such as (i) whether the right to annual leave lapses upon expiry of the 18 months term and, (ii) whether in such a case the corresponding right to payment of an allowance in lieu of leave not taken upon expiry of the 18 months also lapses.*

*This study intends to address the above-mentioned questions and suggests an approach that takes into account both the purpose (ratio legis) of the annual leave and the legal nature thereof, as well as the recent CJEU case law rendered in the interpretation of Directive 2003/88, pursuant to which the workers' right to annual leave may be construed as lapsed in cases where (i) the employer is able to prove that it enabled workers to exercise their right to paid annual leave in a concrete and transparent manner and (ii) the worker refused to benefit from annual leave voluntarily.*

**Keywords:** *annual leave; lapse of annual leave; fundamental social right; indemnity in lieu*.

## 1. Introduction

According to the Labor Code provisions[1] if the employee, for justified reasons, can not make all or part of the annual leave he/she was entitled to in that calendar year, with the agreement of the person concerned, the employer is obliged to give the rest of the leave not performed during a period 18 months starting from the year following the one in which the right to annual leave was born.

The provisions mentioned above are reffering to an exeception from the rule mentioned at paragraph one from the same article 146 from Labor Code which establish that the annual leave shall be taken each year.

Also the same provisions gave rise to endless debates in the legal literature regarding aspects such as (i) whether the right to annual leave lapses upon expiry of the 18 months term and, (ii) whether in such a case the corresponding right to payment of an allowance in lieu of leave not taken upon expiry of the 18 months also lapses.

## 2. General aspects regarding the annual leave

Employees are entitled to annual leave in accordance with the legal provisions in force.

The right to paid annual leave is a constitutional right provided by art. 41 paragraph 2 of the Constitution of Romania[2], paragraph stipulating the following: "Employees are entitled to social protection measures. These concern the safety and health of employees, the working conditions of women and young people, the establishment of a minimum gross national salary, weekly rest, paid leave, special or special work, vocational training, as well as other specific situations by law. "

The right to annual leave is also provided by art. 39, paragraph 2 of the Labor Code, as it is guaranteed to all employees and can not form the object of any assignment, renunciation or limitation[3].

One of the mandatory clauses of the individual labor contract is the annual leave [4] which is also included in the framework model of the individual labor contract stipulated in the Annex to Order no.63/2004[5] and mentioned in item M. General rights and obligations of the parties, paragraph 1, letter c.

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[1] Art.146, par 2, Law no. 53/2003 regarding Labor Code, republished in The Official Gazette of Romania, Part I, Issue no.345 from 14th May 2011, with subsequent amendments

[2] The Romanian Constitution updated and republished in The Official Gazette of Romania, Part I, Issue no.767 from 31st October 2003

[3] See art.144, par 2 from Labor Code

[4] See art.17, par. 3, letter i from Labor Code and par 4 from the same article

[5] Order no. 64 of February 28, 2003, issued by the Minister of Labor and Social Solidarity for approval of the framework model of the individual labor contract, as subsequently amended and supplemented

The annual leave is governed by Articles 145-151 of the Labor Code.

One of the elements in respect of which the person selected for employment must be informed before the conclusion of the individual employment contract which is the subject of negotiations between the parties to the individual employment contract and which must be compulsorily included in the individual employment contract is the annual leave.

The right to annual leave is an application of the principle of the protection of employees' rights set out in the provisions of Article 6 of the Labor Code.

The annual leave is a fundamental principle of social law and, thus, part of the EU and national public order. As put by the Court of Justice of the European Union, the annual leave aims to ensure that workers are entitled to actual rest, with a view to guaranteeing effective protection of their health and safety.

To this end, both EU Directive 2003/88 on the organization of working time and the Romanian Labor Code preclude the payment of an allowance in lieu of the annual leave not taken before the termination of the employment relationship.

## 3. Length of annual leave

Article 7 of Directive[6] 2003/88 EC requires the Member States to take the necessary measures to ensure that every worker receives an annual paid leave of at least four weeks and that the minimum paid annual leave can not be replaced by an allowance financial, unless the employment relationship ceases.

According to the Romanian legislation, the minimum annual leave is 20 working days[7], with the stipulation that the effective annual leave is set in the individual labor contract in compliance with applicable law and collective labor agreements.

Legal holidays in which the employees are not working and also the paid days off laid down in the applicable collective labour agreement shall not be included in the length of the annual leave[8].

There are also employees who, in view of certain specific elements, enjoy an additional leave, employees working in difficult, dangerous or harmful conditions, the blind persons, other disabled persons and the young people under the age of 18 enjoy an addional leave to at least 3 working days[9].

The number of working days related to additional leave for the above categories of employees is set by the applicable collective labor agreement and will be of at least 3 working days.

Additional leave will have to be stipulated distinctly from the annual leave in the individual labor contract. In the same sense, the framework model of the individual labor contract stipulated in the Annex to the Order no. 63/2004 mentions distinct the addditional leave at element “I. The leave” whose provisions are mentioned below:

"I. leave

The duration of the annual leave is ..... working days, in relation to the duration of the work (full-time, part-time).

The employee also benefits from an additional leave of ..... "

## 4. Can the right to annual leave elapse in certain conditions?

Annual leave shall be taken each year[10] on the basis of a collective or individual schedule[11] laid down by the employer after consulting the trade union or, as the case may be, the representatives of the employees, as far as the collective schedule is concerned, or after consulting the employee, as far as the individual schedule is concerned. Programming is done by the end of the calendar year for the following year.

If the employee, for justified reasons, cannot take all or part of the annual leave he/she was entitled to in that calendar year, with the consent of the person concerned, the employer is obliged to give the untaken leave in a period of 18 months from the year following that in which the right to annual leave was born[12].

Compensation in cash for untaken annual leave is allowed only in the case of termination of the individual employment contract. Article 7 (2) of Directive 2003/88 / EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time laid down, as stated above, that the minimum paid annual leave may not be replaced by a financial indemnity, unless the employment relationship ceases.

Consequently, the rule laid down by both the Romanian[13] and the European legislators is for the annual leave to be taken in-kind, except for the termination of the individual employment contract, in which case the untaken leave will be compensated in cash. The aim is to restore the working capacity of the employee and as stated at the beginning of this article

[6] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time

[7] See art.145 from Labor Code

[8] See art.145, par.3 from Labor Code

[9] See art.147 from Labor Code

[10] See art.146, par.1 from Labor Code

[11] See art.148 from Labor Code

[12] See art.146, par.2 from Labor Code

[13] See in this sens also Al.Athanasiu, Ana Maria Vlăsceanu, Labor Law. Course notes. C.H.Beck Publishing house, Bucharest, 2017,p.174

represents a transposition of the principle of social protection.

Also, in the sense of confirming this rule set by the Romanian legislator, we consider that there are also the provisions of Article 149 of the Labor Code which state that the employee is obliged to take in kind the annual leave of rest during the period in which he was scheduled, except cases expressly provided by law or when, for objective reasons, the annual leave cannot be taken.

If the right to annual leave is set in proportion to the actual time worked by an employee in a calendar year, naturally it follows that a cash offset of untaken annual leave will take into account the same rule for determining the number of unpaid leave days to be paid[14].

Annual leave can be interrupted at the request of the employee for objective reasons.

The employer can recall the employee from the rest leave in case of force majeure or for urgent interests requiring the presence of the employee at the workplace. In this case, the employer has the obligation to bear all the expenses of the employee and his / her family necessary for his / her return to the workplace, as well as any damage suffered by him / her as a result of the interruption of the leave.

Regarding Article 146 (2) of the Labor Code, the following questions arise:

1. If the 18 months mentioned in art.146, paragraph 2 of the Labor Code pass, the days of unpaid leave shall be lost in the case of an employee who did not unduly took his annual leave even though the employer repeatedly told him/her to take the annual leave he was entitled to?
2. What will happen in the case of an employee who, for objective reasons, did not take annual leave within the respite period?
3. Loss of annual leave would only entail the loss of the right to annual leave in kind or also to the right to benefit from the cash compensation at the termination of the contract for the same days referred to in Article 146 (3) of the Labor Code?

We will answer in the following to the above questions.

*Answer for the 1st question*

If the employee, for unjustified reasons, did not take, all or a part, of the annual leave he/she was entitled to in the respective calendar year, with the agreement of the person concerned, the employer is obliged to grant the untaken annual leave during a period of 18 months from the year following that in which the right to annual leave was born.

If the employee has not taken the annual leave for unjustified reasons, although the employer repeatedly informed him about the annul leave and the term established by art. 146, paragraph 2 of the Labor Code was exceeded, the employee loses the right to annual leave for that period? We consider that, in such a situation, as long as the employer has made all the necessary steps in order for the employee to take the annual leave according to the schedule, and if necessary informed the employee also after that about the annual leave and the employee did not want to exercise this right, the fulfillment of the conditions provided by art. 46, paragraph 2 of the Labor Code will result in the employee's loss of the right to take the remain annual leave for the respective period.

*Answer for the 2nd question*

We consider that if an employee, for objective reasons, that can be demonstrated, did not take the annual leave within the respite period, he/she will not lose his/her right, because the factors which stopped the employee to take his annual leave could not be controlled by him/her.

*Answer for the 3rd question*

According to Article 146, 3rd paragraph from the Labor Code: "The cash compensation of the annual leave not taken shall only be permitted in the event of termination of the individual labor contract." So regarding the provisions mentioned before, we consider that the right to the annual leave in kind is indissoluble linked to the annual leave allowance and as a consequence with the compensations to which is referring Article 146, 3rd paragraph from the Labor Code. As a consequence, the loss of annual leave would not only entail the loss of the right to annual leave in kind but it will also atract the loss to the right to benefit from the cash compensation at the termination of the contract for the same days.

The Court of Justice of the European Union ("**CJEU**") issued on 6 November 2018 a decision regarding case C-684/16, on the interpretation of art. 7 of Directive 2003/88/EC concerning certain aspects of the organisation of working time and of Article 31 Para. (2) of the Charter of Fundamental Rights of the European Union, regarding the annual leave.

The dispute was concerning the fact that a German employer, Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV, refused to grant one of its workers, upon termination of employment, a financial compensation for the untaken leave days. The employer's refusal was based on the German legislation pursuant to which the annual leave must be granted in the course of the calendar year when it is accrued – the possibility of carrying forward the annual leave in the following year being permitted only in the event of compelling operational grounds or for personal reasons pertaining to the employee.

In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions to the CJUE for a preliminary ruling:

"(1) Does Article 7(1) of Directive [2003/88] or Article 31(2) of the [Charter] preclude national legislation, such as Paragraph 7 of the [BUrlG], under which, as one of the methods of exercising the right to

[14] See in this sens also Al.Athanasiu, Ana Maria Vlăsceanu, Labor Law. Course notes. C.H.Beck Publishing house, Bucharest, 2017,p.174

annual leave, an employee must apply for such leave with an indication of his preferred dates so that the leave entitlement does not lapse at the end of the relevant period without compensation and under which an employer is not required, unilaterally and with binding effect for the employee, to specify when that leave be taken by the employee within the relevant period?

The CJEU ruled that if the employer is able to prove that it enabled workers to exercise their right to paid annual leave in a concrete and transparent manner and the worker refuses to take annual leave voluntarily, being aware of all the consequences arising thereof, EU law does not preclude national legislation from providing the loss of annual leave or payment of an allowance in lieu of untaken paid annual leave at the end of the employment relationship.

In addition, CJEU recalled that, according to its consistent case law (which remains applicable hereinafter), the right to paid annual leave must be regarded as a particularly important principle of European Union social law, the implementation of which by the competent national authorities must be confined within the limits expressly laid down by Directive 2003/88 itself.

## 5. Conclusions

In light of the above cited CJEU case law and considering the Romanian legal framwork on the subject matter, it is our view that art. 146 of the Labor Code may be construed in the sense that the right to annual leave lapses at the end of the calendar year during which it was accrued provided the employer guaranteed the employee the right to perform the annual leave (e.g.: specific and timely information, notification with regard to the number of untaken leave days) and the employee refuses to benefit from annual leave without having any objective justification.

CJEU ruled that if

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# THE OBLIGATION TO INFORM ONE ANOTHER OF THE INSURANCE CONTRACTIG PARTIES. LIMITS AND CONTENT OF THE OBLIGATION, FROM THE POINT OF VIEW OF EACH OF THE CONTRACTING PARTIES.

**Ștefan Matei DĂNILĂ***

**Abstract**

*In contractual relationships, in general, and as regards the insurance contract, in particular, the obligation to inform one another is of particular importance, all the more so as it is an effective means of protection for both contracting parties.*

*The obligation of the professional to provide advice to the user of insurance services in order to conclude the contract requires the observance of certain principles such as loyalty and good faith and is carried out, as a rule, by insurance intermediaries.*

*The obligation to advice of the insurer refers, and at the same time is limited, exclusively to the framework of the insurance operation, without involving external aspects and that are presumed to be known by all. According to some opinions, the obligation to advice is distinguished from the obligation to provide information, the content of which is distinct and refers to the contractual relationship and not to the pre-contractual relationship.*

*Also, the other contracting party, the insured, has the obligation to inform the insurer, being mandatory that the insured acts in good faith when providing the information required by the insurer, information that is considered by the insurer important when taking over and quantifying the risk.*

*The insurance contracts must be executed with the utmost good faith. The aspects related to hiding certain key elements are often found in insurance contracts. Failure to inform or distortion of the facts is a violation of the obligation to inform, involving, together with fraud, serious consequences in the execution of the contract by the insured.*

*All these aspects will be the subject of our analysis, presented within this article.*

**Keywords:** *information, advice, insurance, fraud, good faith, distortion*

## 1. The obligation of the insurance products distributor to provide information and advice in accordance with the European and national legislation

When the insured risk occures and we find out that the insurance agreement does not cover the risk, the reaction is to say that we were poorly advised.

Distinct from classical claims based on contract, we notice, more and more, the occurence of complaints based on poor information and/or advice.

For a long time, insurance intermediaries advised their clients verbally. Therefore, those who considered to have been poorly adviced had to prove the deficient advice, which in practice was quite difficult.

The Directive of the European Parliament and of the Council of 20 January 2016 on insurance distribution, provides drawing in the responsability of the insurance distributors for the deficiencies of advice and information. The cited regulatory document, concerning the harmonization of national provisions on insurance distribution, establishes the obligation to issue a written document with regard to the information made and, generally, allows the customers to benefit of the same level of protection, regardless of the differences between the distribution channels.

The Directive applies to all natural or legal persons who are established in a Member State of the European Union or who wish to establish in a Member State for the purpose of performing the activity of distribution of insurance and reinsurance products and of carrying out those activities. The Directive does not apply to the accessory insurance intermediaries.

The regulatory document regulates the obligation to provide advice and information and stipulates that, prior to the conclusion of an insurance contract, the distributor of insurance products must establish, based on the information provided by the client, the needs of that client and, accordingly, disclose to the client objective information, with regard to a specific product, in a comprehensible way, in order to allow the client to make a decision on insurance contracting in full awarness.

At the same time, the Directive also provides that, to the extent that the pieces of advice are provided prior to the conclusion of a specific insurance contract, the distributor of insurance products must provide the customer with a customized recommendation, explaining to the client the reasons why a particular product better satisfies his/her demands and needs.

According to the Directive, the insurance intermediary must propose the contract that best suits the needs of the client.

If the insurance distributor reckons, based on the information received, that the product is not the most suitable for the client, it is required that the client is notified in this respect.

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The liability for the poor information or advice lies with the insurance distributor.

The liability of the insurance intermediary may be subsequently undertaken, in the event that when the event occurs, there shall be proved that the proposed contract was not best suited to the client`s situation and that another contract would have made it possible to avoid a situation of non-existence of the guarantee.

At the same time, the Directive also provides that the insurance intermediaries or the insurance company must provide the client with the appropriate information regarding the service provided, on a durable medium, in the meaning that a written document, with regard to the information made, shall exist. All the information provided to the client shall be delivered on paper, with some exceptions, strictly regulated.

As regards the insurance distribution, the national legislation has implemented the provisions of the European Union (EU) Directive 2016/97.

Thus, the Law no. 236/2018 on insurance distribution stipulates the requirements applicable to the distributors of insurance products and transposes the provisions of the Directive 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution.

According to this national regulatory document, the information, including the information about the marketing of the products, must be clear and must not mislead the customers.

The insurance distributor has the obligation to inform the customer to what extent the service provided is about advice on the insurance products offered according to the law.

As defined by the law, by customer it is understood only the natural person, according to the applicable national legislation, and by client it is understood both the customer and the client as legal person.

It must also be clear whether the distributor carries out the activity on behalf of an insurer or independently, as well as who pays him.

According to the provisions of the law, brought in line with the provisions of the Directive, the insurance distribution represents the activity consisting in the following sub-activities: advising on insurance contracts, proposing such contracts or carrying out other work preparatory to the conclusion of such contracts.

The activity of insurance distribution may also consist in concluding such contracts or assisting in the management or performance of such contracts, in particular in the case of a claim, including the provision of information on one or more insurance contracts in accordance with the criteria selected by the clients on a website or by other means of communication.

The insurance distribution activity also includes the compilation of an insurance product ranking list, including price and product comparisons, or a discount on a premium, if the client has the possibility to conclude, directly or indirectly, an insurance contract using a website or other means of communication.

For the purposes of the law, the following activities are excluded from being regarded as distribution activities: a) the occasional provision of information in the context of another professional activity where the provider is limited to it, without assisting a client in concluding or performing an insurance or reinsurance contract; b) the management of claims of a company on a professional basis, and the assessment and regulation/processing of claims; c) the mere provision of data and information on potential contractors, to intermediaries or companies, if the provider is limited to it, without providing assistance in concluding an insurance or reinsurance contract; d) the mere provision of information about insurance or reinsurance products, intermediaries or companies to potential contractors, if the provider is limited to it, without providing assistance in concluding an insurance or reinsurance contract. (3) The terms and expressions provided for in para. (1) shall be supplemented by those defined by the Law no. 237/2015.

In accordance with the provisions of the Law no. 236/2018, the insurance intermediaries are those natural or legal persons, other than a company or its employees and other than an accessory insurance intermediary, who initiate or carry out an insurance distribution activity, in return for remuneration.

The processes carried out by the distributors, including the decision-making process, and the supervisory process carried out by A.S.F. (the Financial Supervisory Authority) are substantiated by supporting documents, the Law no. 236/2018 stating the so-called principle of documentation.

The documentation is made on durable medium, defined by the law as the instrument which, on the one hand, allows the client to store the information that is addressed to him personally so that the information can be used for future reference for a period of time adequate for the purpose of the information, and on the other hand, allows the exact reproduction of the information stored.

The law establishes, in accordance with the Directive, the requirements for information and conduct in the performance of the activity, stating that the insurance distributors must always act honestly, fairly and professionally in order to fit best to the interests of their clients.

The information relating to the subject matter of this law, including advertisements, which are addressed to the clients or potential clients by the insurance distributors, must be accurate, clear and non-misleading and easily identifiable (art. 12).

In this regard, before concluding an insurance contract, the insurers and/or the insurance intermediaries must provide their clients, in due time, with certain information, namely: a) **in the case of insurers and intermediaries:** (i) their identity and address; (ii) the capacity of intermediary or insurer, as

applicable; (iii) if they provide advice on the insurance products marketed; (iv) the procedures provided for by art. 4 para. (20) and the information on out-of-court complaint procedures and appeals procedures provided for by art. 4 para. (27); b) **in the case of intermediaries:** (i) the register in which they are registered and the means by which the registration can be checked; (ii) whether they represent the client or act for and on behalf of the insurer.

The law clearly distinguishes between the obligation to provide advice and the obligation to provide information.

**The obligation to provide advice.** As far as the advice information is concerned, before the conclusion of insurance contracts, the insurance distributors must assess the requirements and needs of the clients, based on the information obtained from them, so that the proposed contracts are in line with them.

In the event that the advice is given prior to the conclusion of a specific contract, the insurance distributors make customized recommendations for the clients, documenting the reason for the suitability of a particular product to the clients` requirements and needs, by adapting to the complexity of the proposed insurance product and to the type of client.

The advice is provided after the analysis of a sufficiently large number of insurance contracts available on the market, so that the customized recommendation is made based on professional criteria and the insurance contract is best suited to the needs of the client.

Within the obligation to provide advice, they must provide clients with objective information about the proposed insurance product, in an easily understandable form, in order to allow them to make an informed decision.

### 1.2. The obligation to provide information. General aspects.

According to the doctrine[1], the general pre-contractual obligation to provide information exists independently of an express provision of the law.

The general legal basis for the existence of the obligation to provide information lies, under the old regulations, in the extensive construction of **art. 970 paragraph 1** of the 1864 Civil Code, according to which: *„They (the agreements) must be performed in good faith",* this text being unanimously construed by the doctrine and the case law arisen from the provisions of the old regulations, that applies also to the pre-contractual period.

Under the new regulation, **art. 14** of the Civil Code provides that (1) *„any natural or legal person must perform his/its obligations in good faith, in accordance with the public order and good morals. (2) Good faith is presumed until proven otherwise",* and **art. 1170** of the Civil Code provides that *„The parties must act in good faith both during the **negotiation** and the conclusion of the contract and throughout its execution. They can not eliminate or limit this obligation".*

The second thesis of art. 1170 of the Civil Code adds that the parties can not eliminate or limit this obligation, which gives the rule of the first thesis, **a public order nature**. A similar rule is provided by the principles of the European Contract Law.

If this is the general rule applicable to contract matters, we must point out that good faith is specifically regulated also with regard to the mechanism for concluding contracts by **art. 1183,** which details the obligation of good faith **during the negotiations** and provides the sanction for bad faith conduct, namely the obligation to repair the damage caused to the other party.

Violation, by the insurer, of the rights of the insured has as a consequence, with respect to the clauses resulting from these violations, namely their lack of effect, their lack of opposability to the insured (the equivalent of the absolute nullity).

According to an opinion expressed in the specialized doctrine [2] before the law nr. 236/2018 was enacted, *„there will also be taken into account the regulations in the field of customer protection, legislated mainly by the Law no. 296/2004 on the consumption code. The Law no. 296/2004 provides the regulation of legal relations created between traders and customers on purchasing products and services, including financial services (art. 1). Under the Law no. 296/2004, the notion of financial services includes some services of banking nature, credit, insurance, private pensions and investments or payments ... We note that, according to art. 27 of the law, the customers* (and therefore also the insurance customers - our emphasis, MD) *have the right to be fully, accurately and precisely informed of the essential characteristics of the products and services, so that the decision they adopt in relation to them corresponds best to their needs and to be educated in their capacity as customers, and according to art. 78, traders are prohibited from stipulating abusive clauses in contracts concluded with customers".*

### 1.3. The obligation to provide information according to the Law no. 236/2018.

Without prejudice to the provisions of art. 107 of the Law no. 237/2015, prior to the conclusion of a contract, irrespective of whether or not advice is given and whether or not the insurance product is part of a package, the insurance distributor applies the provisions of the law on how to provide information about that product.

That information shall be delivered using a standardized insurance product information document, according to the legal provisions, called „PID", an information document prepared by the creator of the

[1] L.Pop, „Tratat de drept civil. Obligaţiil". Vol II. Contractul. Ed Universul Juridic, Bucureşti 2009 pag 281
[2] Vasile Nemeş, „Dreptul asigurărilor" Ediţia a 4-a Editura Hamangiu 2012, pag. 194,

non-life insurance product in a succinct and stand-alone manner.

The information document shall be presented and structured using legible characters in order to be clear and easy to read and shall be written in the official language used in the Member State where the insurance product is offered or in another language, if an agreement is entered into between the customer and the distributor in this regard. P.I.D. must be accurately structured, not-confusing and must contain the title „Insurance Product Information Document".

It will also include the statement specifying that full pre-contractual and contractual information shall be provided in other documents.

The P.I.D. is delivered together with the information required to be transmitted according to the legal provisions and shall include the following information: a) the type of insurance; b) a summary of the cover of the insurance including: (i) the main risks; (ii) the insured amount; (iii) geographical coverage, if applicable; (iv) the summary of the excluded risks, if applicable; c) methods of payment of premiums and frequency of payments; d) the main exclusions for which no claims can be made; e) obligations at the beginning of the contract; f) obligations during the term of the contract; g) obligations in case of claims; h) the contract period, including the start and end dates of the contract; i) methods of termination of the contract.

The information provided in accordance with the provisions of the law shall be communicated to the clients on paper, clearly and accurately, in a manner that is comprehensable to the customer, in one of the following official languages: of the Member State where the risk is situated, of the Member State of the committment, in the language agreed upon by the parties. Transmission will be free of charge.

By way of exception, if certain conditions are met, the information may be provided to the clients using one of the following means of communication: a) a durable medium, other than paper; b) a website, and only if the delivery method is appropriate in the context of the activity carried out between the insurance distributors and the clients and offers the possibility for the clients to choose between information on paper and other durable medium, the clients choosing the second option.

The provision of information is considered to be appropriate if there is evidence that those clients have access to the Internet on a regular basis. The provision by the client with an email address for the purpose of that activity is considered such proof.

In the case of telephone sales, the information provided to the clients before the conclusion of the contract, including the PID, is provided in accordance with the national and European Union rules directly applicable to the distance marketing of customers financial services.

**1.4. The sanction for non-compliance by the insurer with the obligation to provide information in national case law.**

The insurer`s failure to comply with the obligation to provide information and the consequences that it implies considering the obligations of the contracting parties, is also pointed out by the national case law.

In accordance with the civil decision no. 620 dated 26 February 2009, delivered by the High Court of Cassation and Justice, court order that was published in a case law review, the author Cristina Enache, judge magistrate at the Prahova Tribunal[3] and on the website www.scj.ro, it has been sanctioned the culpable conduct of the insurer consisting in not handing over a copy of the conditions, not mentioning the cases excluding the liability of the insurer in the section of the insurance policy specially created for that purpose, also noting that *„the insured did not give his consent with regard to the clause concerning the exclusion causes of the insurer".*

In the reasoning of the decision of the High Court of Cassation and Justice no. 620/26.02.2009 the following recitals are noted:

*„The High Court, analyzing the appealed decision in terms of the criticisms made based on the provisions of art. 304 pt. 7, 8 and 9 of the Civil Procedure Code, in relation to the deeds and proceedings of the file and the relevant legal provisions, finds that they are not such as to lead to the cassation or the modification of the decision of the appelate court. In this respect, it is noted that the appealed decision is correctly and coherently reasoned, the appelate court justly establishing that, although there is a mention on the insured`s statement that he took note of the terms and conditions of the contract, it is not signed by the insured claimant (page 6)and the insurer defedant did not prove that he handed a copy of the above mentioned general conditions to the insured or that he has a copy signed by him, and that the section of the insurance policy specially created for cases excluding the insurer`s liability is not filled in (page 5) and the insurance agent did not request the insured to submit the construction authorization, nor did he inform him that the existence of such an authorization conditioned the conclusion of the insurance contract by the insurer, so that, the court judiciously noted that the insured claimant did not express the consent with regard to the clauses concerning the reasons of exclusion of the liability of the insurer, the court also fairly construed the clauses of the insurance contract in litigation ..... References of the appellant to the breach of the provisions of the Law no. 50/1991 are void in this case, because the penalties provided for by this law can not be applied incidentally, at the request of a legal person governed by private law, and in order to take effect in the case of a trade contract of another nature. Therefore, the Court*

[3] Cristiana Dana Enache, „Clauze abuzive în contractele încheiate între consumatori şi profesionişti", Editura Hamangiu, 2012

*considers that the appelate court has correctly construed and enforced the law, for this reason, under art. 312 para. (1) of the Civil Procedure Code, the appeal will be dismissed as unfounded."*

In another case decision, which is also extremely relevant as regards the failure of the insurer to comply with the obligation to provide information, the Covasna Tribunal notes in the recitals of the civil decision no. 142R/28.05.2014 the following:

*„Noting that the insured risk has occured, the judicial review court finds that the aspect to be examined in the case concerns the effects of the clause that exonerates the liability which the defendant insurer made use of in justifying the refusal to pay the insurance indemnity, clause that has been challenged by the claimant insured and to which the first ground of appeal relates to ..... Analyzing the above clause, the court will note that it has the legal nature of a* ***standard clause*** *in the meaning presented by art. 1202 para. 2 of the New Civil Code, according to which „There are considered standard clauses the provisions established in advance by one of the parties for general and repeated use and which are included in the contract without being negotiated with the other party", a hypothesis that is found in this case, considering that this clause is written by the insurer and is inserted in a brochure or book, according to the terminology used by the appellee in the statement of defence, and it is not the result of a negotiation with the insured. At the same time, the clause clearly has the legal nature of a liability exemption clause, given the fact that it is provided a hypothesis in which, although the insured risk occures, the insurer`s contractual obligation is removed.*

*Therefore, considering the nature of the clause in question, the court will take into account that it is subject to the express provision of art. 1203 of the New Civil Code, according to which* ***„the standard clauses providing for the benefit of the person proposing them the limitation of liability, ... shall have effect only if expressly accepted by the other party".***

*But, in this case, the judicial review court will note that the insured did not adopt by signing this clause stipulated in his detriment, from the evidence presented to the case it did not result that he had been informed of the conditions of the insurance and that he had taken note of their content and much less that he would have agreed and would have accepted this clause, since the condition required provided for by the above mentioned legal provision has not obviously been fulfilled in order for that clause to take effect.*

*In view of the above, considering the nature of the clause and its drastic effect, to completely remove the obligation of the insurer - who has received the insurance premiums - to pay the insurance indemnity,* ***the court notes that an assertion that the agreement of the insured would appear from other clauses or related provisions is contrary to the compulsory rule of the Civil Code, a rule which unequivocally states that this clause must be expressly accepted, not tacitly and generically.***

*The judicial review court shall not, in this respect, consider the defense of the appellee that in the insurance policy has been stated that the insured acknowledged and received the insurance conditions and that those conditions are part of the contract, these terms being insufficient to express the acceptance by the insured of the clause presented by the appellee - defandant."*

## 2. The obligation of the insured to provide information to the insurer. General aspects.

The pre-contractual stage is always marked by various communications or attempts of communication, sometimes abandoned, by future contractors.The deficiencies arising with regard to the pre-contractual information are always the cause of an important litigation.

The insurance operation is often too technical for the uniformed insured, who should be informed and advised by the professional.

It is therefore the responsibility of the insurer to provide the insured with a limitative and precise insurance questionnaire and to provide him with a copy of the draft contract together with the insurance conditions, as well as with detailed information regarding insurance exclusions and covers/guarantees.

As regards the insured, the obligation to provide information consists in presenting the risk in a frank and accurate manner, the exact description of the proposed risk belonging to the insurance contract and being carried out based on the information requested by the insurer through the insurance questionnaire.

In the concrete process of concluding an insurance contract, the insured performs his obligation to declare the risk only after receiving the first information provided by the professional.

The information that the insured provides to the insurer in relation to the risk that he wishes to cover is an essential element of the contract. This information, by itself, allows the insurer to assess to what extent he accepts to offer the guarantee of the insurance contract.

The basis for the obligation to declare any circumstances which might lead to a risk lies in the principle of extreme good faith or „uberrime fidei". Therefore, the obligation of the insured to inform the insurer must be carried out in maximum good faith.

In order to establish the extent of the obligation to declare, it arises also the issue of the person who determines the extent of the obligation. Therefore, the main issues will be to know how to determine the measurement criteria and who has the responsibility to establish the statement framework.

If the liability for the content of the statement lies with the declarant himself, he will always be liable for the information deficiencies.

The existence of a particular circumstance, known to the insured, must be disclosed to the insurer,

because otherwise, assuming the insured risk arises, it will come down to what the insurer would have done if he knew that situation prior to the conclusion of the contract, the assumptions being the following: either the insurer would have refused to contract, or would have committed to cover the risk only in return for a higher premium.

As far as the insurer is concerned, his main objective, at this stage, is to accurately measure the risks and to assess the costs.

Consequently, insofar as he is the one that takes over the responsibility of establishing the questions from the insurance questionnaire, the first stage, but a very important stage in the risk statement, is to determine the circumstances existing at the conclusion of the contract in relation to the insured asset, which is subject to the statement and which may influence his opinion.

The circumstances that may affect and influence the insurer`s opinion may be very different. They vary not only depending on the different categories of insurance but also depending on each specific case.

In this context, a clarification is necessarily required: if the insurer is the one that determines the extent of the obligation to provide information, he will not be able to blame the co-contractor for the insufficiency of the information, insofar as the insured has provided exact answers to all the questions.

In the system of the so-called spontaneous statement of the insured, the insured had to declare, when concluding the contract, all the circumstances known to him and which can help the insurer make the risk assessment.

This procedure proved to be impractical because the insured does not have or has little experience in insurance, which implicitly leads to his inability to assess the importance and relevance of the information regarding the conditions of taking over the risks by the insurer.

The jurisprudence has moderated the use of the spontaneous statement, and the so-called limited statements were adopted, within the questionnaire proposed by the insurer. It was considered that the insurer, given his own experience, as a professional, is sufficiently trained in order to adequately and comprehensively determine all the information he needs for a correct risk assessment.

The system of the limited statement therefore consists in providing exact answers to the questions asked by the insurer, within the form for the risk statement, a form through which, upon the conclusion of the contract, the insurer inquires the insured with regard to the circumstances that are likely to determine him to assume guarantee coverage and risk taking.

However, regardless of the insurer`s help through the questionnaire, the insured is still required to declare all information known by him, that could influence the insurer`s opinion with regard to the risk.

The circumstances known to the insured and that have to be declared to the insurer may be objective or subjective. The objective circumstances are those that concern the subject of the contract itself and that allow the insurer to determine the possibility and intensity of the risk, such as fire insurance, being of interes for example the construction materials, the neighborhood and the destination of the building.

The subjective circumstances are those that refer to the person of the underwriter, meaning if an insured event occurred under a previous insurance contract, if he previously terminated an insurance contract with another company, if he was subject to civil or criminal convictions, or if he has already been insured for the same risks by another insurance company.

In the doctrine, there has been raised the issue of the consequences of an on-site visit of the insurer, namely to the asset to be insured. The issue that arises is to know whether such a visit would involve, as a consequence, the limitation of the extent of the obligation to declare incumbent upon the insured.

Does an inspection procedure carried out by the insurer represent the signal of a waiver of the insurer to make use of an inaccurate statement made by the insured?

The waiver should mean that the insurer already knows the inaccuracy of the statement at the time of the inspection, having the value of a simple presumption of knowing the circumstances of the risk.

No such conclusion can be drawn, as the obligation to determine the framework of the statement belongs to the insurer, who must ask questions to the insured.

Insofar as a pertinent question is asked to the insured, he can not refuse to answer, even if he is able to prove that the insurer already knows the answer.

If, because of the ineffectiveness of the inspection, the insurer has not been able to notice certain aspects and, as a consequence, he has failed to question the insured about those aspects, the insurer will not objectively be able to blame the insured for not giving an exact statement.

The risk inspection is only an additional way to check the accuracy of the risk assessment. The existence of a risk inspection will automatically determine a facilitation of the obligation to declare of the insured, who often knows the reality better than others.

The insured is bound to answer correctly the questions asked by the insurer, even if he knows for sure that the insurer knows the answers. The questionnaire has the role of facilitating the risk statement and the insured has the obligation to submit to the insurer`s guidance.

Also, there has been raised the question whether the insured is exonerated of the obligation to declare, when certain aspects, as a consequence of their public knowledge, are, or ought to be known by the insurer.

The French jurisprudence[4] has admitted that the insured does not have to declare to the insurer any elements of which the latter is presumed to have knowledge of. It is the case of a famous sportsman for whom it has been decided that he did not have the obligation to make a statement regarding his speedboat racing, since these activities as well as his engagement in sports competitions were public and should have been known by the insurer. The insurer is not a mere addressee of the statement, he has a precise role in the procedure.

The insured are protected against dangers resulting from inaccurate and obscure questions. An incomplete questionnaire can be assimilated to an ambiguous questionnaire. Consequently, incomplete, partial answers might be attributable to the insurer and not to the insured. The inaccurate nature of the answers, consequence of ambiguous questions, can lead to the elimination of the insured`s suspicion of bad faith. In a 1993 judgment, the French Court of Cassation showed that the accuracy and the honesty of the insured`s statements must be assessed depeding on the questions presented in the risk statement questionnaire[5]. For example, if the insurer asks the insured to indicate the risk history occurring within a specified period of time, he can not blame the insured for not indicating the events that had occurred before or after that period.

The insurer has also the possibility to obtain the information necessary for the risk assessment also by other means, the risk statement not being the only way. Thus, the insurance company may request the provision, from another insurer, of the risk statement signed by that insured when concluding contractual relations with the other insurer.

The omission of the insured to answer to one or more of the questions asked by the insurer, especially when he is aware of the issues he has been asked of, may result in the refusal to pay compensation for the omission in statements.

In one case, the French case law considered the deliberate nature of the insured`s omission to answer to a particular question when the insured, aware of the risk of land compaction, refused (omitted) to answer the insurer`s question and, moreover, did not provide him with the proof of the technical check required by the insurer.[6]

In fulfilling an obligation to provide information, such as the one regarding the risk statement, it is required that the transmission of the document is done, in order have the proof for that, thus raising a crucial issue, namely the proof of making the statement.

The distinctiveness of the insurance contract lies not only in the evidence or in determining who is responsibile for the burden of proof, but, also in the fact that, in the process of searching for information about the risk, it may come into conflict with certain rights of the person, including those relating to confidentiality. These minuses give rise to a delicate problem, namely to know the limits of risk related research.

The first limit depends on the condition of good performance of the insurance, meaning no statement should be made if it does not serve the insurer in the risk assessment.

However, even in the presence of such a clear principle, in practice, there have been pointed out situations in which there has been a conflict between the compulsoriness to preserve the medical confidentiality and the need to declare certain information, for purposes of insurance coverage, information likely to lead to a breach of medical confidentiality, which has a general and absolute nature.

**2.1. Th obligation to inform. The effects of bad faith of the insured.**

An insurer who criticises his insured that the latter has violated the obligation to declare must prove, by all means, a number of aspects such as: the fact that the insured, knowing the existence of a circumstance likely to influence the insurer`s opinion on the risk, has not made the statement or made an inaccurate statement.

If the insurer claims that the insured has acted intentionally, he will also have to prove the bad faith of the contractor, otherwise good faith is presumed. The bad faith means that the reluctance or the false statement is intentional, most often happening for the insured to benefit of a more advantageous premium regime.

It is necessary to demonstrate not only the bad faith of the insured, but also the fact that the simulated circumstance had consequences on the insurer`s opinion regarding the risk.

The starting point of the analysis is the evidence of a wrong answer to the questionnaire given by the insured, but the false statement does not equal bad faith.

To the extent that the intentional nature of the inaccurate statement can not be established, the declarant should not be subject to sanctions, as his bad faith is not proved.

The bad faith is sovereignly appreciated by the first instance judges, in particular, taking into account the insured`s personal capacity to become aware of the effects of the inaccurate or false statement. However, it is also necessary to take into account the way the questions are drafted.

Thus, if the insured proves to be in difficulty to understand precisely the questions asked by the insurer, the judge may dismiss the bad faith.

In the presence of inaccurate answers to the questions in the questionnaire, one can also draw the conclusion that the declarant has a limited understanding capacity, aspect which also appeals to tolerance in the assessment of his bad faith. However, those who possess particular professional competences, for example, of the kind that helps them understand the

[4] Cass 1 er civil, 2 martie 1994, Campagnie Abeille Paix Vie c/ Banque Commerciale Privee et M. Coudray, RGAT, 1994, p. 469
[5] Cass, 1 er civile, 17 martie 1993, Mem Manon c/ Societe Cogirout La Henin et Societe Assurance vie, RGAT 1993, p. 547
[6] Cass, 1 er civil, Societe Visconti c/Cie Yorkshire General Accident Fire and Life Corp, RGDA, 1997, p. 123, note du Jerom Kullmann.

meaning of the questions asked by the insurer, should not benefit from this tolerance.

The case law affirmed the sovereign power of the first instance judge to assess the intentional nature of the erroneous statement.

If the judge finds that, at the time of the underwriting, the insured was unaware of the circumstance omitted or of its effects, its importance may be understated and, finally, the consequences of the omission removed, since the ignorance or knowledge of the declarant, which are not intentional, should not lead to incurring any sanctions.

The insured in default can not claim that he had not been advised by the insurer regarding his obligation to act in good faith or regarding the consequences of an inaccurate, omissive or untruthful statement. The insurer can not be liable to inform the insured with regard to the sanctions applied in case of his bad faith.

If the insurer wants to obtain the nullity of the contact, the evidence of the bad faith of the insured is not enough. Additionally, it is required that the insurer proves that, in his opinion, the falsity of the statement changed the subject of the risk and had consequences on the opinion that he might have had.

A possible defense of the insured may be, in this situation, to claim that the false statement, despite its intentional nature, did not alter the risk assessment.

There are no well-defined criteria to determine this fact, the insurer is free to prove that, if the omission or false statement of the insured are found, they would lead to either a refusal to contract or a higher premium regime.

**2.2. The sanction that occurs in case of inaccurate statement or reluctance regarding the risk, according to the romanian Civil Code .**

The Romanian legislator provided for in art. 2203 of the Civil Code, the obligation of the insured to inform the insurer, by way of a statement, answering, in writting, to the insurer`s questions.

Thus, the insured has the obligation to answer in writing to the questions asked by the insurer and to declare any information or circumstances known to him and which are also essential for the risk assessment at the conclusion of the contract. This obligation to provide information shall also be maintained during the performance of the contract, being provided that, if the essential circumstances regarding the risk change during the performance of the contract, the insured shall notify the insurer in writing of the change occurred. The same obligation also lies with the insurance contractor who became aware of the change occurred.

The sanction that occurs in the event of non-compliance with this obligation, non-compliance expressed by making an inaccurate statement or by an omission to declare, is the nullity of the insurance contract, a sanction that occurs only to the extent that the bad faith of the insured arises.

According to the provisions of art. 2204 para. 1 of the Civil Code, besides the general reasons for nullity, the insurance contract is null in the event of inaccurate statement or reluctance made in bad faith by the insured or by the insurance contractor with regard to the circumstances which, if had been known by the insurer, would have determined him not to give his consent or not to give his consent under the same conditions, even if the statement or the reluctance had no influence on the occurrence of the insured risk. The premiums paid remain acquired by the insurer, who, may also request the payment of the premiums due until the moment he became aware of the cause of the nullity.

The Civil Code adapts the sanction not only in relation to the good or bad faith of the insured, but also depending on the moment of finding the inaccurate statement or the reluctance in the statements of the insured.

Thus, the inaccurate statement or the reluctance on the part of the insured or of the insurance contractor, whose bad faith could not be established, does not draw in the nullity of the insurance.

In the event that the finding of the inaccurate statement or of the reluctance happens prior to the occurrence of the insured risk, the insurer has the right either to keep the contract requesting the premium to be increased, or to terminate the contract at the end of a period of 10 days calculated from the notification received by the insured, refunding to the latter the share of the premiums paid for the period during which the insurance no longer operates.

When the finding of the inaccurate statement or of the reluctance happens after the occurrence of the insured risk, the sanction, that occurs in the event that the bad faith of the insured could not be established, is the decrease of the compensation in relation to the ratio between the level of the premiums paid and the level of the premiums that should have been paid.

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# COMPARATIVE ANALYSIS OF THE REGULATION REGARDING THE SUBSTANTIVE CONDITIONS OF ADOPTION IN ROMANIA AND IN THE REPUBLIC OF MOLDOVA

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**Abstract**

*The study examines from a comparative point of view some theoretical issues of the substantive conditions of adoption both in Romania and in the Republic of Moldova as they are regulated by the specific laws. The research consists in the analysis of the legal provisions related to the conditions that must be fulfilled by the adopted and by the adopter both from theoretical and practical perspectives. The authors also intend to carry out an analysis of the relevant case law of the courts of law in this matter.*

**Keywords:** *adopted, adopter, consent, adoption age, interdictions*

## 1. Introduction

This paper intends to carry out an analysis of the substantive conditions of adoption both in the Romanian and in the Moldavian legislations.

The substantive conditions of adoption are regulated by the Romanian Civil Code (Law No. 287/2009, republished)[1] – hereinafter referred to as Civil Code –, by the Law No. 273/2004 regarding the legal regime of adoption, as republished and further amended[2] – hereinafter referred to as Law No. 273/2004 – and by the Moldavian Law No. 99/2010 regarding the legal regime of adoption[3] – hereinafter referred to as Law No. 99/2010 –.

## 2. Content

### 2.1. The individuals who can be adopted

According to the provisions of article 455 paragraph (1) of Civil Code, the child can be adopted until acquiring full exercise capacity. Nonetheless, the provisions of article 455 paragraph (2) of Civil Code stipulate the fact that the individual with full exercise capacity can be adopted also, when raised during minority by the individual who wishes to adopt him or her[4]. As per article 38 of Civil Code, the full exercise capacity begins when the individual becomes an adult, respectively at the age of 18 years old. Also, it must be taken into consideration the case of the child acquiring full exercise capacity by marriage, as well as the child acquiring full anticipated exercise capacity, under the conditions stipulated by article 40 of Civil Code. As stated in the literature[5], the growth of the child during minority means not only ensuring the child support, but also the existence of affective relations between the adopted and the adopter, such as those established between the child and the natural parents. Also, the growth must have been continuous and on a long-term. With respect to the application in time of the provisions governing the age of the adopted, article 48 of Law No. 71/2011 on the application in time of the Law No. 287/2009 on the Civil Code[6] stipulates that „the provisions of article 455 of Civil Code are applicable also in case the child acquires anticipated exercise capacity, as per article 40 of Civil Code".

The provisions of article 10 of Law No. 99/2010 are approximately similar to those in the Romanian legislation, meaning that the individual can be adopted only until the age of 18 years and, by way of derogation from this rule, the individual who has acquired full exercise capacity until the age of 18 years old can be adopted only in case the adopter is the individual or the family who has raised him or her, if he or she has cohabited for no less than 3 years until the application for adoption.

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[1] Published in Official Gazette of Romania No. 505 of July 15, 2011, as further amended.

[2] Published in Official Gazette of Romania No. 739 of September 23, 2016, as further amended.

[3] Published in Official Gazette of Republic of Moldova No. 131-134 of July 30, 2010, as further amended.

[4] Please see Constanța Tribunal, I Civil Division, Civil Sentence No. 99/2012 and Civil Sentence No. 139/2012 (www.juridice.ro), when the court admitted the action and approved the adoption of an adult.

[5] D. Lupașcu, C.M. Crăciunescu, *Family law*, 3rd edition, Universul Juridic Publishing House, Bucharest, 2017, p.481; E. Florian, *Family law. Marriage. Matrimonial regims. Filiation*, ed. a 5-a, C.H. Beck Publishing House, Bucharest, 2016, p.467; C. Mareș, *Family Law*, Second Edition, C.H. Beck Publishing House, Bucharest, 2015, p.288; B.D. Moloman, L.-C. Ureche, *The new Civil Code. 2nd Book. About family. Articles 258-534. Commentaries, explanations and jurisprudence*, Universul Juridic Publishing House, Bucharest, 2016, p. 608-609.

[6] Published in Official Gazette of Romania No. 409 of June 10, 2011, as further amended.

The distinction between the two regulations consists in the following: (i) according to Law No. 99/2010, may be adopted the individual who has not reached the age of 18 years old and, exceptionally, the individual who has acquired full exercise capacity until 18 years of age, (ii) according to Law No. 99/2010, a minimum cohabitation period of 3 years until the application for adoption is regulated, in case of adoption of the individual who has acquired full exercise capacity until the age of 18 years.

The first difference stipulated by article 10 of Law No. 99/2010 consists in the fact that only the child until the age of 18 years old can be adopted and, in case the individual acquires full exercise capacity until the age of 18 years old, the adopter must be the individual or the family who has raised him or her, if the latter has cohabited for no less than 3 years until the application for adoption.

The second difference between the two legislations is that, according to the Romanian law, it is not mandatory a minimum duration for the adopted with full exercise capacity to be raised during minority by the adopter, unlike the Moldovian legislation which stipulates the mandatory minimum cohabitation period of 3 years of the adopted with the adopter individual or the family who has raised him or her, until the application for adoption.

Article 463 paragraph (1) letter b) of Civil Code and article 15 paragraph (2) of Law No. 273/2004 require the consent to adoption of the adopted individual who is 10 years old. Thus, it is mandatory also the consent of the adopted with full exercise capacity. Prior to the consent, the general direction of social assistance and child protection, in whose territorial jurisdiction the child who is 10 years old resides, shall inform and shall advise the latter, especially with respect to the consequences of the adoption and its consent thereof, and shall conclude a report in this regard[7]. The consent to adoption of the child who has reached the age of 10 years old shall be given in front of the custody court, when approving the adoption[8].

The consent to adoption must cumulatively meet the following conditions:

a) to be freely expressed, not affected by any vice of consent. According to article 479 paragraph (1) of Civil Code, the vices of consent in the matter of adoption are the following: (i) the error on the adopter's identity, (ii) the misrepresentation or (iii) the violence.
b) the consent must be unconditional, a consent given in view of the promise or the actual gain of benefits, irrespective of their nature is not considered valid[9].
c) the consent must be expressed only after the child who is 10 years old has been duly informed and advised, taking into account his or her age and maturity, especially on the consequences of the adoption and his or her consent thereof.

Article 23 paragraph 1 letter c) of Law No. 99/2010 stipulates the expressing of consent to adoption of the adopted who is 10 years old.

The individuals whose consent to adoption is required shall be duly informed of the consequences of their consent and, in particular, of the termination, following the adoption, of the family ties between the child and his or her biological family[10]. The territorial authorities at the place of residence of the adopted individual are obliged to provide counseling and information to him or her prior to expressing the consent to the adoption and to conclude a report in this respect[11].

The consent of the adopted is expressed in writing, freely and unconditionally, authenticated according to the provisions of the legislation or confirmed by the territorial authority of their domicile[12]. Consent of the adopted through corruption, deceit, fraud, money, other goods, or any kind of promise before or after obtaining the consent is not valid[13].

The competent court may request confirmation of the consent when examining the case in front of the court, ensuring the confidentiality of information about the adopters and the biological parents[14].

The territorial authority shall require the consent of the child, taking into account the age and the degree of maturity, as well as his or her views, desires and feelings in the adoption process[15].

In the process of matching the adopter, the child who is 10 years old, at the request of the territorial authority at his/her domicile, must express his written consent[16].

The child must receive counseling from the territorial authority on the consequences of adoption, future adopters, as well as appropriate information on all aspects of adoption[17].

In order to approve the adoption, the consent of the child who is 10 years old must be expressed in front of the court, when the child has the right to decide on

[7] Article 15 paragraph (3) of Law No. 273/2004.
[8] Article 15 paragraph (1) of Law No. 273/2004.
[9] Article 463 paragraph (2) of Civil Code.
[10] Article 23 paragraph (2) of Law No. 99/2010.
[11] Article 23 paragraph (3) of Law No. 99/2010.
[12] Article 23 paragraph (4) of Law No. 99/2010.
[13] Article 23 paragraph (5) of Law No. 99/2010.
[14] Article 23 paragraph (6) of Law No. 99/2010.
[15] Article 26 paragraph (1) of Law No. 99/2010.
[16] Article 26 paragraph (2) of Law No. 99/2010.
[17] Article 26 paragraph (3) of Law No. 99/2010.

the adoption, to confirm or to withdraw the consent to adoption[18].

With respect to the consent of the child who is 10 years old, both legislations stipulate the obligation to express it, along with the obligation of the competent authorities to advise the child on the consequences of adoption and his or her consent to adoption, as well as the need to express the consent before the court, in the adoption phase.

Also, in order to approve the adoption, both legislations provide the need for biological parents' consent. Thus, article 463 paragraph (1) letter a) of Civil Code requires the consent of the natural parents or, as the case may be, of the child's guardian whose natural parents are deceased, unknown, declared dead, missing or prohibited. Article 23 paragraph (1) letter a) of Law No. 99/2010 stipulates the need of the biological parents' consent or, as the case may be, of the guardian or curator of a child whose parents are deceased, unknown, declared missing or decease, subject to judicial protection in the form of custody under the law.

Although custody is also established in case the parents are deprived of their parental rights[19], in this case the consent to adoption shall be given by both the guardian and the natural parents, based on article 464 paragraph (2) of Civil Code, according to which the parent or parents who has/have been deprived of the parental rights or who has/have been subject to the interdiction of parental rights shall keep their right to consent to the child's adoption, the consent of the child's legal representative being also mandatory. In order to validly conclude the adoption, the consent of both natural parents is mandatory, even if they are separated in fact or divorced and the custody court has decided that the parental authority be exercised only by one of the parents. Consent to adoption can not be expressed in the place of the natural parents or the guardian by the curator, trustee or other individual empowered to do so.

Unlike the Romanian legislation, article 24 paragraph (3) letters b) and c) of Law No. 99/2010 stipulates that the consent of biological parents is not required if they are deprived of their parental rights or in case they are subject to judicial protection in the form of custody.

Another difference between the two legislations resides in the manner in which the minor parent expresses the consent. Thus, according to the Romanian legislation[20], the minor parent who is 14 years old shall express his or her consent, assisted by his legal guardian. According to the Moldovian legislation[21], minor parents shall express their consent to the child adoption through their legal representatives, until the age of 16 years old, and individually, after this age.

As regards the revocation of consent and the refusal of natural parents or of the guardian to consent to the adoption, both legislations provide for solutions to be adopted in such situations. Thus, according to article 466 of Civil Code, the consent to adoption of the natural parents or, as the case may be, of the guardian may only be expressed after a period of 60 days as of the child's birth and may be revoked within 30 days of the date of its expression. According to article 24 paragraphs (6) and (7) of Law No. 99/2010, the consent of the biological parents can not be expressed until the child's birth, but only after 45 days after his or her birth, and they can revoke their consent until the court decision on the adoption is pronounced.

In the case of the natural parents' refusal to consent to adoption, article 467 of Civil Code provides that, by way of exception, the custody court may disregard the refusal of the natural parents or, as the case may be, the guardian to consent to adoption if proven by any means of proof that it is abusive and the court considers that the adoption is in the superior interest of the child, taking into account his/her opinion, given according to the legal provisions, with the express reasoning of the decision in this respect.

A similar provision is also regulated by article 24 paragraph (9) of Law No. 99/2010, respectively the exceptional situation in which the court may disregard the refusal of the biological parents or, as the case may be, the guardian's or the curator's consent to the adoption of the child if proven, by any means of proof, that they abusively refuse to give their consent to adoption, and the court considers that the adoption is in the best interest of the child, expressly reasoning it in the court decision.

As stated within the case law[22], the mere assertion that the consent to adoption is abusive is not sufficient,

[18] Article 26 paragraph (4)-(5) of Law No. 99/2010.

[19] Article 110 of Civil Code.

[20] Article 12 of Law No. 273/2004.

[21] Article 24 paragraph (2) of Law No. 99/2010.

[22] Piteşti Court of Appeal, Civil Division I, Decision No. 764/2013, in the Legal Week No. 40/2013, p.11-12. The court held that the court of first instance made a correct assessment of the evidence administered and legally held that it was not necessary to admit the applicant's application for adoption because the conditions laid down by the Law No. 273/2004, respectively, lacking the father's consent, an essential condition stipulated by the law. The child's biological father claimed that he rarely visited the child because of reasons determined by the child's mother's family, who is reluctant to allow him to have contact with the minor. The circumstances shown by the applicant, namely that the natural father of the child manifests disinterest in this, does not contribute to its growth and maintenance, does not visit it, but which is not supported by clear and conclusive evidence, is not such as to determine the refusal the defendant to consent to adoption as an abuse in the sense of the law. The court held that the father's negligence towards the child was presumed. This negligence is not complemented by a real lack of affection and affiliation from father to child. No deeds or acts committed by the father have been proven to lead to the alienation of the child.

To consider, in view of the peculiarities of the case, that the refuse of the father to the adoption of her daughter constitutes an abuse, it would mean giving rise to conflicts between the mother's family and the natural father of the child, between them and the adopter, between the child and the father. Although the child said that she wanted to be adopted by the plaintiff, the current husband of the mother, when listening to the

in the absence of clear evidence of the contrary nature of the refusal to the child's interest; the court can not approve the adoption in this case because the condition of the natural parent's consent is not fulfilled.

Also, it was decided[23] that the possibility of the court to supplement the consent to adoption of the mother must be analyzed by reference to the exact circumstances of the case, the mother's behavior towards the child who she abandoned and who she has never visited again, as well as the repeated absence before the administrative bodies or the court being considered abusive refusal to adoption consent.

It may also be considered as an abusive refusal to adoption consent the situation when the natural parents or, as the case may be, the guardian, although legally cited, did not repeatedly appear before the court at the hearings set for the expressing of the consent[24].

According to another decision[25], the situation in which a parent can not be found given that his/her domicile is unknown may be considered as an abusive consent.

With respect to the conditions of the natural parents' consent or, as the case may be, of the guardian, the natural parents of the child or, as the case may be, the guardian must consent to the adoption freely, unconditionally and only after being properly informed of the consequences of adoption, especially on the termination of the child's relations with his or her family of origin[26].

The consent to adoption must cumulatively meet the following conditions:

a) it must be freely expressed, not affected by any vice of consent, meaning: (i) error with respect to the identity of the adopted individual, (ii) misrepresentation, or (iii) violence;
b) it must be unconditional, a consent given in view of the promise or actual gain of benefits, regardless of their nature, not being valid;
c) it must be expressed only after the natural parents or guardians have been properly informed of the consequences of the adoption, especially the termination of the child's family ties with his or her family of origin. The general direction for social assistance and child protection in whose territorial jurisdiction the natural parents or, as the case may be, the guardian reside is obliged to ensure their counseling and information before expressing the consent to adoption and to draw up a report in this respect.
d) to be given by the natural parents or, as the case may be, by the guardian, only after a period of 60 days after the child's birth. The given consent may be revoked within 30 days as of the date of its expression;
e) to be given by the natural parents or, as the case may be, by the guardian in front of the court when deciding over the start of the adoption procedure. Along with the request for consent, the court shall ask the general direction for social assistance and child protection the counseling and information report, confirming the fulfillment of the counseling and information obligation[27].

The Moldovian legislation also provides for the obligation to properly inform the biological parents or, as the case may be, the guardian or curator of the child whose parents are deceased, not known, declared missing or deceased, are subject to judicial protection in the form of custody the conditions of the law, whose consent to adoption is requested, on the consequences of their consent, in particular on the termination of the family relations between the child and his/her biological family as a result of adoption[28].

Also, as shown for the condition of the adopted's consent, the territorial authorities from the domicile of the biological parents or, as the case may be, of the guardian or the curator of the child are obliged to provide counseling and information to them prior to the consent to the adoption and to draw up a report in this regard[29].

Moreover, the consent of the biological parents or, as the case may be, of the guardian or curator of the child must be expressed in writing, freely and unconditionally, authenticated according to the legislation or confirmed by the territorial authority of their domicile[30]. The consent of the biological parents or, as the case may be, of the guardian or curator of the child obtained through corruption, deceit, fraud, money, other goods or for any kind of promise before or after obtaining the consent shall not be valid[31].

### 2.2. The individuals who can adopt

The general rule is that any individual can adopt irrespective of civil status, gender, race, nationality, religion etc. However, the above-mentioned elements

child in the council room, there were indications that this manifestation of will be impressed by the influence exercised by her mother and husband, of the conflicting attitude maintained about the child's natural father, the desire of the child to be in agreement with his mother. It was found that the child artificially imposed a distance from her father. The defendant sought his child, but in the last few years he did not do so because of preventing the former wife from making contact with the child. The child's mother denies these claims of the father of the child, but at the declarative level.

[23] Bucharest Court of Appeal, 3rd Civil Division, decision No. 857/2013, in Legal Week No. 9/2014, p.23.

[24] Article 8 paragraph 2 of Law No. 273/2004.

[25] Bucharest Court of Appeal, Civil division, decision No. 207A/2013, apud. B.D. Moloman, *Consent – an important actor in the adoption procedure*, in Romanian Review of privat law No. 3/2018, p.250.

[26] Article 465 Civile Code and article 9 of Law No. 273/2004.

[27] Article 14 paragraph (3) of Law No. 273/2004.

[28] Article 23 paragraph (2) of Law No. 99/2010.

[29] Article 23 paragraph (3) of Law No. 99/2010.

[30] Article 23 paragraph (4) of Law No. 99/2010.

[31] Article 23 paragraph (5) of Law No. 99/2010.

shall be duly analyzed when approving an adoption. Also, according to article 452 letter c) of Civil Code the ethnic, linguistic, religious and cultural origins will be taken into account in view of the continuity principle of the child's growth and education.

**2.2.1. The age of the adopter**

With respect to the minimum age, as per article 459 of Civil Code, the individuals who do not have full exercise capacity can not adopt. From the corroboration of these provisions with those of article 40 of Civil Code, according to which the court may give full exercise capacity to an individual who is 16 years old, for justified reasons, thus it can be concluded that the minimum age of the adopter may be 16 years old, when acquired a full anticipated exercise capacity. The Civil Code does not explicitly stipulate the maximum age of the adopter.

However, according to article 460 paragraph (1) of Civil Code, the adopter must be at least 18 years older than the adopter. According to paragraph (2) of the same article, "for good reasons, the custody court may approve adoption even if the difference in age between the adopted and the adopter is less than 18 years, but not less than 16 years". As decided by the Supreme court[32], the adoption can be refused in exceptional and undeniably proven circumstances, where the advanced age of the adopter is an unavoidable obstacle to the fulfillment of the purpose of adoption, namely the satisfaction of the adopted individual's interests.

The Moldovian legislation provides for a minimum age for the adopter, but also a maximum age difference between the adopted and the adopter[33]. Thus, according to article 12 paragraph (1) of Law No. 99/2010, the adoption is only allowed for individuals who have full exercise capacity, 25 years of age, and are at least 18 years older than the one they wish to adopt, but not by more than 48 years old. With respect to the condition of the minimum age of 25 years old, the law provides a derogation, in the sense that it is sufficient that only one of the spouses to be 25 years old.

Regarding the age difference between the adopted and the adopter, the Moldovian legislation also provides that the court can approve adoption even if the age difference between the child and the adopter is less than 18 years old, but in no case less than 16 years old[34].

**2.2.2. The exercise capacity**

From the provisions of article 459 of Civil Code, according to which people who do not have full exercise capacity can not adopt, it follows that the adopter must have full exercise capacity.

The same condition of full exercise capacity is expressly stated by the provisions of article 12 paragraph (1) of Law No. 99/2010.

**2.2.3. The vocation to adopt**

In accordance with the principle of the best interests of the child, article 461 paragraph (1) of Civil Code and article 13 paragraph (1) of Law No. 273/2004 on the adoption procedure, republished, stipulate that the adopter or adoptive family must fulfill all moral guarantees and material conditions necessary for the child's harmonious growth, education and development[35].

We consider, together with other authors[36], that the fulfillment of the moral guarantees and material conditions is not mandatory in case of adoption of the individual with full exercise capacity, given the express mention on the final thesis of article 461 paragraph (1) of Civil Code, with respect to the child, meaning the individual is not 18 years old or who has not acquired full anticipated exercise capacity, as well as the provisions of article 484 of Civil Code, according to which "the parental authority is exercised until the child acquires full exercise capacity".

The fulfillment of all guarantees and material conditions, as well as the existence of the parental skills shall be assessed by the general direction of social assistance and child protection by issuing a certificate attesting that the individual or family is able to adopt[37], which shall be attached to the decision of the general / executive director of the direction, when carrying out the evaluation according to Law No. 273/2004[38].

Nonetheless, according to article 26 of Law No. 273/2004 the certificate shall not be necessary in the following cases: a) for the adoption of the individual who has acquired full exercise capacity; b) for the adoption of the child by the husband of the natural or adoptive parent.

The capacity to adopt is also provided under the Moldovian legislation. According to article 16 of Law No. 99/2010, the territorial authority at the domicile of the adopter shall assess should the moral guarantees and material conditions of the adopter comply with the child's development needs, in accordance with a

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[32] Supreme Court of Justice, Civil Division, Decision No. 578/1992, in Dreptul No. 2/1993, p.68.

[33] See B.D. Moloman, L.-C. Ureche, *Law No. 273/2004 on the adoption procedure. Commentaries on articles*, Ed. Universul Juridic, Bucharest, 2016, p.65-66.

[34] Article 12 paragraph (2) of Law No. 99/2010.

[35] See Supreme Tribunal, Civil Division, decision No. 2144/1985, in R.R.D. No. 9/1986, p.65. In this case, the 84-year-old adopter, who died 2 months after the adoption, could not provide the moral conditions of the 6-year-old minor, the only purpose of adoption being to create a succession vocation. Moreover, the adopter, beneficiary of a benefit of 300 lei per month needed assistance himself in ensuring living conditions, so that the court's decision to reject the action on the nullity of adoption is untenable and unlawful.

[36] E. Florian, *op. cit.*, p.476.

[37] See Order No. 552/2012 regarding the approval of the framework model of the certificate of a individual or family able to adopt, as well as the model and content of some forms, instruments and documents used in the adoption procedure (published in Official Gazette of Romania No. 245 of April 11, 2012).

[38] Article 461 paragraph (2) Civil Code along with article 13 paragraph (2) of Law No. 273/2004.

regulation approved by the central authority, and shall conclude an evaluation report.

Based on the results of this assessment, the territorial authority shall decide the issuance or the refusal to issue the certificate. In case of issuance, the territorial authority shall decide the registration of the adopter[39]. The territorial authority that issued the decision shall provide, within 10 days, to the central authority a copy of the decision and of the certificate in order to include all necessary information in the State Register of Adoptions[40].

Also, as within the Romanian legislation, according to article 18 paragraph (3) of Law No. 99/2010, as an exception, the registration of the adopter is not a condition of adoption in the case of the following: a) the adoption of the child by the husband or wife of the biological parent or adoptive parent of the child; b) the adoption of the child who has acquired full exercise capacity until the age of 18 years old.

**2.2.4. The consent of the adopter or, as the case may be, of the adoptive family**

Article 463 paragraph (1) letters c) and d) of Civil Code requires the consent of the adopter or, as the case may be, of the spouses of the adoptive family when they adopt together, as well as the spouse of the adopter, unless the lack of discernment makes it impossible for him to manifest his or her will.

As in the case of the consent of the adopted, as well as of the natural parents or guardian, the consent must be freely expressed, not affected by the vices of consent, and unconditional, the consent given in view of the promise or the actual gain of benefits, regardless of their nature, not considered as being valid. The consent of the adopter or adoptive family shall be given to the custody court when deciding on the adoption application[41]. The consent of the adopting husband is necessary even if, at the date of the adoption, the spouses are separated in fact and without distinction as to whether a child or an individual with full exercise capacity is adopted.

However, the consent of the adopting husband is not necessary in case of impaired judgment but also in the following cases: the husband is considered a mentally incompetent individual, is missing etc. As with the adopter or adoptive family, the consent of the adopter's spouse is given to the custody court when deciding on the adoption application. When the adopter is the adoptive parent's husband, the latter will consent to the adoption as a parent, by the effect of the previous adoption.

According to article 25 of Law No. 99/2010, the adopter shall give the consent to the adoption of the child proposed by the territorial authority from the domicile of the latter and shall confirm that he or she was informed on the child's health. At the adoption by spouses, it is mandatory the consent of both spouses.

The adoption by both spouses shall be permitted only in case their marriage has been lasting for at least 3 years prior to the application for adoption[42].

**2.3. The interdictions**

**2.3.1. Multiple adoptions - brothers and sisters**

According to article 456 of Civil Code, the brothers, irrespective of their sex, may be adopted by different people or families only if this is in their best interests. The general rule is that the brothers must be adopted together by the same individual or adoptive family, except for the case when their separate adoption is consistent with their superior interest.

The same provision is governed unde the Moldovian legislation. Thus, according to article 10 paragraph (3) of Law No. 99/2010, the separation of siblings through adoption and their adoption by different individuals or families is forbidden, except for the case when this requirement is contrary to the best interests of the child.

**2.3.2. The adoption between brothers**

The adoption between brothers is forbidden, irrespective of their sex[43], them being from marriage or from outside marriage, good brothers[44], consanguineous[45] or uterine[46].

The Moldovian legislation also stipulates that the adoption between brothers is forbidden[47].

**2.3.3. Adoption of two spouses or ex-spouses by the same adoptive parent or adoptive family as well as adoption between spouses or former spouses [48]**

Adoption of two spouses or ex-spouses by the same adoptive parent or adoptive family, as well as adoption between spouses or ex-spouses is forbidden. Incompatibility arises from the fact that, by adoption, husbands or ex-husbands would become brothers, and the quality of brother is incompatible with the one of husband. Also, it is incompatible the quality of a husband with the parent-child relationships.

This prohibition is not regulated under Law No. 99/2010.

**2.3.4. Adoption by the individual with no full exercise capacity[49]**

As mentioned, according to article 38 of Civil Code, the full exercise capacity begins when the

[39] Article 17 paragraph (2) of Law No. 99/2010.
[40] Article 18 paragraph (1) of Law No. 99/2010.
[41] Article 16 of Law No. 273/2004.
[42] Article 12 paragraph (6) of Law No. 99/2010.
[43] Article 457 of Civil Code.
[44] Having the same mother and father.
[45] Only after the father.
[46] Only after the mother.
[47] Article 11 paragraph (1) of Law No. 99/2010.
[48] Article 458 of Civil Code.
[49] Article 459 first thesis of Civil Code.

individual becomes an adult, at the age of 18 years old. It is also necessary to consider the case of the minor who acquires full capacity by marriage, as well as the minor who acquires full anticipated capacity under the conditions stipulated by article 40 of Civil Code.

This prohibition is also regulated under the Moldovian legislation, according to article 12 paragraph (1) of Law No. 99/2010 which stipulates the condition of the full exercise capacity of the adopter.

**2.3.5. Adoption by the individual with a mental illness or mental disability [50]**

This prohibition concerns the mentally ill individual, whether he or she is under a court order or not. Similarly, the interidction also applies to an individual with a mental disability regardless of whether he or she has been assigned to a category of disabled individuals requiring special protection or not.

A similar prohibition is also regulated by Law No. 99/2010, which, as per article 12 paragraph (4) letter b) prohibits the adoption of individuals whose state of health does not allow the proper fulfillment of obligations and responsibilities regarding the raising and education of children.

**2.3.6. Simultaneous or successive adoption of the same individual by several adopters**

According to article 462 paragraph (1) of Civil Code, two individuals can not adopt together, neither simultaneously, nor successively. This prohibition considers the purpose of the adoption, otherwise the adopted would have more parents at the same time. The exceptions to this rule are the following: a) simultaneous or successive adoption by adopters who are husband and wife[51]; b) the adopter or adoptive spouses has/have died; in this case, the previous adoption is considered to be terminated on the date of the final decision on the new adoption[52]; c) the previous adoption has ended because of any other reason[53]; d) the adopted child has only one parent, unmarried, and he or she is in a stable relationship and is living with an individual of the opposite sex[54], not married, who is not a relative to the fourth degree and declares, by authentic notarial act, that the new adopter has been directly involved in raising and caring of the child for an uninterrupted period of at least 5 years[55].

A similar provision is included within the Moldovian legislation. Thus, according to article 11 paragraph (2) of Law No. 99/2010, the adoption of a child by several adopters is prohibited, unless it is done by both spouses at the same time.

However, a new adoption may be granted if:

a) the adopter or adoptive spouses has or have died, the previous adoption being considered to be terminated on the date of the final decision with respect to the new adoption;
b) the previous adoption ceased as a result of it being declared as void.

**2.3.7. The adoption by same sex individuals**

Article 462 paragraph (3) of Civil Code expressly states that "two individuals of the same sex can not adopt together".

Law No. 99/2010 does not expressly regulate this prohibition, but it is implicitly derived from the legal provisions on the legal status of adoption.

## 3. Conclusions

In conclusion, the Moldavian legislation is almost similar to the Romanian legal provisions with some differences.

The first difference stipulated by article 10 of Law No. 99/2010 consists in the fact that only the child until the age of 18 years old can be adopted and, in case the individual acquires full exercise capacity until the age of 18 years old, the adopter must be the individual or the family who has raised him or her, if the latter has cohabited for no less than 3 years until the application for adoption.

The second difference between the two legislations is that, according to the Romanian law, it is not mandatory a minimum duration for the adopted with full exercise capacity to be raised during minority by the adopter, unlike the Moldovian legislation which stipulates the mandatory minimum cohabitation period of 3 years of the adopted with the adopter individual or the family who has raised him or her, until the application for adoption.

Unlike the Romanian legislation, article 24 paragraph (3) letters b) and c) of Law No. 99/2010 stipulates that the consent of biological parents is not required if they are deprived of their parental rights or in case they are subject to judicial protection in the form of custody.

Another difference between the two legislations resides in the manner in which the minor parent expresses the consent. Thus, according to the Romanian legislation, the minor parent who is 14 years old shall express his or her consent, assisted by his legal guardian. According to the Moldovian legislation, minor parents shall express their consent to the child adoption through their legal representatives, until the age of 16 years old, and individually, after this age.

[50] Article 459 second thesis of Civil Code.
[51] Article 462 paragraph (1) final thesis of Civil Code.
[52] Article 462 paragraph (2) letter a) of Civil Code and article 6 paragraph (2) letter a) of Law No. 273/2004.
[53] Article 462 paragraph (2) letter b) Civil Code and article 6 paragraph (2) letter b) of Law No. 273/2004.
[54] According to article 6 paragraph (5) of the same law, "The condition regarding the existence of a stable relationship and cohabitation shall be verified by the court in charge of the examination of the application for the adoption approval and can be proved by any means of proof."
[55] Article 6 paragraph (2) letter c) of the same law. In this case, the legal provisions relating to the adoption of the child by the natural or adoptive parent's spouse, as well as those relating to the name, domicile, rights and obligations between parents and children, the exercise of parental authority, succession rights, identity papers applicable to the child born out of marriage with established affiliation to both parents is properly enforced.

As regards the revocation of consent and the refusal of natural parents or of the guardian to consent to the adoption, both legislations provide for solutions to be adopted in such situations. Thus, according to article 466 of Civil Code, the consent to adoption of the natural parents or, as the case may be, of the guardian may only be expressed after a period of 60 days as of the child's birth and may be revoked within 30 days of the date of its expression. According to article 24 paragraphs (6) and (7) of Law No. 99/2010, the consent of the biological parents can not be expressed until the child's birth, but only after 45 days after his or her birth, and they can revoke their consent until the court decision on the adoption is pronounced.

In relation to the adopter's minimum age, the Moldovian legislation provides for a minimum age for the adopter, but also a maximum age difference between the adopted and the adopter. Thus, according to article 12 paragraph (1) of Law No. 99/2010, the adoption is only allowed for individuals who have full exercise capacity, 25 years old, and are at least 18 years older than the one they wish to adopt, but not by more than 48 years old. With respect to the condition of the minimum age of 25 years old, the law provides a derogation, in the sense that it is sufficient that only one of the spouses to be 25 years old.

Regarding the age difference between the adopted and the adopter, the Moldovian legislation also provides that the court can approve adoption even if the age difference between the child and the adopter is less than 18 years old, but in no case less than 16 years old.

Referring to interdictions, the differences between the two legislations reside in the fact that the Moldavian legislation does not provide the interdicition of the adoption of two spouses or ex-spouses by the same adoptive parent or adoptive family as well as adoption between spouses or former spouses and also the interdition of the adoption by same sex individuals. Notwithstanding, even if Law No. 99/2010 does not expressly provide the interdition of the adoption by same sex individuals, it results from the entire legal regime of adoption.

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# THE JUDGMENT IN LIEU OF THE CONTRACT - INTERPRETATION AND APPLICATION OF ARTICLES 1279 AND 1669 OF THE CIVIL CODE RELATING TO THE PROMISE OF SALE

**Emilian-Constantin MEIU**[*]

**Abstract**

*The matter of enforcement in the promise of sale poses practical problems arising from the interpretation of the articles 1279 and 1669 of the Civil Code and that we intend to analyze in this study. Among the issues to analyze we can mention: the role of the court and the legal requirements for a judgment in lieu of contract as follows: execution of their duties by the party calls for a judgment in lieu of the contract; the unjustified refusal of the promissor-seller to conclude the contract of sale within the set deadline; establishing the fulfillment of the terms of sale at the time of the judgment; the quality of the promise-seller of the owner of the good; the filing of the fiscal certificate issued by the specialized department of the local public administration authority resulting in the lack of debts of the promised property owner; proof of up-to-date flows of contribution allowances to the owners expenses. We will now consider the prescription of the right to request a decision in lieu of contract under article 1669 para. (3) Civ. Code, as well as the importance of the inalienability clause in the conventions which give rise to the obligation to pass on the property in the future to a determined or determinable person, as provided by article 627 par. (4) Civ. Code.*

**Keywords:** *promise, promissory agreement, judgment in lieu of a contract, prescription, inalienability.*

## Introduction

The Civil Code regulates in art. 1669 and art. 1670 promise to sell, in certain respects, such as the ability of the rightful party to request, in the event of unjustified refusal of the other party to conclude the contract of sale, the delivery of a judgment which takes the place of the contract, the limitation of the right of action, the nature of the sums of money paid on the basis of a sales promise.

The unilateral sales promise is a contract whereby a party, called the promisory-seller, undertakes to sell in the future a certain good to the other party, called the promissory-buyer, if the latter promises to buy it. The promissory-seller does not sell the good, but only undertakes to sell it in the future or to conclude the sales contract if the promissory-buyer chooses to buy it.

The existence of an option for the promissory-buyer is one that characterizes the unilateral promise and distinguishes it from the sinalagmatic promise. In order to exercise the right of option, the parties agree that the beneficiary has a certain amount of time to reflect and make informed decisions. In the case of the bilateral sale promise, both parties, both the promissory-seller and the promissory-buyer, firmly and mutually commit themselves to conclude in the future the sales contract, whose essential elements (at least the object and price) are already established the promise ended.

The bilateral sales promise is a preparatory contract for the conclusion of the definitive sales contract between the same parties. Given that the sales promise is not a sale, the consent given at the end of the sale promise differs from the consent given at the conclusion of the sales contract, the latter being expressed in order to fulfill the obligation to undertake by promise.

## 1. The judicial stamp duty

In the matter of the judicial stamp duty, for the application for a decision to take place the contract shall apply art. 3 par. (1), par. (2) lit. c) and art. 31 from G.E.O. no. 80/2013 on stamp duty. The interpretation of these legal provisions leads to the conclusion that the application for a decision in lieu of sale contract is one that can be evaluated in money, the determination of the amount of the judicial stamp duty being made by reference to the value limits established by art. 3 par. (1) of the mentioned normative act. According to art. 31 par. (2) from G.E.O. no. 80/2013 the value taken into account for stamp duty is the one indicated in the application (which may or may not coincide with that indicated in the sales promise). The same law stipulates that if the value is disputed or appreciated by the court as obviously ridiculously low, the assessment is made under the terms of par. (3) of art. 98 Civ. Proc. Code.

Over the value to be taken into account when stamp duty is set, several approaches are encountered in court practice. A first solution is to establish the stamp duty considering the value of the price set by the parties in the promissory-sale, in the context in which the applicant does not specify in the application its value for the stamp duty. This method of setting the stamp duty is the easiest and includes a high degree of celerity, because the setting of the stamp duty will no longer be postponed in order to inform the applicant of

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the obligation to specify the value of the object of the application in order to establish the stamp duty.

The use of the price of the promissory-sale as a reference also takes into account the fact that the price set by the parties for sale usually reflects the market value of the good, even if it is possible to imagine situations in which the parties have set a price lower than the real value of the good. This approach is to be criticized for failing to comply formally with art. 31 par. (2) from G.E.O. no. 80/2013 which state that the value at which the judicial stamp duty is calculated is the one provided in the application.

A second practice of the courts is to notify the applicant of the obligation to provide proof of the taxable value for immovable property and to set the judicial stamp duty on that amount. It takes into account the real estate demand, capitalizing on it by reference to an objective value, the taxable one, which usually reflects the value of the movement of the asset.

A third variation of stamp duty, which is less common in practice, is to report the value of the movement of the asset to be transmitted if the request is made by the promissory-buyer, or the agreed price if the request is made by the promissory-seller. This method has as a criterion the value with which the applicant's patrimony is to be increased, which consist either of the good which is the object of the sales promise for the buyer or the selling price for the seller.

Although all three solutions present convincing arguments, the closest to the letter and spirit of the rules governing this matter is the establishment of the stamp duty at the market value of the good, which can be assimilated to the taxable value, or the value of the notarial scales. It is true that according to art. 31 par. (2) from G.E.O. no. 80/2013 value must be the one in action, but this value can not be left to subjective appreciation, but must be based on objective criteria .

The value of the movement of the property is related to the time of the filing of the petition. If the amount indicated by the claimant is contested, the amount shall be determined by the documents submitted and the explanations given by the parties, according to art. 98 par. (3) C. Proc. in which the data on the taxable value of the property or, as the case may be, the market studies carried out by the public notary's chambers, commonly known as "grids of notaries public" in accordance with the provisions of art. 104 par. (4) the final thesis of Law no. 227/2015 on the Fiscal Code.

## 2. The competent court

From the perspective of material competence, the value criterion is applied, competence being determined according to art. 94 pt.1 lit. k) and art. 95 pt. 1 Civ. Proc. Code.

From the perspective of territorial competence, the provisions of art. 107, art. 113 par. (1) point 3 Civ. Proc. Code, if expressly stipulated the place of performance of the obligation to conclude the contract.

From this perspective, the application for a contract decision is a personal action, even if the contract that is required to be finalized is a translational contract of ownership or other real rights, this being merely an expression of its real estate character.

In this respect, the High Court of Cassation and Justice, through the Decision no. 8/10.06.2013 , pronounced in an appeal in the interest of the law, stated that "the application requiring a court decision to take the place of an authentic sale and purchase agreement of a building has the character of a personal real estate action", since "the civil action requesting the delivery of a court order to take the place of a sale and purchase agreement, in the matter of the obligations to make arising from the pre-contract is personal inasmuch as the applicant makes use of a right of claim, namely the right to require the conclusion of the contract, correlated with the defendant's obligation to take the necessary steps with a view to concluding the contract. (...) Territorial jurisdiction is alternative, between the court of the defendant's domicile and the court of the place of performance of the obligation only if the legal act concluded by the parties provided for the place of enforcement, or even in part, of the obligation. "

The foregoing considerations regarding the judicial stamp duty relating to the determination of the value of the object of the application relevant to the determination apply mutatis mutandis to the determination of material jurisdiction.

## 3. The conditions required by the law for the delivery of a judgment in lieu of contract and the evidence administered to prove them

The valid conclusion of the bilateral sale promise obliges the parties to conclude the sales contract. The same obligation have the parties in the case of the unilateral sale promise, once the beneficiary has opted for the purchase of the good.

According to art. 1669 par. (1) Civ. Code "when one of the parties having concluded a bilateral sale promise unjustifiably refuses to conclude the promised contract, the other party may request that a judgment be held to the place of the contract if all other conditions of validity are met ".

The provisions also apply to the unilateral sale promise, according to art. 1669 par. (3) Civ. Code. Therefore, the question which may arise is that of the conditions required for the court to be able to pronounce such a court decision. Of course, the court will have to analyze these conditions in concrete terms, depending on the circumstances of each case.

### 3.1. The conclusion of a valid pre-contract and the fulfillment of the conditions of sale at the date of the awarding of the contract

The condition results implicitly from the text of art. 1669 par. (1) Civ. Code, which claims that "all other conditions of validity are to be fulfilled" and which clearly refers to the promise to sell agreement. This is

because, in order to be able to pronounce the decision in lieu of contract, the promise of sale must fulfill its own conditions of validity, necessary for any convention. For example, there is a requirement for a valid consent to be expressed under the ordinary law (article 1204 Civ. Code). At the time of the promise, the parties must have the ability to sell and buy, for otherwise the agreement on the sold asset and the price would not be valid.

Also, the object of the promise of sale, consisting in the conclusion of the sale contract in the future, must be determined and lawful and it must be stipulated the good to be sold and the price, and the cause must be licit and moral.

In relation to the provisions of art. 1.279 par. (1) Civ. Code, the court will verify the existence of the essential elements of the sale, which must be included in the pre-contract, when the decision is based on a sales act, otherwise it is considered to be a simple convention concluded for the continuation of the negotiations - art. 1.279 par. (4) Civ. Code.

It should be noted that the object, i.e. the good promised, must be in the civil circuit at the date of the judgment. The decision in lieu of a sale contract is governed by the law in force at the time of its pronouncement as an application of the principle tempus regit actum, a solution legally required by art. 6 par. (5) Civ. Code. This reasoning is followed by the Constitutional Court in the decision no. 755/2014 of the Constitutional Court .

Also, the property must belong to the promissory-seller at the time the property transfer operates. The requirement that the promissory-seller also be the owner of the good at the time of the judgment can no longer be the object of the controversy, the non-unitary practice that it triggered being cut by the H.C.C.J throught Decision no. 12/2015 following an appeal in the interest of the law.

At the date of the judgment, all the conditions required by the law to complete the sale must be fulfilled: the promissory-seller shall be the owner of the promised asset to be sold, and the promise-buyer shall not be struck by any special inability to acquire it. The court's pronouncement of a decision to take place is only possible if the property is in the patrimony of the promissor-seller (current owner) and in respect of which there are no inalienability clauses, established in compliance with the legal provisions (art. 627 par. (1) Civ. Code. If the promissory-seller pledged to sell the whole property, although he is not the sole owner of the property, the supreme court has decided that the promise of sale can not be enforced in kind, in the form of a court decision to take place for sale, unless the other co-owners agree.

The doctrine has advanced the view that such a decision could be pronounced even if, after the promissory contract had been concluded, the promissory-seller sold the good that was the object of the promised contract; the contract thus concluded will be a sale of the good of another.

In the light of Decision no. 12/2015 the sale promise can not be enforced in kind, in the form of a court decision to place a sale contract, in the absence of the sole owner of the promise-seller, so even less could be said such a decision when the promissory-seller sold the good and hence no longer owns the property.

Moreover, the considerations of that decision are apparently illustrating the fact that the decision which takes the place of a sale contract is constitutive of rights, which involves the transfer of the property from the date of its final stay. Thus, if the promissory-seller sold the object of the promise, the court could not issue a decision to take the place of the sale contract.

The issuance of a a decision to take the place of the sale contract it is not conditional upon the conclusion of a promise of sale in an authentic form, solution stemming from the Decision no. 23/2017 of the H.C.C.J., pronounced as a result of a complaint about the loosening of legal issues. We continue to reproduce part of the provisions of this decision: "... In interpreting and applying the provisions of art. 1.279 par. (3) first sentence and art. 1.669 par. (1) of the Civil Code, the authentic form is not mandatory upon the conclusion of the promise of sale of immovable property with a view to pronouncing a judgment which would take the place of an authentic act ... ". The promise has to be proven under the conditions of common law. The sale-purchase promise is a bilateral legal act, to be proved according to the rules provided by the law in the field of legal acts. For example, if the value of the object of the legal act is more than 250 lei, the proof is made with a document, under private signature.

**3.2. The applicant has fulfilled his promised obligations.**

The party entitled to request the court to adjudicate is the one that has fulfilled its obligations or is ready to do so. If the promissory-buyer has obtained a time limit for the payment of the price or part of the price, which would have been made after the court has delivered the ruling, it does not prevent the court from pronouncing the judgment.

As to the meaning of the phrase "at the request of the party who has fulfilled his own obligations", provided by art. 5 par. (2) of the Law no. 247/2005, Title XI (now abrogated, but applicable to the promises of a contract concluded as long as it was in force) and art. 1279 par. (3) Civ. Code, we consider the interpretation to be applicable as referring to the obligations established by the pre-contract and not by the contract to be concluded.

In this regard, we have to conclude that the prior payment of the sale price can not be a condition for the admission of the application. It is sufficient for the court to make mention of the price in the device, the advance paid and the remainder of the price due - even if, in the absence of a counterclaim, it can not oblige the applicant to pay that sum to the defendant - in order to make it possible to register the legal mortgage (Article

2386 (1) of the Civil Code). Given that the legal mortgage is a legal effect of the sale contract concluded without the full payment of the price, we consider that the court must state of its own motion not only the price of the contract, the price already paid and the price still due, but also the existence of the mortgage legal tender for the remaining price, for the benefit of the seller. The explanation for such a solution lies in the fact that the court, by issuing a judgment which takes the place of a contract, has quasi-notary powers, being required to record in the device at least the essential elements of the contract or the seller, the remaining price due and the legal mortgage guarantee payment constitutes such essential elements; the seller could not be deemed to have a counterclaim as he does not "request" anything from the court, the enrollment of the legal mortgage is a natural consequence of accepting the claimant's claim and concluding the contract by the court's judgment.

**3.3. Unjustified refusal to sign the promised contract**

One party refuses to conclude the sales contract and the refusal is unjustified. This condition is expressly provided for in art. 1669 par. (1) Civ. Code which stipulates that "when one of the parties who have concluded a bilateral sales promise unjustifiably refuses to conclude the promised contract, the other party may demand that a judgment be taken on the basis of a contract ... ". For example, the party did not appear before the public notary on the day and at the time fixed, for signing the contract of sale in authentic form for unjustified reasons.

As far as the proof of this refusal is concerned, we consider that the burden of proof is overturned, so that it does not come to the claimant but to the defendant, according to art. 249 Civ. Proc. Code. Thus, the plaintiff should only prove that, at the end of the term set in the contract for the sale, this did not happen. The defendant should prove either the justified nature of the refusal (proving the existence of one of the justified reasons for non-fulfillment of the contractual obligations provided by art.1555-1557 Civ. Code) or the applicant's fault according to art. 1517.

Thus, although in court practice the applicant is admitted to witness evidence and documents to prove that the defendant was not present at the date fixed for signing the sale contract, in reality the plaintiff's support that the promised contract was not concluded reverses the burden of proof so that the defendant is bound to prove the conclusion of the contract or the reason that prevented it.

**3.4. The submission of the land registry excerpt, of the fiscal certificate attesting the payment of all payment obligations due to the local budget and proof of the current debits regarding the contribution rates to the owners' association**

According to art. 57 par. (1) from E.G.O. no. 80/2013, in the case of applications for a decision that takes the place of an authentic act of alienation of immovable property, the court will request a land registry excerpt for the immovable properties registered in the land book or a certificate of tasks for the immovable properties who do not have an open land book, tax certificate issued by the specialized department of the local public administration authority and proof of the current debits regarding the contribution rates to the owners' association.

Also, according to art. 159 par. (5) of the Law no. 207/2015 on the Fiscal Procedure Code, "for the alienation of ownership of buildings, land and means of transport, the owners of the assets to be alienated must present tax attestations certifying that all payment obligations due to the local budget of the administrative-territorial unit in whose rayon is registered the taxable asset, according to par. (2). For the asset that is being alienated, the owner of the property must pay the tax due for the year in which the good is sold, except for the fact that the asset to which the tax is transferred is owed to another person than the owner "and, in accordance with par. (6): "The acts by which the buildings, land and means of transport are alienated, in violation of the provisions of para. (5) are null ". Although the legal texts directly concern the voluntary act of alienation, it is obvious that the court can not ignore their existence. The solution that will be applicable in case of non-compliance with the requirements of par. (5) is the rejection of the request for a judgment that takes the place of a contract of sale as unfounded.

The foregoing conclusion also follows from Decision no. 42/2017 pronounced by the H.C.C.J - The Law Enforcement Assembly, stating that in the interpretation and application of the provisions of art. 159 par. (5) of the Law no. 207/2015 on the Fiscal Procedure Code, in the case of an action requesting the determination of the validity of a bilateral exchange promise relating to goods subject to taxation and the delivery of a judgment which takes the place of an authentic act, it is mandatory that the owners of the goods submit a certificate of tax certification and have paid all the payment obligations due to the local budget of the administrative-territorial unit in which the asset is located, irrespective of whether the goods have equal value or different values. In the recitals of that decision, it was noted that in order for the defendant not to paralyze the efficiency of the action by refusing to present the tax attestation certificate, 57 of the Government Emergency Ordinance no. 80/2013 imposed on the court the obligation to apply for the certificate of tax attestation regarding the good; in order to avoid abusive conduct on the part of the defendant defendant, the complainant's petitioner (if he formulates a petition in this respect) should be given the opportunity to pay himself the obligations owed to the local budget by the other party, simultaneously with the ability to seeks, in the same or separate proceedings, to order the latter to pay damages equal to the amount of the obligations paid.

Regarding the proof of the daily debits of the contribution allowances to the expenses of the owners' association, this is in accordance with art. 20 par. (2) of the Law no. 230/2007, a condition whose non-fulfillment is sanctioned with absolute nullity of the act of alienation. The previously held regarding the non-compliance with the requirements regarding the existence and the content of the tax certificate are also properly applied in the present case.

Another proving relevant provision is art. 57 par. (3) from G.E.O. no. 80/2013, according to which the technical expertise (topographical) must be endorsed by the cadastre office and real estate publicity.

According to art. 5 par. (1) of the Law no. 17/2014, in all cases where a court decision is required for a sale-purchase contract, the action is admissible only if the pre-contract is concluded according to the provisions of Law no. 287/2009, republished, as subsequently amended, and the relevant legislation, as well as if the conditions stipulated in art. 3, art. 4 and art. 9 of this law, and the building that is the subject of the pre-contract is registered in the fiscal role and in the land book. The provisions of art. 5 of Law no. 17/2014, legal text which, from the perspective of art. 20 of the same normative act (as it was created following the Constitutional Court's Decision No. 755/2014 ) hall apply to all pre-contracts, whether prior to or after the entry into force of this Act, that they are concluded in the form of a document in private or in authentic form.

Therefore, in order for the action to be admissible, the applicant must submit the opinion of the Ministry of National Defense (if the land is located at a depth of 30 km from the state border and the Black Sea coast); the opinion of the Ministry of Culture (for the lands where the archaeological sites are located, where listed sites of archaeological patrimony or areas of potentially archaeological potential have been established), the opinion of the territorial or central structure of the Ministry of Agriculture and Rural Development or the certificate issued by the City Hall at the location of the land (the latter attesting the completion of the procedures necessary for the exercise of the pre-emptive right). The abovementioned law stipulates that the action will also be rejected if the complainant fails to prove that the real estate is registered for tax purposes in the land register.

## 4. The limitation of the action for delivery of a judgment in lieu of contract of sale

According to art. 1669 par. (2) Civ. Code, the right of action for the delivery of a judgment in lieu of contract shall be prescribed within 6 months from the date on which the sale has to be completed.

When the parties expressly promised the date on which the sales contract is to be concluded, the obligation to do of the parties can not be executed immediately, because it was postponed until the agreed date. Consequently, the obligation to conclude the sale contract and, in addition, the right to request the conclusion of the sale contract, are affected by a standstill period for the benefit of both parties. If one of the parties has refused to conclude the sale agreement on the due date, the other party is entitled to bring a civil action before the court to request a judgment to be given by the contract. As is clear from art. 2524 par. (2) Civ. Code, the limitation period of 6 months will start to run from the day after the deadline for the contract .

If the parties have not promised the date on which the sales contract has to be concluded and subsequently can not agree on it, 1182 par. (3) and art. 1415 par. (2) Civ. Code, the court may order, at the request of either party, to complete the promise with that date. According to art. 1415 par. (3) the civil request for settlement of the date shall be settled according to the rules applicable to the presidential ordinance, subject to prescription, which shall start to run from the date of promulgation. In the absence of a special legal provision, the 3-year general limitation period provided for in art. 2517 Civ. Code shall apply.

Regarding the moment when the limitation period of the action under art. 1415 par. (3) Civ. Code in which the court may be required to settle the term in which the contract is to be concluded, it flows according to the said text, from the date of the conclusion of the "contract", i.e. the promise of sale, because the obligation affected by the term is that of concluding in the future the contract prefigured by the parties by the promise made.

During the period in which the promissory-buyer is in possession of the promised asset, the prescription is interrupted, according to art. 2538 par. (2) Civ. Code. The handing over of the good to the promissory buyer and the exercise by the latter of the ownership of the promised asset is an act of tacit acknowledgment by the promissor-seller of the claim in the forced execution of the pre-contract in the way of a judgment in lieu of sale. In this case, the prescription of the right to action begins to run again when the promissory-seller expressly manifests himself in the sense of denying the promissory-buyer's right.

## 5. The inalienability clause

According to art. 627 par. (4) Civ. Code, the inalienability clause is understood in the conventions from which it is the obligation to pass on the property in the future to a determined or determinable person. The scope of this law was subject of controversy as to whether the promise of a translative property contract "gives rise to the obligation to pass on the property in the future", or whether this condition refers to the translative contract itself, in where, for various reasons (e.g. good future, suspensive condition, etc.), the property is not transmitted at the time of the conclusion of the contract.

This controversy was solved by art. 601 of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, as modified by G.E.O. no. 60/2012, according to which "in the category of

conventions provided by art. 627 par. (4) of the Civil Code, which implies the obligation to pass on the property in the future to a determined or determinable person, also includes the pre-contracts for the future transmission of the right to ownership of a movable or immovable property by concluding contracts, as the case may be, unless otherwise provided by law. "

The implicit existence of the inalienability clause in pre-contracts is not without significant practical consequences. Thus, the promissory-buyer, as a beneficiary of the inalienability clause in the pre-contract, may request the cancellation of the translative or constitutive act of real rights concluded without respecting the clause marked for opposability in the land book. In the absence of this note, the action for annulment is to be dismissed.

In order to ensure the irrevocability of the ineligibility clause, it is sufficient to note in the land book the pre-contract pursuant to art. 902 par. (2) point 12 Civ. Code, without the necessity of enforcing the ineligibility clause under art. 902 par. (2) point 8 Civ. Code. This text applies only to the situation of expressive inalienability.

## Conclusions

The forced execution in nature of the promise of sale takes on the atypical form of the contract which, by virtue of its particular nature of the form of execution in nature of the contracts, has a number of peculiarities which translate into the substantial plan by the conditions to be met for obtaining of such a judgment.

Interpretation of the legal framework in the matter of the contract decision may reveal difficulties such as those we have dealt with in the foregoing.

With regard to the value of the stamp duty the market value of the good is preferable. The value of the movement of the good is related to the time of the filing of the petition. If the amount indicated by the claimant is contested, the amount shall be determined by the documents submitted and the explanations given by the parties, according to art. 98 par. (3) Civ. Proc. Code in which the data on the taxable value of the asset or, where appropriate, the grids of the notaries public could be used.

With regard to the conditions to be met for the award of a contract, they are: the conclusion of a valid pre-contract and the fulfillment of the terms of the sale at the date of the delivery of the contract (including the condition that the property be retained in the promise of the seller at the date the award of the contract which takes place); the applicant has fulfilled his promised obligations; the unjustified refusal of one of the parties to conclude the promised contract. To these substantial conditions are added formal obligations established by the law regarding the submission of the land book excerpt on the immovable property subject to the promise of sale, the fiscal certificate certifying the payment of all payment obligations due to the local budget and the proof of current debts of the contribution rates to the owners' association.

According to art. 1669 par. (2) Civ. Code, when the parties expressly promised the date on which the contract of sale must be concluded and one of the parties refused to conclude the contract of sale on the established date, the other party has the right to address to the court, to file an application in civil matters, requesting a decision to be taken, within 6 months of the date fixed for the conclusion of the contract.

If the parties have not promised the date on which the sale contract has to be concluded and subsequently can not agree on it, 1182 par. (3) and art. 1415 par. (2) Civ. Code, the court may order, at the request of either party, to complete the promise with that date. Regarding the moment when the limitation period of the action under art. 1415 par. (3) Civ. Code in which the court may be required to settle the term in which the contract is to be concluded, it flows according to the said text, from the date of the conclusion of the "contract", i.e. the promise of sale, because the obligation affected by the term is that of concluding in the future the contract prefigured by the parties by the promise made.

Under art. 627 par. (4) Civ. Code, the inalienability clause is understood in the conventions from which it is the obligation to pass on the property in the future to a determined or determinable person. The implicit existence of the inalienability clause in the pre-contracts entitles the promissory-buyer, as a beneficiary of the inalienability clause in the pre-contract, to demand the cancellation of the translative or constitutive act of real rights concluded without respecting the clause marked for opposability in the land book.

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# CLUSTER OF COMMERCIAL SALE AGREEMENTS

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**Abstract**

*The object of this article is the analysis of some actual issues regarding the content and particularities of the cluster of agreements involved by the sale-purchase agreement. We identified mainly two categories of contractual relationships that are specific to sale transactions that we classified in the legislated/regulated cluster of agreements and the contractual conventional cluster existing in relation to the sale-purchase agreement. Given that the problems are many and complex, we limited ourselves to the issues regarding the transfer of ownership and bearing the risk of perishing of the goods subject to sale, but which have to be carried from the place where they are to the buyer's office/domicile, or to some other destination mentioned by the latter. We reached the conclusion that a distinction should be made between the transfer of ownership and bearing the risk of perishment of goods, which pertain exclusively to the relationship between the seller and the buyer, and the issues regarding the liability for the destruction/loss of goods, which pertain to the contractual relationship with the other participants in the transaction (shipper, carrier, insurer, etc).*

**Keywords:** *agreement, sale-purchase, contractual group, risk, perishment of goods, deterioration, loss, liability.*

## 1. Introduction

From its appearance and up to the present, the sale-purchase agreement has been one of the most used agreements, both within the relations between simple individuals, and within the trade relationships between various participants in such relationships. Truly, sale-purchase is the agreement that meets a multitude of needs of natural persons, in their capacity of consumers of various goods and services, but also the main tool of agency of exchange and movement of goods (raw materials, materials, products, merchandise, etc.) both from manufacturers to distributors, and from the latter to the end recipients. It is indubitable that the sale transactions in their various forms are the main means of marketing the goods both on large (regulated) markets), as provided in Law no. 357/2005 regarding commodity exchanges[1]and the Regulation regarding the approval, supervision, control and sanctioning the activity of commodity exchanges[2] and within the usual relationships between consumers, or between consumers and professional traders.

Sale transactions have evolved over time, the most significant progress being witnessed, undoubtedly, in relation to commercial sales.

## 2. Content

### 2.1. Particularities of the commercial sale-purchase

As it is well-known, by the enactment of this Civil Code, the sale-purchase was doubly regulated, in the meaning that the common law relations (between simple individuals) were legislated in the Civil Code (of 1864), while the ones specific to commercial sale were legislated in the Commercial Code[3]. The duality of the regulation was based on the specifics of the two categories of transactions. Several characteristics forming the specifics of commercial sale-purchase the purpose of sale, the economic function of sale, the capacity of contractual parties, the condition and particularities of the goods subject to sale, the price and method of payment, etc.

Repealing the Commercial Code has not led, however, to the disappearance of commercial sale-purchase transactions, because the specifics characterizing them consist of veritable intrinsic elements of such categories of transactions. More precisely, given that commercial relationships have not disappeared, neither have so the specific differences between the commercial sales and the civil ones.

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[1] Official Gazette no. 1115 of 9 December 2005.

[2] Official Gazette no. 850 of 21 November 2014.

[3] for an analysis of the commercial sale-purchase transactions subject to the Commercial Code, see St. D. Cărpenaru, Romanian Commercial Law, 5th edition, All Beck Publishing House, Bucharest, 2004, p. 409 *et seq*

We do not intend to analyze hereby all the elements forming the difference between the civil sale-purchase agreement and the commercial sale-purchase agreement, but we limit ourselves to the ones arising from capacity and the place where the contractual parties are. We proceed in this way because, undoubtedly, in light of parties' capacity, at least one participant in the sale is a professional trader, in the meaning of the Civil Code, while, in light of the place, most commercial sale agreements are negotiated, entered into and implemented between remote persons.[4]

These features of commercial sale-purchase generate, among others, also a series of other categories of legal relations, some being intrinsic to the sale, as tools of marketing through sale (such as consignation, commission, supply, franchise, leasing, agency relations, etc.), while others extrinsic to it (such as shipping, transport, insurance, etc.), but without which, actually, the commercial sale-purchase could not achieve its purpose.

Surely, each of these categories of relations forms the legal content of an agreement, which is regulated and autonomous in the Civil Code or in other normative acts. Given that these are closely interconnected and serve a common purpose, that of marketing through sale, such categories of legal relations look like a veritable „cluster of agreements" gravitating around the commercial sale-purchase, which is the „queen" of the other civil or commercial transactions, as the case may be.

### 2.2. Main commercial sale-purchase agreements

The actual analysis of the legal relations involved by commercial sale-purchase shows that they cluster in two categories of agreements. One category contains those agreements that have a natural connection with commercial sale, such as the relation sale-leasing-mandate and we consider the actual cases in which the financer mandates the user to search for and negotiate with the supplier the essential elements of the sale-purchase agreement for the goods that are to be used on a leasing basis[5].

We called such contractual relations „a natural cluster of agreements" or „a regulated/legislated cluster of agreements" due to the connection existing between them, in the meaning that sale, as the main transaction of marketing the goods, involves the intrinsic (natural) existence of such agreements.

Besides the contractual transactions which have a natural (intrinsic) connection with commercial sale, there is a series of other agreements that the contractual parties connect to the commercial sale agreement. Such examples are the shipping agreement, the transport agreement, the insurance agreement, the customs service agreement, etc., that we call „the conventional/volitional cluster of agreements". Such agreements do not have an intrinsic connection, but facilitate the performance of commercial sale transactions, and increase efficiency of the particularity of the commercial sale-purchase agreement of being negotiated, concluded and implemented between remote persons. The conventional cluster of agreements is based on real facts, in the meaning that, given the parties are placed within a distance from each another, or the merchandise is found in a certain place or in a certain condition (such as in the case of sale of future goods)[6] and should be carried to the buyer's domicile/office, or to another destination mentioned by them. For the operations of transport of merchandise, a shipping company may be mandated, and if the merchandise carried (bought) is to transit the territory of other states as well, the services of a customs agent are used. Likewise, as regards the merchandise carried (that is subject to sale-purchase), the parties may agree on taking up an insurance policy for the duration of transportation (CARGO). In this way, the same goods (subject to the sale-purchase agreement) are subject to an entire chain of other separate sale agreements, but in close connection with it. Mainly the goods that are subject to sale are, at the same time, subject to the shipping agreement and/or to the transport agreement, subject to the insurance agreement, subject to customs formalities, etc. The situations are even more complex, if the goods are bought or are to be marketed through agency, commission, consignation, franchise, distribution relations or any other relations, when, issues specific to the mandate agreement, with or without representation, are also involved in the case.

### 2.3. Correlation between the agreements within the conventional cluster with commercial sale transactions

Hereinafter, we intend to point out several issues related exclusively to the conventional cluster of agreements involved by the implementation of the commercial sale-purchase agreement, even if, in fact, both clusters of agreements may coexist.

We mentioned above that the conventional cluster of agreements is created by the parties to the sale-purchase agreement, depending on their understanding of the distribution of the obligations incumbent on them. For instance, the agreement stipulates that the issues regarding the loading and carrying of goods are the responsibility of the seller, while the ones related to

[4] for the analysis of the mechanism of conclusion of an agreement between remote persons, see L. Pop, I-F. Popa, St. I. Vidu, Civil Law.Obligations), UniversulJuridic Publishing House, Bucharest, 2015, p. 67-68; P. Vasilescu, Civil Law. Obligations, Hamangiu Publishing House, 2012, p. 301-302.

[5] For details regarding the analysis of the leasing agreement, see St. D. Cărpenaru, Treaty of Romanian Commercial Law, UniversulJuridic Publishing House, 2019, p. 599 *et seq*.; V. Nemeș, Commercial Law, third edition revised and supplemented, HamangiuPublishing House, Bucharest, 2018, p. 396 *et seq*.

[6] for the analysis of sale of future goods, see St. D. Cărpenaru, Treaty of Romanian Commercial Law, op. cit. p.455; V. Nemeș, Commercial Law, op. cit. p.307-308.

insurance and customs services are incumbent on the buyer. Likewise, the parties may establish, based on the principle of freedomof contract, that all the issues regarding the arrival of goods at destination be the exclusive responsibility of one of the contractual parties. It is understood that the substance of the conventional character of the cluster of agreements is provided by the will of the parties, both as regards the correlation elements, and in light of the knowledge of their content. This because, as shown by facts, the parties procure the protection of contractual provisions, by inserting some confidentiality clauses, or even by entering into veritable agreements in this respect, from the very beginning of negotiations.

A „contractual hierarchy" is thus created, according to which sale is clearly the main transaction/agreement, while the others are not necessarily subsidiary, but, undoubtedly, should serve the purpose of sale.

The contractual parties may choose also a third solution, especially, within trade relations with extraneous elements, that of mandating a specialized entity, an agent( we consider the agent in the agency contract regulated by the Civil Code and not the agent in the meaning of ordinary language),who is to take care of the conclusion of all the agreements involved by sale, and also of the performance of transactions/deeds, such as the loading/stacking of merchandise, its transfer, unloading at destination, etc., especially, in situations in which the nature of goods requires special handling machinery/techniques. Such agent of sale and of related transactions takes care of the transfer within the group of the main contractual elements, or this may be done by the very seller/buyer, a kind of contractual union being thus formed, within which certainly the seller/buyer is to be the leader. Such a contractual technique may be used in the case of a group of companies [7] within which named or unnamed agreements may be implemented, containing clauses specific to several transactions performed by the group (for example, sale and leasing, sale and commission, etc.), subject to the groups' changing economic needs.

Irrespective of the option chosen by the parties to the sale agreement, it is sure that certain essential elements of each agreement within the group are known by all the group members. More precisely, the carrier knows the main clauses of a sale agreement; likewise, an insurer is no stranger to the sale, transport and shipping relations, etc. Undoubtedly, on the correlation between the agreements within the group, depends the success of the commercial sale-purchase relations. This because, as mentioned previously, all the other agreements within the group should contribute to the achievement of the main objective of the commercial sale-purchase agreement. Certainly, from a legal standpoint, each of the agreements within the group may be analyzed inclusively as to their application, both individually, and collectively, looking like a contractual conglomerate of sale.

### 2.4. The main legal effects of the conventional cluster of agreements related to the commercial sale-purchase.

In order to grasp the importance and effects of the conglomerate of sale related agreements, it is sufficient to recall the issue of liability/covering damages. More precisely, if the goods subject to commercial sale are deteriorated in full or in part, the issue of bearing the risk of perishment arises, having its root in the sale agreement, and also the issue of liability of the shipper, carrier, the insurance company, etc., and, last but not least, issues related to the transfer of the property title.

The issues become, therefore, complex enough, and might overwhelm the seller/buyer, however specialized they could be. This is exactly the reason why we showed above that the seller/buyer may outsource these services/deliveries to an agent specialized in such transactions[8].An example would be using the commission agreement as a transaction facilitating the identification of contractual partners, group members, and of the relations serving for the purpose of commercial sale. But another contractual mechanism may be also conceived, such as the letter of credit, whereby many sale related transactions are performed by financial institutions, such as the correspondent bank (the acknowledging bank, the approving bank).

### 2.5. Liability versus bearing the risk in case of the conventional cluster of agreements

Some of the most important issues related to the sale-purchase agreement are the ones regarding the transfer of the property title to the goods subject to sale and the liability/bearing the risk of perishment of goods. As regards commercial sale, such issues arise, especially, within the relationship seller-buyer-carrier and CARGO insurer. Indeed, in commercial matters, the scope of sale consists mainly of generic goods, which have sometimes the particularity of being „future goods" (which do not exist concretely at the time of negotiation of the agreement) and which have to be carried from the seller's domicile/office or from the place where they are to the buyer's office/domicile, or to another place mentioned by the latter. Or, during transportation, the merchandise may suffer certain deterioration or loss, and the issue of liability for damages arises, respectively, bearing the risk of perishment of goods subject to sale, but also of the other agreements, in close connection with this agreement.

I. Transfer of ownership

As regards the transfer of ownership, the Civil Code regulatessuch issue, depending on the nature of goods. Thus, as regards future goods, art. 1658 in the Civil Code stipulates that, if the subject of sale is some

[7] Manole Ciprian Popa, Group of Companies , Publishing House C. H. Beck, Bucharest, 2011

[8] for a detailed analysis of the agency transactions/agreements within commercial relations, see D.A. Sitaru, *Agency Contracts within Commercial Activity*, Hamangiu Publishing House, Bucharest, 2012

future asset, the buyer acquires ownership when the relevant asset is realized. The ownership over generic goods is transferred to the buyer as of the date when they are individualized through delivery, counting, weighing, measuring, or by any other means agreed or prescribed by the nature of goods (art.1.678 in the Civil Code). On the other hand, if the goods are sold in bulk and for a single aggregate price, the ownership is transferred to the buyer as soon as the agreement is concluded, even if the goods were not individualized (art.1.679 In the Civil Code). As noticeable, as regards generic goods, except for those sold in bulk and for a single aggregate price, the transfer of the property title is related to the actual fact of delivery of goods. Given that goods move through the carrier, it means that the actual act of delivery takes place in relation to the carrier or the shipper, as the case may be. The solution is substantiated also by the provisions under art. 1.667 in the Civil Code, according to which, in the absence of contrary usage or stipulation, if the goods have to be carried from one place to another, the seller should take care of shipping, at the buyer's expense. The seller is released when delivering the goods to the carrier or shipper. We infer from this that, once the goods are delivered to the carrier, the property title is transferred from the seller to the buyer.

II. Bearing the risks

The delivery operation is related also to the issue of bearing the risks of full or partial perishment of the goods subject to the sale agreement. As regards, especially,generic goods, art. 1686 par.3 in the Civil Codestipulates that, as regards generic goods, the seller is not released from the obligation of delivery, even if the lot the relevant goods belonged to perished in full, unless the said lot was expressly mentioned in the agreement. It may be easily inferred that the risk of full or partial perishment of goods is the responsibility of the debtor of the delivery obligation, namely the seller, *res perit debitori*, while, after delivery, the risk of perishment is transferred to the buyer. The rule expresses the general principle in such matters, as regulated under art. 1274 in the Civil Code, which sets forth that, in the absence of a contrary stipulation, to the extent goods are not delivered, the risk under the agreement stays with the debtor of the delivery obligation, even if the ownership was transferred to the acquirer. Therefore, as a rule, the delivery of goods to the carrier realizes both the transfer of ownership, and the transfer of the risk of full or partial perishment of goods to the buyer. The issues regarding bearing the risk of perishment interconnect with the ones regarding liability, in the hypothesis of full or partial destruction/deterioration of the goods during transportation.Certainly, the issue of bearing the risk of full or partial perishment of the goods carried, subject to the sale-purchase agreement arises only within the relationship between the buyer and the seller, and this fact is settled, as we showed above, to the detriment of the buyer, in the meaning that, in the absence of a contrary stipulation, the latter bears the risk, being obliged to pay the price to the seller. On the other hand, the issues regarding the liability for deterioration/loss of goods during transportation arise mainly within the relationship buyer-shipper-carrier and the insurer of the merchandise. As a consequence, the carrier shall be held liable for all the losses arising during transportation. Certainly, there are essential differences between the two instances, namely bearing the risk and the liability.

### 2.6. The difference between bearing the risk of perishment and the liability for deterioration / destruction

The issue of bearing the risk of full or partial perishment of the goods arises only under agreements transferring ownership (we consider the period of negotiation and execution of the agreement), or, the only agreement transferring ownership within this contractual mechanism is the sale. Consequently, if the full or partial perishment (deterioration or loss) of the goods occurred during transportation, the other members of the contractual group (shipper, carrier, insurer, etc.) do not bear the risk of perishment of the goods, but may be kept liable for the contribution/risk undertaken upon the occurrence of damage. More precisely, as regards the carrier, pursuant to the provisions under art. 1.984 in the Civil Code, this is liable for the damage caused by the full or partial loss of goods, due to their alteration or deterioration, arising during transportation. The legislator sets forth, under art. 1.991 in the Civil Code, the cases that exempt the carrier from liability, a situation which is, undoubtedly, more privileged than that of the person liable for bearing the risk. [9]. Likewise, as regards the insurance of goods, the insurer undertakes , upon the occurrence of the risk insured, to pay the insured, the beneficiary of insurance or other entitled persons (art. 2.214 in the Civil Code). [10]

Therefore, as regards the other agreements than the sale one, the only issue is the liability for covering the damage caused, such as in the case of the shipper and carrier, or of the damage undertaken by contracting some risks, as in the case of the insurance agreement, but not also of bearing the risk of full or partial perishment of the goods.

[9] for the issues regarding the carrier's liability, and also other essential elements of the transport agreement, see Gh. Piperea, CarriageLaw, 3rd edition, C.H.Beck Publishing House, Bucharest, 2013; A.T Stănescu, Ț-A. Stănescu, Transport Agreement, in the new Civil Code. Comments per Articles 2nd edition, C. H. Beck Publishing House, Bucharest, 2014, p. 2106 *et seq*.; M. Afrăsinei, Transport Agreement in the new Civil Code. Comments, Doctrine and Case Law)Vol.III, Hamangiu Publishing House, 2012, p. 324 *et seq*.; O. Crauciuc, Transport Agreement in the new Civil Code, Vol.III, Part II, Studies and Comments), p. 277 *et seq*

[10] as regards the goods insurance agreement, see V. Nemeș, Insurance Law, Hamangiu Publishing House, Bucharest, 2012, p. 256 *et seq*.; C. Iliescu, Goods Insurance Agreement in Romania, All Beck Publishing House, Bucharest, 1999; I. Sferdian, Goods Insurance Agreement, Lumina Lex Publishing House, Bucharest, 2004.

Undoubtedly, the legitimacy of the capacity to sue in the action for covering the damage stays with the person that entered into the contract, being thus a personal/contractual action. The question is if, for example, the obligation of entering into the transport/shipping agreement or the insurance agreement is incumbent on the seller, does the buyer still have the legitimacy to sue such persons? More precisely, if, during transportation, goods are destroyed, stolen or lost, and the transport agreement was concluded by the seller, is the buyer able to request payment of the damage from the carrier, although, hypothetically speaking, he is not party to such an agreement? Without proceeding further with the analysis, for space related reasons, we believe the answer is yes. The main argument is that, as we have showed, in the absence of a contrary stipulation, the concrete fact of delivery of goods to the carrier for loading transfers the property title and transfers the risk of the full or partial perishment of goods. Thus, any deterioration or loss of the goods subject to sale is borne by the buyer, given that all such losses are to be borne through the latter's assets. Therefore, as the owner of goods and as an injured person following the full or partial loss of such goods, the buyer may not be denied the right to be indemnified by the author of the loss. In conclusion, given that the adverse impact of the loss is on the buyer's assets, the latter should be acknowledged anaction in tort against the shipper, carrier, the insurer and any other persons that caused damages to the goods.

## 3. Conclusions

The sale-purchase agreement is first and foremost one of the most important and frequent agreements not only within civil relationships, but also within commercial activity. What is specific to commercial activity is that sale-purchase in almost any situations is in close connection with a multitude of other agreements, forming, thus, a regulated cluster, or, as the case may be, a conventional cluster of agreements. All such agreements created around sale should serve the essential purpose of sale, namely that of marketing the goods until reaching the end recipient of such goods. Objectively, the goods subject to sale are, at the same time, subject to other agreements, such as shipping, transport, insurance, etc. agreements. The main issues arising in such a contractual context regard the transfer of the property title, the transfer of bearing the risk of full or partial perishment of goods and the liability for the damages caused. Given that not all such issues are regulated in detail by the legislation in force, it is advisable that at least the essential aspects of the three categories of issues be an object of concern to the contractual parties, being inserted in the contracts the latter enter into.

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# PROTECTION OF A BUSINESS NAME IN CASE OF SIMILARITY OR IDENTITY OF BUSINESS NAMES AND/OR TRADEMARKS

**Anna NIKOLOVA***

**Abstract**

*In Bulgarian legislation, the regulatory framework of a business name was supplemented by two new paragraphs of article 7 of the Commerce Act (SG № 34/2011). The changes were almost immediately subject to criticism by the doctrine. This report analyzes, on one side, the business name, focusing on the protection provided in violation of the right of the business name under Art. 7, para. 4 of the Commerce Act in case of bad faith application or use of business name, and on the other side, the newly introduced prohibition under art. 7, para. 5 of the Commerce Act for similarity or identity between a registered business name and a trademark, unless the merchant has rights in the trade mark. An overview of the case law has been made. The purpose of the research problem is to answer the question of whether adequate protection of the right of business name has been provided by the legislator in cases where a business name in a bad faith has been registered similar to an already existing one or with trademark.*

**Keywords:** *a business name, protection of a business name.*

## 1. Introduction

In Bulgarian legal literature, the business name is traditionally seen as a means of individualizing the merchant and as an element of their entreprise. The general legal framework of the business name, and the ways for its legal protection, are regulated in Chapter three of the Commerce Act, Art. 7-11. The business name is not just a means of individualizing merchants. As an element of his enterprise, the business name may be a subject of transactions. It is necessary to point out that in many cases the business name is an important pricing factor in transactions with the merchant's enterprise. Therefore, the issues of the legal protection of the business name are important.

The objectives set out in the report are to clarify what new claims have been regulated in the case of a breach of right of the business name through the newly created paragraph 4 of Article 7 of the Commerce Act. The objective can be achieved with the performance of the following tasks: to explain when there is identity and similarity between two business names and the comparison of the claims under Art. 7, para. 4 and under Art. 11, para. 2 of the Commerce Act.

Next, the objective of the report is to indicate what new requirements for the content of the business name are introduced with the newly created paragraph 5 of Article 7 of the Commerce Act. In order to meet the defined goal, it is necessary to make a comparison between a business name and a trademark. Moreover, the latest amendments to the regulations of the business name (SG 34/2011) are subjected to a critical analysis by well-known scientists in the field.

The third and fourth paragraphs of Article 7 of the Commerce Act are therefore subject to thorough analysis. For the sake of completeness, the case-law has been reviewed.

## 2. Content

### 2.1. The essence of the right to a business name

In the Bulgarian legal doctrine the right to a business name is considered as an indefinite, personal (non-material), indiscriminate, absolute and exclusive right, which arises at the moment a business name is registered in the Commercial register[1]. The condition for registration of the business name in the register is compliance with the normative requirements, which determine the content of the business name. These requirements are determined according to the rules of the mixed system with the priority of the beginning of the truth[2]. Its expression is the rule of Art. 7, para. 2, last sentence of Commerce Act, according to which the business name must be truthful, not misleading and must not be offensive to the public order and moral. The content of the business name is traditionally divided into obligatory and optional. It should be determined in such a way as to provide exclusivity of the business name. It should not coincide with the the business name of already registered merchants. These requirements are derived from Art. 11, para. 1 of the Commerce Act,[3] Art. 21, para 7[4] and Art. 35[5] of the Commercial Register and the Register of Non-Profit Legal Persons Act. With

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[1] Georgi Stefanov, Targovsko pravo.Obshta chast. (Veliko Tarnovo, Abagar, 2016) ,p.141-142.

[2] Stefanov, Targovsko pravo, p.136.

[3] Stefanov, Targovsko pravo, p.141.

[4] Angel Kalaydzhiev, Targovsko pravo. Obshta chast. (Sofia, Trud I Pravo, 2010), p.126.

[5] Nikolay Kolev, Otnosno firmata na targovetsa (Targovsko i konkurentno pravo, issue 5/2011, p.15-21).

the transition from decentralized judicial registration of merchants to centralized administrative procedure before the Registry Agency, the exclusivity has turned from local to national (the change is regulated by the Commercial Register Act). The business name is a means of individualisation of merchants. Having in mind that merchants are both legal and economic entities, which produce or provide goods or services, it is indisputable that the business name must differ from the business names already registered. Otherwise how could consumers distinguish the merchants' goods from those of others.

In my opinion Art. 11, para. 2 of the Commerce Act regulates only the exclusive nature of the business name which ensues from the entry in the register. However, the provision does not introduce a requirement for the uniqueness of the business name. It could therefore be assumed that the entry of two identical merchants with identical business names into the register would lead to confusion among consumers. There is no rule in any of the provisions of Chapter Three of the Commerce Act that the merchant's business name must be distinguished from those of already registered mercahts. Such a requirement existed in our old trade legislation. Pursuant to Article 24 of the repealed Commerce Act, each new business name must be clearly distinguished from other business names, registered in the same place or in the same municipality. In the old Bulgarian commercial legal literature it is stated that the right to a business name is exhausted by the exclusive use of the business name to carry out the commercial activity under its name. Only by way of exclusive use of the business name, one can expect the related benefits - good name, trade relations, customers[6]. To include such a rule in our legislation would make the disputes about the identity of two bisiness names pointless, if they differ only by the punctuation marks used or the spaces between the words.

Pursuant to Art. 21, item 7 and Art. 35 of the Commercial Register and the Register of Non-Profit Legal Persons Act, before entering a merchant the registration official is obliged to check whether another person has rights over the business name and whether it meets the requirements of Art. 7, para. 2 of the Commerce Act. Consequently, there is no explicit rule in these provisions either that a merchant's business name should be distinguished from other listed business names. As it has already been pointed out, the requirement for authenticity is the guiding principle when determining the content of a business name. An obligatory element of the business name's content is the designation of the trader's type. /e.g Rompetrol Limited Liability company or Rompetrol LLC/. These requirements are imperative. In addition to the obligatory content of the business name, all business names may also indicate the nature of the business, the names of the partners, as well as a freely chosen addition.

The first conclusion that can be drawn from the analysis of Art. 7, para 2 and Art.11 of the Commerce Act is that the right to a company name is an exclusive right - the name can only be used by the merchant who has registered it and that each business name entered in the register is distinguished from the bisiness names of the others. The Commerce act does not regulate the cases in which the registration official has registered a business name that does not meet the requirements of Art. 7. Until the 2011 amendments to the law, the only protection against violation of the right to a business name was regulated in Art. 11, para. 2 of the Commerce act. The claim under Art. 11 is inapplicable in the cases of violation of Art. 7, para. 2 of the Commerce act. The doctrine states that the legislator has failed to provide a legal mechanism for removing any breaches committed when registering a business name[7]. For the reasons given, the view deserves to be supported. Apart from being a right, the business name is also a means of individualizing the merchant in turnover. It is vital for him/ her to be able to protect themselves against any intentional or unintentional misuse of their name. Such actions can be expressed in any unauthorized use of the business name not by the merchant who registered it but by another person (he may or may not be a mercant) or in the use of a business name that is registered in compliance with the legal requirements, but is similar or identical to a business name registered earlier.

In the first hypothesis protection shall be granted with the claim under Art. 11, para 2 of the Commerce Act. From the expression 'affected parties', it can be concluded that the claimant may be both the trader and any other person, provided that they have an interest in discontinuing the use of this bisiness name[8]. This has to be proven specifically for each case. In my opinion, while it is highly unlikely, it should be assumed that it is possible to file only a claim for compensation without seeking the cessation of the infringement. If damage has not been caused to the right-holder by the wrongful use, then he may file a claim only to cease further use of the right to the business name. Both claims can therefore be brought individually[9].

**A claim to establish an application for, or a use of, a business name in bad faith, to cease and desist using a business name in bad faith and for damages, when the business name is identical or similar to an already registered one**

In the second hypothesis, up until amendments to the commercial legislation in 2011, there was no private protection in the case of registering two identical or similar business names in the commercial

[6] Lyuben Dikov, Kurs po targovsko pravo Commercial Law Course (Sofia, Third Phototype, 1935,1992), p.46.

[7] Stefanov, Targovsko pravo, p.139, Valentin Braykov, Targovskoto ime i negovata zashtita The Trade Name and Its Protection (Tagovsko pravo, issue 2/2001, p.5-12).

[8] Stefanov, Targovsko pravo ,p.143, opposite Kalaydzhiev, Targovsko pravo , p.128.

[9] Kalaydzhiev, Targovsko pravo, p.128 opposite Stefanov, Targovsko pravo,p. 143.

register. Art. 7, para. 4 was subject to criticism by the doctrine.

According to another opinion, Art. 7, para. 4 of the Commerce act provides private legal protection of a business name. This paragraph regulates three claims - declaratory -to establish an application for, or use of, a business name in bad faith, reprehensible - to cease and desist using a business name in bad faith, compensation - for damages.

In order to distinguish between claims under Art.11 para. 2 and Art. 7 para.4 of the Commerce Act, it is necessary to analyze the prerequisites for the submission of claim under Art. 7 para.4of the Commerce Act.

For a claim to be admitted under Art. 7 para.4 of the Commerce Act, both the plaintiff and the defendant must have a commercial quality, whereas a defendant under Art. 11 para.2 of the Commerce Act may not be a trader.Next, in order to admit a claim under Art.7 para.4 of the Commerce Act, it is necessary for the plaintiff to prove identity or similarity between his business name and the one of the defendant and has to prove that his business name has been registered before the bisiness name of the defendant. Therefore, it is necessary to clarify whether the identity of a business name only refers to its optional content or to all elements of the business name's content. According to doctrine, there will be no matching of names if they are entirely covered by the optional content but differ only by the designation for the type of commercial company. When consumers choose certain goods, they hardly pay attention to the type of merchant. That is why it would be more correct to judge the identity of two business names in relation to the other elements of its content.

Next, in order to determine whether there is an identity between two business names, the question must be answered whether the different punctuation marks contained in the business names lead to an identity between them. This question – so easy at first glance, has created controversial practice, both judicial and registration. Opinions are split into two. It has been affirmed in the legal literature that business names that differ only in their punctuation marks are identical. It has already been pointed out that the business name as a means of individualizing traders must be unique. That is why I adhere to this opinion. According to the jurisprudence, there is an identity between two business names when they differ either by using a double vowel or a double consonant (it is a matter of identical sound, identical pronunciation).

The identity is a circumstance that can be established more easily than the similarity between two business names. Moreover, the optional content of the business name may contain an indication of the nature of the business or be defined as a combination of the partners' names. These requirements allow for the listing of many companies in the commercial register, whose names are somewhat similar. The registration of similar business names in the register is not a violation of legislation. This is also the case law. Establishing a similarity between two business names can not be self-directed. Such an assessment should be made only in the case of a claim under Art. 7, para. 4 of the Commerce Code, and not at the initial entry of the business names in the register. Similarity should be assessed specifically and factually in regard to its relation with bad faith.

Next, in order to admit the claim under Art. 7, para. 4 of the Commerce Act, it is necessary to prove the defendant's bad faith. On the question of how bad faith was established, the Supreme Court of Cassation, in its Decree No. 304 of 15.05.208, ruled that, in its application for registration of a trademark and its use, it established a consistent practice, assessed in Decision No 194 /30.10.2013 SCC, Decision No. 162/ 24.01.2012 SCC. This practice may also apply to misconduct when a business name is identical with or similar to a previously registered bisiness name. Criteria regarding the content of 'bad faith' within the meaning of Art. 7, para. 4 of the Commerce Act may be the reputation of a previously registered bisiness name, identity or similarity in the content of the business names, the behaviour before and after filing an application for registration of the business name in terms of the knowledge of the existence of an earlier identical or similar name, as well as the intention to harm another person.

As a conclusion from the analysis of Art. 7, paragraph 4 of the Commerce Act, we can point out that despite some imperfections of the regulation, the change is positive. Even if the claim under Art. 7 para.4 is admitted, there are no means to force the merchant, who has registered the later (second) business name, to change its content. There is already a case law on this issue, according to which the only enforcement mechanism is to impose fines.

### 2.2. Identity or similarity of a business name with a trademark

Before proceeding to consider the issue of identity or similarity between a business name and mark, a distinction must be made between them. The business name is always a verbal indication of the merchant and he/ she can own only one name. The right to a business name is exclusive and arises from the entry in the Commercial Register. It can only be transferred as an element of the merchant's enterprise, not as a separate object of industrial property. The registration of the business name is indefinite. Each name is different from the name of all the other merchants. The merchant can use it to denote all the goods or services he/ she produces or provides. Merchants are legally obliged to have a bisiness name and state it in their commercial correspondence. The trademark has quite different functions. Not every merchant is required to register a mark. It is a sign, capable of distinguishing the goods or services of one person from those of other persons and can also be represented graphically. The mark therefore individualises the goods or services and not the merchant. It is not always a verbal indication. The right to a trade mark arises from the registration at the Patent

Office for a period of 10 years from the filing date of the application. The trademark registration can be renewed for an unlimited number of times. The right to a trademark is also exceptional. Legislation allows the registration of identical marks provided that they are used to designate different goods or services.

In the commercial literature, until the change in the legislation in 2011, it was pointed out that no prohibition or protection of verbal identity was established between a registered business name and a later registered trademark in the Patent Office. It was even considered acceptable that the optional content of the business name should match the mark or be part of it[10]. Protection against the use of a business name, trademark, or geographical designation identical or similar to that of other persons, both before 2011 and at present, is regulated in Art. 35, paragraph 2 of the Law on Protection of Competition. Responsibility under Art. 35, para. 2 of the LPC is administratively punitive.

The addition of Art. 7 para. 5 of the Commerce Act (promulgated in the State Gazette, issue 34 of 2011) regulates the prohibition of identity or similarity between a business name and a protected trademark, unless the merchant has no rights over it. The newly created paragraph 5 of Article 7 of the Commerce Act is subject to criticism in the legal literature regarding the term used - 'protected trademark' and the lack of criteria to judge the identity, respectively the similarity between a business name and a trademark. An identity is allowed between a business name and a trademark when the registered trademark is a word or a dominant word element[11].. Since the business name is always a verbal indication, in my opinion, in Art. 7, para 5 of the Commerce Act is meant not a protected trademark but a word mark. Therefore, the view should be supported that Paragraph 5 of Article 7 of the Commerce Act provides for the prohibition and protection of verbal identity between a registered business name and a later registered trademark at the Patent Office, as well as vice versa[12].

As already explained, the legal form of the merchant is an element of the business name's mandatory content. Consequently, the view that the identity of a business name and a trademark is at the very least excluded because of the mandatory content of the company, which pursuant to the Marks and Geographical Indications Act is in most cases an absolute ground for refusal of registration[13],, deserves to be supported.

Even authors criticizing Art.7 para. 5 admit that a mechanism is needed to avoid the misconduct of registration of business names that include trademard, registered before the registrationof the business name. The prohibition under Art. 7, para. 5 of the Commerce code should apply only to newly registered business names and not to existing business names as of the date of entry into force of the provision. The law-maker has not provided for any reversal of Art. 7, para. 5. That is also the case law.

Criticism is also grounded that the assessment of similarity requires the application of criteria that the Commerce Act does not provide. The lack of criteria does not relieve the registration official of the obligation to monitor compliance with the requirements for entry in the commercial register. The Patent Office provides free access to electronic registers which they keep, including of trademarks.

On the basis of the above analysis it can be concluded that even imprecise use of expressions and lack of criteria by the requirements of Art. 7, para. 5 of the Commerce Act the regulation of the business name has been improved .

## 2. Conclusions

The margins of private law protection of the right of business name have been expanded as a result of the amendments to Chapter Three of the Commerce Act. Settlement, damages and indemnification for the use of a business name identical or similar to a previously registered business name are governed by the provision of Article 7, paragraph 4 of the Commerce Act. New requirements for the contents of a business name have been added. It has banned for the business name to be identical or similar to a registered trademark, unless the merchant holds rights over the latter. Therefore, the legislator is striving to improve the business names` legal framework in order to put an end to the unscrupulous registration of business names, identical or similar to business names already existing in the register, as well as identical or similar to registered trademarks.

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[10] Stefanov, Targovsko pravo. Obshta chast. (Veliko Tarnovo, Abagar, 2009) p.132, 141.

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[12] Stefanov, Targovsko pravo. Obshta chast.p.145.

[13] Zhivko Draganov, Obekti na intelektualnata sobstvenost. (Sibi, Sofia 2016) p.238.

# BRIEF PRESENTATION OF RESTITUTIO IN INTEGRUM ACCORDING TO THE ROMANIAN CIVIL CODE OF 2009

**Vlad-Victor OCHEA***

**Abstract**

*This study aims to briefly present restitutio in integrum in light of the New Romanian Civil Code of 2009. Apart from the civil law point of view, it shall mention an aspect pertaining to the procedural law that should not be ignored when a court of law gives a ruling on restitutio in integrum.*

**Keywords:** *restitutio in integrum, restitution of prestations, Romanian Civil Code of 2009, civil law, procedural law*

## 1. Introduction

As in many other areas, the Civil Code of Quebec has served as inspiration for the Romanian legislator in drawing up the provisions related to *restitutio in integrum*. Several articles pertaining to *restitutio in integrum* are mere translations of the Quebecois provisions in the matter.

A clear understanting of *restitutio in integrum* can only be achieved by operating with the distinction between substantial law and procedural law. In other words, it is essential to be aware of the fact that the application of any civil (substantial) provision is conditioned to the procedural decor in which the interested party seeks protection of her/his rights.

That is why this study aims to present *restitutio in integrum* not only from a civil law point of view, but also from a procedural law point of view.

## 2. Content

### 2.1. Coordinates of restitutio in integrum

According to art. 1635 of the Romanian Civil Code of 2009, which is a translation of art. 1699 of the Civil Code of Quebec, restitution of prestations takes place where a person is bound by law to return to another person the property he has received, either without right or in error, or under a juridical act which is subsequently terminated with retroactive effect or whose obligations become impossible to perform by reason of superior force – casus major, casus or another similar event a.n.

Restitutio in integrum shall take place when a person has received an indebitum solutum (art. 1341-1344 of the Romanian Civil Code of 2009) or when the contract that served as grounds for the prestations exchanged between parties was terminated with retroactive effect. Retroactive termination of a contract can occur when the contract was annulled or terminated due to the unjustified non-performance of the obligations by one of the parties (resolution).

There will obviously be no restitutio in integrum when the contract is annulled or terminated due to the unjustified non-performance of the obligations by one of the parties, when such cessations of existence of the contract generate only ex nunc effects.

Regardless of the cause of restitution, its grounds shall always consist of indebitum solutum. Once the contract is annulled or otherwise terminated, both parties or, as the case may be, one of them become(s) entitled to claim restitution. The foundation of the right to restitution is indebitum solutum, because the dissapereance of the contract leads to the dissapereance of the cause of the prestations. The contract was the reason those prestations were made. As a consequence, the termination of the contract gives right to restitution.

According to art. 1635 par. 2 of the Romanian Civil Code of 2009, that which was performed based on a future cause, which was not fulfilled, is also bound to restitution, except if the person performed the prestation acknowledging the impossibility of fulfillment or deliberately blocking its fulfillment.

Par. 3 of the same article provides that the obligation of restitution enjoys the same sureties/hypothechs as the initial obligation.

The debtor of the initial payment is the person entitled to restitution of prestations. If he has transferred his rights and obligations arising from the contract to another party, then the latter, the successor of the debtor of the initial payment, shall claim restitution. In this regard, art. 1636 of the Romanian Civil Code of 2009 provides that the right to restitution belongs to the one who performed the prestation bound to restitution or, as the case may be, to another person, entitled by law to such restitution.

Art. 1638 of the Romanian Civil Code of 2009 brings an end to a scientific dispute occurred under the previous fundamental civil legislation.

Following the nemo auditur propriam turpitudinem allegans rule, authors were of the opinion that there shall be no restitution of prestations upon the

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annulment of a contract for immoral or illicit cause (causa), because no one can claim the protection of his/her right based on his/her incorrectnes or imorality1.

Although this was the opinion embraced by the majority of authors, art. 1638 of the Romanian Civil Code of 2009 states the opposite.

Restitution of prestations shall be made in kind or by equivalence. Restitution of prestations in kind is the rule, so restitution by equivance shall take place whenever restitution in kind is not possible (art. 1636 par. 1, art. 1639-1640 of the Romanian Civil Code of 2009).

Par. 2 of art. 1637 of the Romanian Civil Code of 2009 indicates that restitution of prestations shall take place, even if damages ar not owed.

A party to a contract which was terminated is entitled not only to restitution, but also to damages, if the other party breached its obligations or, for example, if the other party is held liable for damages, following the annulment of the contract for error occasioned by fraud (see art. 1215 par. 2 of the Romanian Civil Code of 2009).

With respect to restitution in kind or by equivalence, a clear distinction has to made between restitution of movable or immovable property, on one hand, and restitution of other prestations, on the other hand.

Restitution in kind of movable or immovable property shall always be possible, with the exceptions presented below.

Restitution in kind of an amount of money or other fungible goods shall always be possible. The same rule applies for generic goods. As it will be shown below, determined goods are not always prone to restitution.

Services performed by a party or the use of a good ar not prone to restitution. In such cases, the termination of the contract only has ex nunc effects. Admission of restitution in such cases would lead to the same outcome. If, for example, a lease contract is terminated, the lessor would be entitled to the restitution of the use of the good and the lessee could claim the rent. Since the use of the good is not subject to restitution in kind, the party would resort to restitution by equivalence, which translated into paying the other party the amount of money which is the equivalent of the use of the good. Since this is equal to the rent, the two prestations are compensated and thus estinguished. That is why the termination of continuing contracts only has ex nunc effects.

Art. 1640 of the Romanian Civil Code of 2009 provides that if restitution cannot take place in kind due to impossibility, due to a serious impediment or due to the fact that restitution regards services already performed, restitution shall be made by equivalence. In cases provided for at par. 1, the value of prestations shall be assessed as at the time the debtor received what he is liable to restore.

A problem that arises from the restitution of prestations by equivalence is that of determining the amount that has to be paid to the party entitled to restitution. Between the conclusion of the contract, the performance of its obligations and its annulment or otherwise termination that leads to restitution of prestations there is a certain interval of time. Within it, the services initially performed can either increase or decrease in value, due to different factors in that specific market. The Romanian legislator has opted to determine the amount owed to the party who is entitled to restitution by taking into consideration the value of such prestations as at the time the debtor received what he is liable to restore.

*In the case of total loss or alienation of property subject to restitution, the person obligated to make the restitution is bound to return the value of the property, considered when it was received, as at the time of its loss or alienation, or as at the time of the restitution, whichever value is the lowest; but if the person is in bad faith or the cause of the restitution is due to his fault, the restitution is made according to whichever value is the highest (art. 1641 of the Romanian Civil Code of 2009).*

According to art. 1648 of the Romanian Civil Code of 2009, if the good bound to restitution was transferred, the claim to restitution can also be exercised against the third party who acquired that good, subject to the rules of Real Estate register, to the effect of acquiring movable goods in good faith or subject to the application of rules regarding usucaption.

According to art. 1648 of the Romanian Civil Code of 2009, if the good bound to restitution has fortuitously perished, the debtor is exempt from making restitution, but he shall then transfer to the creditor, where applicable, the indemnity he has received for the loss of the property or, if he has not already received it, the right to the indemnity. If the debtor is in bad faith or the cause of the restitution is due to his fault, he is not exempt from making restitution unless the property would also have perished if it had been in the hands of the creditor.

Art. 1643 of the Romanian Civil Code of 2009 provides that if the good bound to restitution has only suffered a partias loss, such as a deterioration of any other depreciation in value, the person who is obliged to make restitution is bound to indemnify the creditor for such loss, unless it results from normal use of the property.

From the previously cited articles, the following conclusions can be drawn:

a) if the good bound to restitution has perished following other event than a fortuitous one or was transferred by the debtor, the creditor can either claim the value of the good from the debtor or can claim the property from the person who acquired

[1] Gabriel Boroi, *Drept civil. Partea generală. Persoanele*, ed. a III-a, București, Ed. Hamangiu, 2008, p 329.

it, subject to the rules of Real Estate register;

b) if the good bound to restitution has only suffered a partias loss, the debtor has to compensate the creditor for such loss. However, he shall be exempt from payment if the loss occurs from normal use;

c) if the good bound to restitution has perished fortuitously, then the creditor is entitled to the indemnity. If the cause of restitution lays in the bad faith of the debtor or in his guilt, he shall be held liable according to art. 1641, regardless of any indemnity.

With respect to the reimbursement for disbursements made with respect to the property, art. 1644 of the Romanian Civil Code clearly provides that it is governed by the provisions applicable to a possessor in good faith or, in case of bad faith or if the cause of the restitution is due to the fault of the person who is bound to make restitution, by those applicable to possessors in bad faith.

Loyal to its source of inspiration, the Romanian Civil Code provides in art. 1645 that *the fruits and revenues of the property being returned belong to the person who is bound to make restitution, and he bears the costs he has incurred to produce them. He owes no indemnity for enjoyment of the property unless that was the primary object of the prestation or unless the property was subject to rapid depreciation. If the person who is bound to make restitution is in bad faith or if the cause of the restitution is due to his fault, he is bound, after compensating for the costs, to return the fruits and revenues and indemnify the creditor for any enjoyment he has derived from the property.*

Costs of restitution are borne by the parties, in proportion, where applicable, to the value of the prestations mutually restored. Where one party is in bad faith, however, or where the cause of the restitution is due to his fault, the costs are borne by that party alone.

Any other acts performed in favour of a third person in good faith may be set up against the person to whom restitution is owed.

### 2.2. Procedural aspects

Although restitutio in integrum is reciprocal, it shall take place in this manner, if both parties have filed a claim in this regard. In other words, if only the claimant files for restitutio in integrum, it shall only be granted to him and not to the defendant as well, since the civil trial is governed by a fundamental principle that states, amongst others, that the object and limits of the trial are set by the claims filed by the parties.

Consequently, if the defendant does not file for restitutio in integrum within the trial initiated by the defendant, then he can do so in 3 years starting from the date the ruling of the court.

## 3. Conclusions

In an attempt to achieve a set of norms which is meant to be clearer and more accurate, the legislator has opted for the systematisation of the rules relating to restitutio in integrum, to whom is dedicated Title X Restitution of prestation of the Fifth Book About obligations of the Romanian Civil Code of 2009.

It comprises of the same rules and principles that have governed this matter under the Civil Code of 1864. There are slight variations and the main aspect of novelty consists in the previously mentioned systematisation, as opposed to some rules scattered across the provisions of the Civil Code of 1864.

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# THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

**Ioana PĂDURARIU***

**Abstract**

*Since 1919, the recognition of children's rights has begun to find an international echo, when the League of Nations "came to life", the name of which links to the Geneva Declaration of 1924. Adopted in 1989, by the Convention on the Rights of the Child, the principle of the best interests of the child is still an imprecise, subjective notion if we consider its application, but so necessary, even in the absence of precise regulatory criteria.*

**Keywords:** *best interests of the child, children`s rights, Geneva Declaration, Declaration on the Rights of the Child, Convention on the Rights of the Child (CRC).*

## 1. Introduction

*„There is only the authority of love, the natural one, that we naturally have since birth, preserved only by love. Authority is not what I want to impose, but just what others recognize in me."*[1]

In the absence of a legal definition, determining the notion of „best interests of the child" may present major difficulties. This happens because this notion can be defined differently, depending on the legal situation to which it refers, above all in family law[2] (separation from parents, adoption, deprivation of family environment), but also in relation to juvenile justice (separation from adults in detention, presence of parents at court hearings for penal matters involving a juvenile).

The Convention on the Rights of the Child (hereinafter CRC) does not simply expose a list of rights. Of course, the CRC is the enumeration of those rights to which the child is entitled, but for sure it is also much more than this. If we admit that, in the past, the Geneva Convention (1924) and the Declaration on the Rights of the Child (1959) considered the child as „an object in need of attention and protection"[3], however, since 1989, when the CRC was promulgated, the child has been understood to be a subject of rights. As a result, the CRC has become a reference document for the development of European child rights.

In this spirit, legal acts concerning children are followed, almost without exception, either by explicit references to the CRC or by implicit references in the form of references to the rights of the child, such as: the „best interests of the child" (article 3 – the best interests of the child as a primary consideration in all actions concerning children), the child's right to participate in decisions that affect him (article 12) or the right to be protected against discrimination of any kind (article 2).

It is important to mention, among other things, the role of the European courts in interpreting and ensuring the respect for children's rights in Europe.

The Court of Justice of the European Union (hereinafter CJEU) referred to the fact that its decisions[4] have been grounded also on the general principles on the rights of the child, also incorporated into the CRC (such as the „best interests of the child" and the right to be listened), especially in the context of international kidnapping cases.

Unlike the CJEU, the European Court of Human Rights (hereinafter ECHR) has a rich jurisprudence on child rights. ECHR jurisprudence on family life recognizes interdependent rights such as the right to family life and the right of the child that his best interests have a higher priority. It recognizes that children's rights are sometimes contradictory. For example, the child's right to respect for family life can be limited to guaranteeing his superior interest. Furthermore, the Council of Europe has adopted various other instruments dealing with issues related to personal relationships, child custody and the exercise of children's rights.

Thus, in the Maslov case against Austria[5], the applicant had been convicted of several delinquencies during the minority period. The ECHR affirmed that the obligation to take into account the best interests of the child includes the obligation to facilitate its reintegration, in accordance with Article 40 of the CRC, as regards the expulsion measures against a juvenile delinquent. The ECHR has also received complaints from children about the impossibility of establishing the identity of their biological fathers. The ECHR has observed that establishing a legal

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[1] S. Baștovoi, *The price of love*, Cathisma, Bucharest, 2018, pages 80-81.

[2] See also C.-M. Crăciunescu, *The best interests of the child in in the exercise of parental authority exclusively by one of the parents, in Parental authority. Between greatness and decadence*, Solomon Publishing House, Bucharest, 2018, pages 3-25.

[3] See J. Zermatten, *The Best Interests of the Child. Literal Analysis, Function and Implementation*, Working Report, 2010, Institut International des Droit de l`Enfant, page 2.

[4] See CJEU, C-491/10 PPU, *Joseba Andoni Aguirre Zarraga/Simone Pelz*, 22.12.2010.

[5] See ECHR, Case *Maslov/Austria*, no. 1638/0323, 23.06.2008.

relationship between a child and the alleged biological father goes into the sphere of private life. Thus, the authorities may have a positive obligation to intervene in the action to establish paternity, in the best interests of the child, when the legal representative of the child (in this case[6], the mother) was unable to represent the child properly, for example, because of a serious disability.

## 2. Meanings of the expression „the best interests of the child shall be a primary consideration". Rule of procedure and foundation for a particular, independent right

First of all, this concept was interpreted as a rule of procedure[7]. That means, whenever a decision is to be taken and that decision will affect a specific child or a group of children, the decision-making process must carefully consider both, positive and negative, impacts of the decision on the child or on the children concerned, and must give to this impact a primary consideration when weighing the different interests at stake.

On the other hand, this principle is nevertheless considered one of the foundations for a particular right. And is clearly that, seen like this, the principle represents the guarantee that it will be applied whenever a decision is to be taken concerning a child or a group of children.

In fact, no one really knows what are the best interests of a particular child. However, the principle of the best interests of the child must respect what the Committee on the Rights of the Child established[8] in the General Comment no. 8 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment:

«26. When the Committee on the Rights of the Child has raised eliminating corporal punishment with certain States during the examination of their reports, governmental representatives have sometimes suggested that some level of „reasonable" or „moderate" corporal punishment can be justified as in the „best interests" of the child. The Committee has identified, as an important general principle, the Convention's requirement that the best interests of the child should be a primary consideration in all actions concerning children (art. 3, para. 1). The Convention also asserts, in article 18, that the best interests of the child will be parents' basic concern. But interpretation of a child's best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence and the requirement to give due weight to the child's views; it cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child's human dignity and right to physical integrity.»[9]

So, this principle must respect the importance of every child as a human being in development, an individual with opinions, all that seen in the global spirit of the CRC, with an interpretation that could not deny other rights of the CRC (for example, the right to protection against harmful traditional practices and corporal punishment).

„Best" and „interests", as a whole, mean that the final goal should and must be the well-being of the child, as defined through the Convention, especially in the Preamble and in the Article 3 of the CRC (paragraphs 2 and 3).

Moreover, as an author has observed[10], there is a subtle, but highly relevant nuance in the second part of the expression of this principle („shall be a primary consideration"). We clearly see that a literal analysis reveals us that this text refers to „*a* primary consideration" and not to „*the* primary consideration". That means, indeed, that this terminology implies that the best interests of the child will not always be the single, overriding interest and that there may be other competing interests at stake.

However, in accordance with the opinion expressed by the same author[11], in at least two particular situations, the drafters of international human rights instruments have used „*the*" when referring to the paramountcy of the best interests of the child:

- Article 21 of the CRC: „States parties that recognize and/or permit the system of adoption shall ensure that *the* best interests of the child shall be the paramount consideration (…)";

and

- Article 23 (2) of the UN Convention on the Rights of Persons with Disabilities: „States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases *the* best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities."

In these cases, the best interests of the child become the sole determining factor when considering a solution, or, „in certain circumstances, such an adoption or for children living with disabilities, the higher standard is applicable".[12]

[6] See ECHR, Case *A.M.M./Romania*, no. 2151/10, 14.02.2012, points 58-65.
[7] See J. Zermatten, *op. cit.*, page 7.
[8] Geneva, 15 May-2 June 2006.
[9] See *https://resourcecentre.savethechildren.net/node/10263/pdf/gc8.pdf*.
[10] See J. Zermatten, *op. cit.*, page 11.
[11] *Idem*, page 12.
[12] See G. Van Bueren, Pushing and pulling in different directions – The best interests of the child and the margin of appreciation of States, in Child Rights in Europe, Council of Europe, 2007, page 32.

### 3. „Best interests of the child" in other articles of the CRC

This expression is also included in a number of other articles of the CRC[13], as a reference point that must be considered in particular situations.

Article 9 of the CRC put the principle promulgated by Article 3 of CRC in relation to the right of the child to live with his parents, also referring to the rule that the child must maintain personal relationships and direct contact with both parents, unless this threatens the best interests of the child (situations that include an open conflict between the child and one or both parents, or the cases when a child and his parents may become separated as a result of an official decision, necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence, but only when such a decision takes into account the best interests of the child).

Article 18 establishes the principle according to which the two parents must be involved with the education of the child; this is called the common responsibility for education.

Article 20 of the CRC provides that the child who is deprived, temporarily or permanently, of his family environment or in whose own best interests cannot be allowed to remain in that environment shall be entitled to special protection and assistance provided by the State. States Parties, in accordance with their national laws, shall ensure alternative care (*inter alia*, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children for such a child).

According to the article 21 of the CRC, „States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall: (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary; (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption; (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it; (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs."

Article 37 of the CRC looks at general principles which should govern the administration of juvenile justice[14], in particular the exclusion of torture, punishments or inhuman treatments and the prohibition of capital punishment. Also this article impose that the child be treated with humanity and, if the child is deprived of freedom, he must be detained separately from adults, except if the opposite proved to be preferable for the best interests of the child (this might be the case if the child is imprisoned with one of his parents or a mother who gives birth while she is confined).

As a conclusion, we observe that the principle of the best interests of the child is a general principle which must be applied in all activities related to implementation of the entire CRC.

### 4. „Best interests of the child" – roles and fields of application

The concept of the best interest of the child, such as it is defined by the CRC, but also for example in the Convention of the Hague on international adoption, was seen as a concept that has two „traditional" roles, one that seeks to control and one that finds solutions (criterion of control and criterion of solution[15]).

Control criterion means that the best interest of the child is applied to oversee that the exercice of rights and the obligations towards children be correctly carried out, fulfilled. It is the entire field of child protection that is concerned with this aspect of control (family law, child protection services, situations of alternative care and cases of migration).

Regardind the solution criterion, the concept of the interest of the child itself must intervene to help the people that need to make the right decisions for children. The solution chosen should be selected because it is in the interest of the child. It is an essential bridge between the right, the theoretical concept, and the reality.

Many attempts have already been made to specify, supplement and to „objectify" the concept of the best interests of the child.

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[13] See https://www.ohchr.org/documents/professionalinterest/crc.pdf.

[14] See also Article 40, as a continuation of the Article 37.

[15] See P. Pichonnaz, Le bien de l'enfant et les secondes familles (familles recomposées), in Le Bien de l'enfant, Verlag Ruegger, Zürich/Chur, 2003, page 163; H. Fulchiron, De l'intérêt de l'enfant aux droits de l'enfant in Une Convention, plusieurs regards. Les droits de l'enfant entre théorie et pratique, IDE, Sion, 1997, pages 30 and following.

For example, in Canada, the draft amendment to the „Divorce Act" which wishes that the child's interests be judged according to elements'[16]:

1. the nature, the stability and the intensity of the relationship between the child and each person concerned with the procedure;
2. the nature, the stability and the intensity of the relationship between the child and other members of the family where the child resides or implicated in the care or the child's education;
3. the child's leisure activities;
4. the capacity of each person to offer a framework for life, education and all care for the child;
5. the child's cultural and religious bonds;
6. the importance and advantages of joint parental authority, ensuring the active involvement of the two parents after separation;
7. the importance of the relationship between the child and his/her grandparents or other members of the family;
8. the proposals of the parents;
9. the capacity of the child to adapt him/herself to the parent's views;
10. the capacity of the parents to facilitate and ensure the maintenance of the child's relationships with other members of the family;
11. all previous incidents showing violence by a relative towards the child;
12. the exclusion of preference shown to one parent because of their sex;
13. the demonstrated willingness of each parent to take part in educational meetings;
14. any other factor that could influence decision-making.

As we can see, it is a long list that is not exhaustive and the 14 elements are not hierarchically ordered. These points remain to be examined largely open „and consequently only have a relative influence, as well they allow for a more concrete approach and offer a working method to better comprehend, *in casu*, the interests of the child"[17].

Other countries have taken identical steps. A particular product of the Anglo-Saxon legal system, an attempt to objectivize the concept, England's „Children Act" of 1984 provides that the judge must take into account[18]:

- the views of the child;
- his/her physical, emotional, educational needs;
- the effect of change on the child;
- his/her age, sex and personality;
- the pains which he/she has already suffered or could suffer;
- the ability of each of the child's parents to meet the child's needs.

## 5. Conclusions

It is very important that any cause involving a child can find a solution best suited to the best interests of the child, so that his development will not suffer. It is also clear that the child must be heard, so the decision maker in question has an obligation to hear if the child is able to form and communicate his views if the case affects him.

Nevertheless, it is evident that the principle of the best interests of the child is one of the most important of the CRC, but, in the same time, it is the most difficult to explain.

We need to clarify this concept; we cannot deal only with the assumption that everyone is acting in the best interests of the child. If we do not clarify, it is possible to risk that this principle be emptied of content, legislative and social reality.

Also, we must consider another aspect: the potential impact on children of relevant legislation. Therefore, the State parties to the CRC have an obligation to take seriously their commitments.

And, above all, maybe it is the perfect time to keep in our minds the fact that, in the absence of the „authority of love", this principle and for sure the whole mechanism that turns the wheels of his profound understanding will become meaningless.

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# PARTICULARITIES AND PRACTICAL ISSUES OF THE COMPULSORY INSURANCE CONTRACT FOR MOTOR THIRD PARTY LIABILITY

**Răducu Marian PETRESCU***

**Abstract**

*This paper aims at identifying and clarifying the legal regulations in the field of insurance. Starting from everything that means in practice as a whole, we need to mention from the outset that best practices are not mandatory or binding rules of law, they can not and will not be placed over the legal provisions in force but only can complete the law. Furthermore, we intend to analyze the implementation of Law no. 132/2017 on compulsory insurance against civil liability in respect of third party damage caused by vehicle and tramway accidents (published in OJ 431/2017) in the light of best practice in the field of insurance.*

*In this research, the main method of study was the theoretical qualitative research (especially the analysis of legal regulations) in order to identify and develop theoretically information on best practices in the field covered by the aforementioned normative acts.*

*The main research results are to identify the general issues that have been briefly presented and which could be the subject of practical situations in the field of compulsory motor third party liability insurance for third-party damage caused by vehicle and tramway accidents.*

**Keywords:** *insurance, insured, beneficiary, indemnity, non-use*

## 1. Introduction

Law no. 132/2017 on compulsory insurance against civil liability in respect of damage to third parties by means of vehicle and tramway accidents (published in OJ No 431/2017) establishes the persons required to conclude MTPL contracts and the exceptions to this obligation, the territorial application limits , the liability limits, the obligations of the insured, the obligations of the MTPL insurer, the risks covered and the exclusions, the elements regarding the establishment and payment of the indemnities, the verification of the MTPL insurance, the facilities and penalties applicable to the insurers and the insurers as well as the organization and functioning of the Romanian Motor Insurers' Bureau (hereinafter referred to as BAAR).

In addition, the provisions of the A.S.F. no. 20/2017 on motor insurance in Romania (published in Government Gazette No. 624/2017) and RCA / 2017 Guide.

From the broad field of Law no. 132/2017 and the related regulations, we intend to present some features of the compulsory motor third party liability insurance contract (hereinafter referred to as RCA).

### 1.1. Common insurance law.

According to the Civil Code, under the insurance contract, the insurance contractor or the insured undertakes to pay a premium to the insurer, and the latter undertakes to pay an indemnity, if the insured person, the beneficiary of the insurance or the third party (Article 2129 paragraph 1 of the Civil Code).

The insurance contract is based on three important principles: the principle of compensation (within the limits of the damage suffered by the insured); the principle of insured interest (determined by the relationship between the person and the good or the damaging event); the principle of subrogation (the insurer substitutes in all the rights of the insured against those responsible for causing the damage)[1].

The insurance contract is subject to the law in force at the date of the conclusion of the insurance policy, the insurance certificate or the cover note, as the case may be (Article 146 of Law No. 71/2011).

According to its subject matter, insurances are divided into: goods insurance, personal insurance and civil liability insurance. Property and liability insurance are insurances (damages) and consequently are indemnifying.

Liability insurance concerns the amount of compensation to be paid by the insured in consequence of the damage caused to a third party (eg compensation due to third parties injured by motor vehicle accidents)[2]. Thus, the insurer undertakes to pay compensation for the damage that the insured person is liable to according to the law against the third persons injured and for the costs incurred by the insured in the civil process (Article 2223 paragraph 1 C. civ.).

In the insurance contract, the parties may agree to include in the insurance and civil liability of persons other than the insurance contractor (Article 2223 paragraph 2 C. civ.).

The rights of injured third parties are exercised against those responsible for causing the damage.

[1] See V. Nemeş, Insurance Law, Hamangiu Publishing House, Bucharest, 2012, p. 15

[2] See V. Ciurel, Insurance and Reinsurance: International Theoretical and Practical Approaches, Ed. All Beck, Bucharest, 2000, p. 47

The insurer may be sued by the injured party within the limits of his obligations under the insurance contract.

Unless otherwise provided by law, compensation shall be determined by a convention concluded between the insured person, the injured third party and the insured person or, in case of misunderstanding, by a court order (Article 2225 C. civ.).

**1.2. Definition, competence and parts of the CAR.**

The natural or legal persons - owners of vehicles subject to registration or registration in Romania (as well as trams), are obliged to insure for the cases of civil liability as a result of the damages caused by vehicle accidents.

Vehicle means means of transport with or without propulsion for landing, including any type of trailer, whether or not coupled, for which there is a legal obligation to register or register in Romania, except for those traveling on rails other than trams, bicycles or animal tractors (Article 2 (27) of the Act).

Vehicle accident means an event involving at least one vehicle resulting in material damage and / or injury to the health and bodily integrity or death of one or more persons (Article 2 (1) of the Act)

Ensuring the above persons is done through the RCA contract.

According to art. 4 of the Act, those who use vehicles exclusively for training, racing, competitions or rallies legally organized (but can be provided on a voluntary basis) are not required to conclude an RCA contract.

Territorial, RCA operates on:

a) the territory of Romania;
b) the territories of the Member States of the European Union, the States Parties to the ESAA and the territory of the Swiss Confederation;
c) the territories of the States directly linking two Member States (where there is no national auto-office);
d) the territories of the States where the national auto offices are competent.

The parties to the RCA contract are the insured and the insurer.

The RCA insurer is the owner or user of a vehicle or a tram whose tort or delict is contractually acquired for damages caused to third parties. The law distinguishes between the insured (in general) and the high-risk insured - the person who, based on the classification in the risk classes, for which at least 3 RCA insurers offer a premium rate N times higher than the reference price calculated by BAAR 2 (5) of the Act). The RCA insurer is the legal entity authorized to "practice" RCA insurance. BAAR is a professional association of all insurance companies that have the right to practice compulsory motor third party liability insurance in Romania. Other topics covered by the RCA contract are: - the contractor is the person who concludes the MTPL and who undertakes to pay the insurance premium; - the correspondent is the person representing one or more foreign insurers, members of other national auto bureaux, for the settlement of damages claims by road accident victims produced on Romanian territory; - the trustee any natural or legal person empowered under the law to represent the interests of the injured party in its relations with the insurer and the auto repair unit; - the person injured is the person entitled to compensation for the damage suffered; - the user is a natural or legal person to whom the owner of the vehicle grants him the right to use it in accordance with the law.

**1.3. Content, duration and RCA limits.**

The RCA contract includes: the number and date of the conclusion of the contract, the parts of the MTPL contract, the validity period, the maximum liability limits of the MTPL insurer, the insurance premium, the number and maturity of the installments, the intermediary, the bonnet, the registration number and the vehicle identification number, as well as the countries in which the contract is valid.

In terms of form, the insurance contract has a consensual character and, therefore, no form of ad validity is required.

Ad probationem, the insurance must be written in writing (regardless of the amount of the insurance premium or indemnity).

In principle, witness evidence is not admitted "even when there is a beginning of written proof" (Article 2200 paragraph 1 C. civ.). As an exception, if the insurance documents have disappeared through force majeure or fortuitous circumstances and there is no possibility of obtaining a duplicate, their existence and content can be proven by any means of proof.

The insurance sample is made with the insurance contract (in the sense of the instrument) or with the insurance policy.

According to art. 2 point 21 of the law, the RCA insurance policy is the document by which "the MTPL insurance contract is concluded" and "certifies the existence of civil liability insurance for third party injuries caused by vehicle and tramway accidents".

The insurance policy must include at least: the name or the name, domicile or headquarters of the contracting parties (as well as the name of the beneficiary of the insurance, if he is not a party to the contract); subject of insurance; the risks to be assured; the moment of commencement and the end of liability of the insurer; insurance premiums; the amounts insured (Article 2201 paragraph 1 C. civ.). Other elements that the insurance policy must include may be established by rules adopted by the competent state bodies (Article 2201 paragraph 2 C. civ.).

The RCA contract ends for a period of one month to 12 months (multiple times a month).

As an exception, the RCA contract can be concluded for less than a month:

a) for vehicles registered in other EEA and EC Member States for a maximum period of 30 days

from the date of acquisition of the property;
b) for vehicles intended for export, for a maximum period of 30 days;
c) for vehicles which are provisionally authorized for use for periods of 30 days.

The minimum liability limits covered by MTPL insurance are:
a) for material damage caused in an accident, irrespective of the number of injured persons, the limit of compensation is set at EUR 1,220,000 (equivalent in lei at the NBR exchange rate);
b) for injuries and deaths in an accident, irrespective of the number of injured persons, the limit of compensation is 6,070,000 euros (equivalent in lei at the NBR exchange rate).

The liability limits are revised from 5 to 5 years, depending on the evolution of the European Consumer Price Index (IEPC).

### 1.4. Obligations of the RCA insured

As a primary obligation, the insured must pay the insurance premium to the MTPL insurer under the terms of the law and the insurance contract.

The insured must notify the RCA insurer of the acidity production within 5 business days of the event (Article 15 (1) of the Act).

At the same time, the insured person provides the RCA insurer with information on the causes and circumstances of the accident and the documents necessary for the case.

The insured must notify the RCA insurer of the following:
a) the injured party has requested indemnification from the insurer;
b) informs the RCA insurer of the proceedings against him;
c) exercise of the right to compensation at a court by the injured party;
d) the changes made in the RCA contract during its execution.

According to art. 16 of the law, the insured is obliged to submit to the injured party (at his / her request) data on:
a) the name, surname and address of the person who has driven the insured vehicle at the time of the accident;
b) name, surname and address or name, headquarters of the contractor or insured person;
c) the name, the seat of the RCA insurer, the serial number and the RCA contract number, and the registration number of the insured vehicle (or identification number).

In the case of material damage, insured persons may also inform the insurance, based on a standard form, called "amicable accident finding", in which the drivers of the vehicles concerned inform information about the circumstances of the accident (Article 17 paragraph 1 of the Act). The conditions for the use of the standard form are set by the regulations of A.S.F., in accordance with O.U.G. no. 195/2002 on the circulation on public roads, republished, as subsequently amended and supplemented.

In the event of injury, the injured person may address (for the repair) to any self repairing unit "without any restriction or constraint on the part of the RCA insurer or the auto repair unit that could influence its option" (Art. 6 pt. 8 of the law).

During the course of the contract, the insured has the obligation to allow the RCA insurer access to the compulsory motor third party liability insurance database in Romania and to provide the information for the risk assessment and calculation of the insurance premium.

The insured has the obligation to inform the RCA insurer about the conclusion of other RCA contracts with other RCA insurers and may opt for the maintenance of a single contract. The right of option is exercised only once a year (Article 8 paragraph 3 of the Act).

In addition to the above obligations, the parties may also agree to include additional clauses. Exceptions are clauses that may restrict the rights of the injured party.

### 1.5. Obligations of the RCA insurer.

At the conclusion of the contract, the RCA insurers request the necessary data for the assessment and verify the correctness of the vehicle identification and technical data, the owner / user's data (Article 4 paragraph 2 of the Act).

As a primary obligation, the insurer must, as at the insured risk, pay the indemnity to the injured third party, under the terms of the law and the insurance contract.

Where, for the same vehicle, there were several valid RCA contracts, the compensation shall be paid in equal parts by all RCA insurers (Article 9 (1) of the Act).

According to art. 5 of the Law, the RCA insurer shall be liable for damages caused to third parties by vehicle and tram accident as well as for the expenses incurred by them in the civil process in relation to:
a) the level required by the law of the State in which the accident occurred;
b) the level imposed by the Romanian legislation, if the injured persons are citizens of some Member States (according to the law).

Compensation is equal to the extent of the damage, but up to the maximum liability limit of the MTPL insurer (which is equal to the highest of the liability limit provided by the applicable law).

The insurance premium is calculated by the insurer so as to cover all contractual obligations (Article 18 (1) of the Act). In the calculation of the premium rate, the RCA insurers may use risk criteria, load indices, increase and / or correction coefficients, or other tariff adjustment instruments established by A.S.F regulations (Article 18 (3) of the Act).

For the calculation of the insurance premium, the RCA insurer may take into account the history of

claims paid in the last 5 years for accidents caused by the insured vehicle.

The RCA insurer has the obligation to inform policyholders about the calculation of the insurance premium.

RCA insurers (and their intermediaries) are required to inform policyholders about termination of the MTPL and the possibility of renewal (30 days before the termination of the contract). According to art. 18 point 9 of the law, the RCA insurer has the obligation to communicate to ASF the following data: a) the method of determining the insurance premium; b) statistical data on the basis of which the insurance premium is established; c) the actuarial ratio underlying the determination of the premium rate; (d) any other information concerning the method of calculation of the insurance premium.

According to the law, RCA insurers assume responsibility for all contracts (including those granted by BAAR).

The liability of the RCA insurer begins:

a) the day following the previous CARR, for the insured who signs a new insurance, at the latest on the last day of the previous contract;
b) the day following the day on which the MTPL contract was concluded for persons who did not have prior insurance;
c) from the date of issue of the insurance contract, but not earlier than the date of entry into force of the provisional registration or registration of the vehicle.

In order to maintain the bonus class, the parties may agree to the redemption or the bearing by the policyholder of the compensation corresponding to the event.

**1.6. Suspension, termination and termination of the RCA contract.**

At the insured's request, the RCA contract may be suspended during the period of suspension of the vehicle's right to drive in accordance with the law or during the immobilisation of the vehicle (but with the obligation to submit the license plates to the authority that issued it)[3]. The suspension procedure and the immobilization cases are established by common regulations of MAI, M.T., A.S.F. and MDRAPFE (Article 4 paragraph 6 of the Act).

During the suspension of the RCA contract, the insured has the obligation to immobilize the vehicle in a private area outside the public domain.

The non-fulfillment of the above obligation is assimilated to the breach of the insurance obligation and the non-fulfillment of the obligation to submit the license plates and shall be sanctioned in contraventional terms.

According to art. 7 of the law, the RCA contract ceases:

a) the date on which the owner of the vehicle notifies the RCA insurer of the transfer of ownership of the vehicle, together with supporting documents;
b) the date on which the vehicle is out of circulation;
c) at the time specified in the RCA contract.

According to art. 8 of the law, the RCA contract is abolished by law when:

a) the insured risk occurred (or became impossible to produce) before the insurer's obligation arises;
b) the production of the risk became impossible after the insurer's obligation was born.

When the policyholder has paid the insurance premium, he can recover it proportionally to the unexpired period of the MTPL contract if no compensation is due for events occurring during the insurance period.

When the RCA insurer is subsequently required to pay compensation for events covered by the RCA contract, the RCA insurer is entitled to recover from the insured the insurance premium returned to him on request.

## 3. Conclusions

Analyzing from the perspective of the insurance field, the compulsory insurance of civil liability for damages caused to third parties through vehicle and tram accident, we have come to the conclusion that the proper understanding and application of the legal regulations in force lead to stability of this sector, and how much the entities that develop such activities respect good practices that serve the interests of those who make such insurance. Understanding customer needs, managing properly, delivering the best services, constantly consulting and increasing transparency will clearly lead to higher professional standards and, implicitly, to avoiding legal issues.

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- Civil Code (Law 289/2009);
- Law no. 132/2017 on compulsory insurance against civil liability in respect of damage to third parties by means of vehicle and tramway accidents (published in the Official Gazette No. 431/2017);


[3] See L. Stănciulescu, Civil Contract Law, Ed Hamangiu, Bucharest, 2017, p. 492

# CONTROVERSIES REGARDING THE ARBITRAL INSTITUTION DESIGNATED BY SUB-CLAUSE 20.6 OF FIDIC CONDITIONS OF CONTRACT TO ADMINISTER THE ARBITRAL CASES RESULTED FROM EXECUTION OF PUBLIC WORKS UNDER THE ROMANIAN LAW

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**Abstract**

*From 2010 to 2017 the execution of public works in Romania took place by virtue of the General Conditions of Contract of FIDIC Yellow Book or Red Book approved by Government Decision no. 1405/2010. In 2011 the Romanian Ministry of Transportation and Infrastructure issued Order no. 146/2011 whereby it approved standard forms of Particular Conditions of Contract, Appendix to Tender and Contract Agreement for execution of such public works. In particular, the Appendix to Tender modified the provisions of Sub-Clause 20.6 regarding the arbitral institution empowered to administer the disputes resulted from public procurement contracts based on FIDIC Conditions of Contract. The mention included in the Appendix to Tender in this regard referred to "the Court of International Commercial Arbitration", apparently an incomplete reference to the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania. Encouraged by a subjective interpretation of the contractual provisions, a significant number of contractors submitted their disputes with the National Company for Administration of Road Infrastructure in Romania to the ICC International Court of Arbitration. Recently, the Bucharest Court of Appeals decided that this approach was wrong, setting aside the final partial awards issued under the auspices of the ICC International Court of Arbitration. In an attempt to clarify which arbitral institution has jurisdiction to administer such arbitral cases, this paper analyzes the controversial contractual provisions, the soundness of the various interpretation and arguments brought by the involved parties under the rules of interpretation provided by the Romanian Law and internationally applicable custom in arbitration, and the recent jurisprudence of Romanian Courts related to this matter.*

**Keywords:** *arbitration, jurisdiction, the Court of International Commercial Arbitration, FIDIC, public works, G.D. no. 1405/2010, Order no. 146/2011, Sub-Clause 20.6, Appendix to Tender*

## 1. Introduction

The Government Decision no. 1405/2010 regarding the approval for the use of some conditions of contract of the International Federation of Consulting Engineers (FIDIC) for the investment objectives from the field of transportation infrastructure of national interest financed by public funds (**"G.D. no. 1405/2010"**) imposed to all the units subordinated or under the authority of the Ministry of Transportation and Infrastructure, including the National Company for Administration of Road Infrastructure in Romania, the obligation to apply the General Conditions of Contract of FIDIC Yellow Book or Red Book to the execution of public works. G.D. no. 1405/2010 entered into force on 20 January 2011.

Taking over the wording of the standard ICC arbitration clause, Sub-Clause 20.6 of both FIDIC Books approved by G.D. no. 1405/2010 reads [...]:

*„Unless otherwise agreed by both Parties:*

*(a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce.*

*(b) The dispute shall be settled by three arbitrators appointed in accordance with these Rules [...]."*

On 1 March 2011, the Ministry of Transportation and Infrastructure issued Order no. 146/2011 regarding the approval of particular conditions of contract for plant and design build, and for building and engineering works designed by the employer of the International Federation of Consulting Engineers (FIDIC) for the investment objectives from the field of transportation road infrastructure of national interest financed by public funds (**"Order no. 146/2011"**), whereby it approved standard forms of Particular Conditions of Contract, Appendix to Tender and Contract Agreement for execution of public works. Order no. 146/2011 entered into force on 17 March 2011.

Whilst Sub-Clause 20.6 of the particular conditions of contract remained unchanged, reiterating the wording provided for that sub-clause by the General Conditions of Contract of FIDIC Yellow and Red Books as approved by G.D. no. 1405/2010, the classic form of the Appendix to Tender provided by FIDIC was amended by Order no. 146/2011, being added supplementary information fields regarding the number of arbitrators (1), arbitration language (Romanian), seat of arbitration (Bucharest) and arbitral institution (the Court of International Commercial Arbitration, apparently an incomplete reference to the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania).

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The modification of the arbitration clause comprised by General Conditions of Contract and Particular Conditions of Contract by the Appendix to Tender created a lot of confusion in the community of construction law practitioners with regard to the arbitral institution designated to administer the arbitral cases under G.D. no. 1405/2010 and Order no. 146/2011, and the rules which should be used for the appointment of arbitrators and settlement of such cases by an arbitral tribunal.

There were two (2) main approaches of this matter to date, both being based exclusively on arguments related to interpretation of contracts and priority of contractual documents. Whilst a part of the construction community interpreted the provisions of Sub-Clause 20.6 of G.D. no. 1405/2010 and Order no. 146/2011 in the sense that the ICC International Court of Arbitration would be the arbitral institution designated to administer arbitral cases resulted from execution of public works in Romania, the other part considered that that institution would be the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.

In an attempt to clarify which arbitral institution has jurisdiction to administer such arbitral cases, this research focuses on the analysis of the legal framework in effect at the moment when G.D. no. 1405/2010 and Order no. 146/2011 were issued by the Romanian Government, which suggests that the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania is actually the arbitral institution contemplated by the aforementioned enactments, yet for different reasons than those expressed within the community of construction law practitioners and by the Courts to date.

## 2. Actual perspectives on interpretation of Sub-Clause 20.6 of G.D. no. 1405/2010 and Order no. 146/2011

### 2.1. Arguments in favor of the jurisdiction of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (The Theory of Hybrid Clause)

Under the Theory of Hybrid Clause[1] it was considered that the mention regarding the arbitral institution comprised into the Appendix to Tender denotes a clear intention to modify the said institution to administer the arbitral cases resulted from the contract.

In this respect it was argued that a corroborated reading of the provisions of Sub-Clause 20.6 included into the Appendix to Tender with the provisions of the same Sub-Clause of the General and Particular Conditions of Contract would take to the conclusion that the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania is the arbitral institution which should administer the arbitral cases under G.D. no. 1405/2010 and Order no. 146/2011, by using the rules of another institution, *i.e.* the ICC International Court of Arbitration.

However, having in mind that at the beginning of 2012 the International Chamber of Commerce issued a new version of its Arbitration Rules, expressly providing, *inter alia*, that: *„The Court is the only body authorized to administer arbitrations under the Rules [...]"*[2], it was concluded that since the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania cannot use the ICC Rules anymore, it would become applicable its own rules.

### 2.2. Arguments in favor of the jurisdiction of the ICC International Court of Arbitration (The Theory of Semantics.)

On a different note, the supporters of the Theory of Semantics[3] considered that the mention regarding the arbitral institution included into the Appendix to Tender did not modified but completed the provisions of Sub-Clause 20.6 comprised into the General and Particular Conditions of Contract.

In this regard it was contended that, since there are a lot of Courts of International Commercial Arbitration worldwide, a reference to a *"Court of International Commercial Arbitration"* alone, such as the one comprised by the Appendix to Tender, would not provide sufficient information to accurately identify one arbitral institution or another, from Romania or from another country, so that the said reference cannot be construed in any case to be a reference to the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.

It was also argued that as long as the documents forming the Contract are to be taken as mutually explanatory of one another, and the Appendix to Tender did not modify the applicable Rules for appointment of arbitrators and for procedure to be followed during the arbitral case provided by Sub-Clause 20.6 of the General and Particular Conditions of Contract, the „real intention of the parties" resulting from interpretation of the contract provisions as a whole would have been to submit their disputes resulted from such contracts governed by G.D. no. 1405/2010 and Order no. 146/2011 to the ICC International Court of Arbitration,

[1] The name of the theory was given by the author for an easier reference to the arguments grouped under this theory

[2] Art. 1 – *International Court of Arbitration*, para. 2) of the 2012 Rules of Arbitration of the International Chamber of Commerce (the provision was maintained in the latest version of the Rules of Arbitration of International Chamber of Commerce issued in 2017)

[3] The name of the theory was given by the author for an easier reference to the arguments grouped under this theory

*i.e. „the only body authorized to administer arbitrations under the Rules [...].”*[4]

Another argument brought in favor of the jurisdiction of the ICC International Court of Arbitration was that the contracts governed by G.D. no. 1405/2010 and Order no. 146/2011 are at the end of the day FIDIC Conditions of Contract. Therefore, except the case when the Appendix to Tender would have actually modified the General and Particular Conditions of Contract, the international contractors - professional users of FIDIC Conditions of Contract – would have been entitled to believe that when they concluded such contracts of public works with the National Company for Administration of Road Infrastructure in Romania, the disputes resulted thereafter shall be referred to the ICC International Court of Arbitration, in accordance with the international custom and the applicable Rules of the ICC.

### 2.3. Actual jurisprudence of the arbitral tribunals regarding the jurisdiction

Based on the Theory of Semantics a significant number of contractors submitted their disputes with the National Company for Administration of Road Infrastructure in Romania to the ICC International Court of Arbitration. In the majority of cases the Arbitral Tribunals constituted under the Rules of the ICC International Court embraced the arguments brought under the Theory of Semantics and retained the arbitral cases for settlement.

For instance, in an Award on Jurisdiction issued in 2017 (unpublished), an Arbitral Tribunal concluded:

*“The effective contextual and systematic interpretation of the Appendix, considering all other contractual documents and the hierarchy of documents agreed by the Parties, leads the Tribunal to find that the reference in the Appendix can be interpreted as being consistent with the arbitration agreement in the Contract of the Parties. Consequently, Sub-Clause 20.6 has not been amended by the Appendix and clearly refers disputes to be resolved under the auspices of the International Court of Arbitration of the International Chamber of Commerce.*

*Since the arbitration agreement refers disputes to the ICC for resolution and this Tribunal has been validly constitute under ICC Rules it does have jurisdiction to resolve this dispute [...].”*

The same approach of retaining for settlement the arbitral cases related to contracts governed by G.D. no. 1405/2010 and Order no. 146/2011 was adopted by the Arbitral Tribunals constituted under the Rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, which, based on the arguments brought under the Theory of Hybrid Clause, decided that they have full jurisdiction to settle the arbitral cases received so far, by using its own Arbitration Rules.

In this regard, in an Arbitral Decision issued in 2018 (unpublished), an Arbitral Tribunal constituted under the Rules of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania concluded:

“Therefore, having in mind:

- the provisions of art. 6 (1) of the Rules of arbitral procedure of Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, in force at the date of the request for arbitration referral (“Rules of arbitral procedure”), which provides that they are applicable whenever an arbitration is lodged to the Court, and
- the provisions of art. 6 (3) of the Rules of arbitral procedure, according to whom, in the situation in which the Parties opted for the application by the Court of the whole package of procedural norms of another court of arbitration, their applicability is possible only if the said norms do not explicitly forbid this, by reference to
- the provisions of art. 1 (2) of the Rules of arbitral procedure of the ICC International Court of Arbitration,
- the Arbitral Tribunal concludes that the parties’ will, by the last modification brought to the arbitral convention in Sub-Clause 20.6 of the Particular Conditions of Contract[5], was in the sense of application of the Rules of arbitral procedure in settlement of the disputes between them […].”

### 2.4. Recent jurisprudence of the Romanian Courts regarding the jurisdiction

The arbitral cases we hereby referred to are still ongoing, so that there are not too many final awards issued to date.

Yet, there are a limited number of arbitral cases in which the Arbitral Tribunals constituted under the Rules of Arbitration of the International Chamber of Commerce issued several final partial awards whereby the National Company for Administration of Road Infrastructure in Romania has been ordered to comply with the Dispute Adjudication Boards’ decisions.

In two (2) such cases[6] the National Company for Administration of Road Infrastructure in Romania requested to the Bucharest Court of Appeals to set aside the final partial awards:

In 2018 the Bucharest Court of Appeals decided in both cases to set aside the final partial awards, considering that the arbitral tribunals were not constituted in accordance with the arbitral agreement of the parties, and that the institution which has jurisdiction to settle the disputes resulted from

[4] Art. 1 – *International Court of Arbitration*, para. 2) of the 2012 Rules of Arbitration of the International Chamber of Commerce (the provision was maintained in the latest version of the Rules of Arbitration of International Chamber of Commerce issued in 2017)

[5] It is noteworthy that pursuant to Order no. 146/2011, the Appendix to Tender is part of the Particular Conditions of Contract

[6] In this respect please refer to Court case no. 3261/2/2017** - *National Company for Administration of Road Infrastructure in Romania v. Salini Impregilo S.p.A.* (regarding the final partial awards issued in the ICC case no. 21328/MHM/2015); and Court case no. 5771/2/2017* - *National Company for Administration of Road Infrastructure in Romania v. JV Teloxim Con SRL - SC Comsa SA - Aldesa Construcciones SA - SC Arcadis Eurometudes SA* (regarding the final partial awards issued in the ICC case no. 21466/MHM (c.21775/MHM)).

performance of the contracts concluded under G.D. no. 1405/2010 and Order no. 146/2011 is the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.

In deciding so the Bucharest Court of Appeals reasoned that[7]:

*"The Court concludes that, by indication of an arbitral institution in the Appendix to Tender ("the Court of International Commercial Arbitration"), the parties understood to modify the arbitral institution chosen by the contract, having in mind the provisions of art. 1268 para. 3 of the Civil Code, pursuant to which "the clauses are interpreted in the sense in which they may produce effects, and not in that in which they would produce none" as well as the fact that the Appendix to tender prevails over the Particular Conditions of Contract.*

*This interpretation respects also article 978 of the Civil Code which provides that, when a clause has two meanings, it will be interpreted "in accordance with the meaning which may produce an effect, and not in accordance with the no-effect meaning." The defendant's interpretation with regard to the terms "the Court of International Commercial Arbitration" removes any effect of these terms, because it would simply confirm a reference to the ICC arbitration already existent in Sub-Clause 20.6 of the Particular Conditions of Contract.*

*The Court acknowledges that the name of the institution utilized in the Romanian version of the Appendix to Tender "the Court of International Commercial Arbitration" is almost identical with the official name of the arbitral forum attached to the Chamber of Commerce and Industry of Bucharest, Romania.*

*Moreover, having in mind that the contract language is Romanian, that the language applicable to the procedure is Romanian, that the substantive law is Romanian, and that the election of the city of Bucharest, Romania, as the seat of arbitration, the Court appreciates that election of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania is understandable from the perspective of the relationship of the contract with Romania [...].*

*Therefore, the Court acknowledges that the arbitral institution indicated in the Appendix to Tender* ***refers to the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania from Bucharest,*** *and not to the International Chamber of Commerce - International Court of Arbitration (ICC), so that the arbitral tribunal was not constituted in accordance with the arbitral agreement of the parties, the reason provided by art. 608 para. 1, letter c) invoked by the plaintiff being grounded."*

Even though both aforementioned decisions of the Bucharest Court of Appeals were not final and they could have been appealed at the High Court of Cassation and Justice, only in Court case no. 3261/2/2017** the defendant decided to file such an appeal. This appeal is currently pending.

Confronted with the aforementioned jurisprudence of the Bucharest Court of Appeals, another contractor which submitted its disputes with the National Company for Administration of Road Infrastructure in Romania to the ICC International Court of Arbitration based on the same reasons of semantics and has its arbitral case pending, vested the Bucharest Tribunal with a request to issue an injunction *"to remove the hindrance occurred with regards to the permanent arbitral institution which must administer the arbitral case"* and to decide that the ICC International Court of Arbitration is the right arbitral institution to administer its case[8]. The Bucharest Tribunal admitted this request for injunction.

Under the Romanian Law it is highly debatable if the contractor could have used this procedural pathway to obtain a clarification from a lower court with regard to the arbitral institution to administer its arbitral case. Also highly debatable is whether a Court could have issued a decision on which arbitral institution would have jurisdiction to administer the arbitral case in lieu of the appointed Arbitral Tribunal and before the issuance of an award on jurisdiction by the Arbitral Tribunal.

However, the injunction issued by the Bucharest Tribunal has only an interim nature under the Romanian Law. This means that at the end of the arbitral case when an award will be finally issued under the auspices of the ICC International Court of Arbitration, the Bucharest Court of Appeals will still have the full power to set aside the arbitral award in accordance with its previous jurisprudence, irrespective of the injunction issued by the Bucharest Tribunal.

## 3. The jurisdiction of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania according to the Romanian Law

The analysis of the legal framework in effect at the moment when G.D. no. 1405/2010 and Order no. 146/2011 were issued by the Romanian Government suggests not only that the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania is actually the

[7] Decision no. 4119/2018 rendered by the Bucharest Court of Appeals in Court case no. 3261/2/2017** - *National Company for Administration of Road Infrastructure in Romania v. Salini Impregilo S.p.A.* (regarding the final partial awards issued in the ICC case no. 21328/MHM/2015)

[8] Please refer to Court case no. 14400/3/2018 – *JV Astaldi S.p.A. – Max Boegl România SRL v. NCAIR* (referring to the ICC case no. 22145/MHM)

arbitral institution contemplated by the aforementioned enactments, but also that what was considered for a long time being a controversed modification brought by Appendix to Tender to the arbitration clause provided by Sub-Clause 20.6 of the General and Particular Conditions of Contract, is in fact a solid solution, strongly sustained by legal arguments and consistent with the applicable provisions of Romanian Law and of the international conventions to which Romania is a signatory part, provisions which were in effect at the moment when G.D. no. 1405/2010 and Order no. 146/2011 were issued by the Romanian Government.

### 3.1. Sub-Clause 20.6 of FIDIC Conditions of Contract - a mandatory arbitration clause under the Romanian Law

The debate on which arbitral institution has jurisdiction to administer the arbitral cases under G.D. no. 1405/2010 and Order no. 146/2011 has gravitated so far around arguments related to interpretation of contracts and priority of contractual documents from the perspective of the will of the signatory parties exclusively. However, the matter was not analysed from the lawmaker's perspective to date.

It is noteworthy that whilst the FIDIC General Conditions of Contract applicable to the public works administered by the units subordinated or under the authority of the Ministry of Transportation and Infrastructure, including the National Company for Administration of Road Infrastructure in Romania were adopted by G.D. no. 1405/2010, the Particular Conditions of Contract, Appendix to Tender and Contractual Agreement applicable to the public works administered by the National Company for Administration of Road Infrastructure in Romania were adopted by Order no. 146/2011. Therefore, all the provisions of the FIDIC General and Particular Conditions of Contract, Appendix to Tender and Contractual Agreement, including the provisions of Sub-Clause 20.6 [*Arbitration*] are part of the Romanian legislation, being mandatory for the parties involved in the construction of infrastructure, the National Company for Administration of Road Infrastructure in Romania and the contractors alike, by the effect of the law.

Thus, with the occasion of initiation of a public tender, the National Company for Administration of Road Infrastructure in Romania has only the liberty to choose which FIDIC Conditions of Contract will be applicable: Red Book or Yellow Book, including in this regard into the tender documentation the relevant Conditions of Contract provided by G.D. no. 1405/2010 and Order no. 146/2011 for information of the participants.

The decision of the interested contractor to participate at a public tender organized by the National Company for Administration of Road Infrastructure in Romania implies the contractor's adherence to the tender documentation, including Sub-Clause 20.6 of the relevant Conditions of Contract provided by G.D. no. 1405/2010 and Order no. 146/2011, in a *"take it or leave it"* manner[9].

Therefore, when later on the winner of the public tender signs the Contractual Agreement, Appendix to Tender and Conditions of Contract, it only reinforces its commitment to comply with the relevant provisions of G.D. no. 1405/2010 and Order no. 146/2011.

In other words, the content of the FIDIC Conditions of Contract applicable to public works, in Romania, including the content of Sub-Clause 20.6 [*Arbitration*], is not the result of the parties negotiation materialized in a *"common intention/understanding of the parties"*, but the result of the lawmaker's will.

Under these circumstances, Sub-Clause 20.6 represents a mandatory arbitration clause imposed by the Romanian law, an arbitration organised under such auspices being a mandatory arbitration, and not a voluntary one, based on the parties' agreement.

In view of the aforementioned, in order to determine which arbitral institution has jurisdiction to administer the arbitral cases under G.D. no. 1405/2010 and Order no. 146/2011 it is therefore not important to establish what was the so-called *„common intention of the parties"* at the conclusion of the contract, but to understand what was the intention of the lawmaker when G.D. no. 1405/2010 and Order no. 146/2011 were issued.

### 3.2. Sub-Clause 20.6 of FIDIC Conditions of Contract imposes a certain institutional arbitration under the Romanian Law - the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania

The intention of the lawmaker at the issuance of G.D. no. 1405/2010 and Order no. 146/2011 may be revealed by an analysis of the legal framework applicable to arbitration in force at that moment in Romania. It is noteworthy that when it issued the aforementioned enactments, the lawmaker had to comply entirely with the Romanian legislation applicable to arbitration at that moment.

In particular, the analysis of the following enactments are relevant for the scope of this research:

- The Code of Civil Procedure (1865);
- European Convention on International Commercial Arbitration (Geneva 1961)[10];
- Law no. 335/2007 *of the chambers of commerce*

[9] Pursuant to Law no. 98/2016 on public procurement and Law no. 101/2016 on remedies and appeals concerning the award of public procurement contracts, sectorial contracts and of works concession contracts and service concession contracts, and for the organization and functioning of the National Council for Solving Complaints, the participants to a public tender have the legal right to challenge the requirements of the tender documentation considered too restrictive or illegal. However, the legal means whereby a contractor would challenge the legal provisions of G.D. no. 1405/2010 and Order no. 146/2011 in a public tender procedure are not forming the scope of our research

[10] Ratified by Romania by the Decree no. 281 of 25.06.1963

*in Romania*;

- 2010 Rules of arbitral procedure of the Court of International Commercial Arbitration[11].

The ad-hoc arbitration was regulated by the provisions of the Code of Civil Procedure (1865), Book IV, art. 340-371, which remained unchanged until 1993. It is noteworthy that between 1948 and 1990 the rules of ad-hoc arbitration were used exclusively in the state mandatory arbitration organized under Law no. 5/1954[12], the voluntary arbitration being practically inexistent in Romania in the period of the communist regime.

In this regard, by Decree no. 495/1953 it was founded the Commission of Arbitration attached to the Romanian Chamber of Commerce and Industry, having its headquarters in Bucharest. This Commission of Arbitration had jurisdiction *"to settle the disputes resulted between the Romanian organizations of international commerce and their foreign partners."*

Later on, the Decree-Law no. 139/1990 *regarding the chambers of commerce and industry in Romania* conferred to the chambers of commerce organized under the new legislation the jurisdiction to administer the ad-hoc arbitration initiated under the Code of Civil Procedure. Further to the issuance of Law no. 15/1990 *regarding the reorganisation of the state economic units into autonomous administration and commercial societies* which formally allowed to such entities to refer their disputes to arbitration, the provisions regarding ad-hoc arbitration comprised by the Code of Civil Procedure were modified, being included[13], *inter alia*, a new article - art. 341[1], providing that:

*"The Parties may agree to have their arbitration organized by a permanent institution of arbitration or by a third party".*

In 2007 it was issued a new law of the chambers of commerce in Romania - Law no. 335/2007, whereby, by art. 29 (1), it was clearly stated that:

**"The Court of International Commercial Arbitration is a permanent institution of arbitration, without legal capacity and operates attached to the National Chamber[14]."**

Moreover, art. 2 [*Organisation of the institutional arbitration*] of the 2010 Rules of arbitral procedure of the Court of International Commercial Arbitration reinforced that:

*"Organisation of the institutional arbitration is made by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, hereinafter referred to as the Court of Arbitration, based on the Rules of organisation and operation of the Court of Arbitration, the Rules of the College of the Court of Arbitration, provisions of the Code of Civil Procedure to the extent that the present rules of arbitration procedure, hereinafter referred to as rules, do not provide otherwise."*

In view of the aforementioned, it results that the reference to *"the Court of International Commercial Arbitration"* included in the Appendix to Tender adopted by Order no. 146/2011 is a clear referral to the arbitral institution provided by art. 29 (1) of Law no. 335/2007 *of the chambers of commerce in Romania*, and by art. 2 of the 2010 Rules of arbitral procedure of the Court of International Commercial Arbitration respectively, which is beyond any doubt the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.

Therefore, contrary to the arguments brought under the Theory of Semantics, when issued Order no. 146/2011, the lawmaker identified in a correct and complete manner the arbitral institution to administer the disputes related to the public works administered by the National Company for Administration of Road Infrastructure in Romania, taking over the name of this arbitral institution exactly as it was provided by the relevant law in force - Law no. 335/2007.

### 3.3. The rules of arbitral institution v. the institution of the arbitral rules under the Romanian Law

Pursuant to Article 4 [*Organization of the Arbitration*] of the European Convention on International Commercial Arbitration (Geneva 1961), ratified by Romania by the Decree no. 281/1963:

*„1. The parties to an arbitration agreement shall be free to submit their disputes:*

*(a) to a permanent arbitral institution;* ***in this case, the arbitration proceedings shall be held in conformity with the rules of the said institution****;*

*(b) to an ad hoc arbitral procedure; in this case, they shall be free inter alia*

*(i) to appoint arbitrators or to establish means for their appointment in the event of an actual dispute;*

*(ii) to determine the place of arbitration; and*

*(iii) to lay down the procedure to be followed by the arbitrators."*

Therefore, under the provisions of the Code of Civil Procedure (1865) and Decree no. 281/1963, whenever an arbitral clause such as Sub-Clause 20.6 of the Appendix to Tender, provides that the disputes shall be submitted to a permanent arbitral institution, the rules of the said institution will become automatically applicable.

Moreover, that also means that, under the Romanian law, whenever there is nominated in the arbitration clause a certain arbitral institution to administer the arbitral case, but by using the rules of

[11] Published in the Official Monitor no. 197 of 29.03.2010

[12] Law no. 5/1954 *regarding the organization and operation of the State Arbitration*

[13] Art. 341 was included into the Code of Civil Procedure by Law no. 59/1993 *for modification of the Code of Civil Procedure, Family Code, of the Law of Administrative Disputes no. 29/1990 and of Law no. 94/1992 regarding the organization and operation of the Court of Accounts*

[14] Pursuant to art. 1 para. (2) letter b) of Law no. 335/2007, the National Chamber is the Chamber of Commerce and Industry of Romania

another institution, the arbitral institution which will have jurisdiction to administer the case will be the one expressly nominated and not the one to which the rules referred to.

Consequently, not only that the reference to *"the Court of International Commercial Arbitration"* included in the Appendix to Tender adopted by Order no. 146/2011 denotes a clear intention of the lawmaker to refer the disputes resulted from the execution of public works administered by the National Company for Administration of Road Infrastructure in Romania to this arbitral institution, but also this reference implicitly excludes the application of the Rules of Arbitration of the International Chamber of Commerce stated by Sub-Clause 20.6 of the General and Particular Conditions of Contract.

Under these circumstances, the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania is the arbitral institution which has jurisdiction to administer the arbitral cases under G.D. no. 1405/2010 and Order no. 146/2011, by using its own arbitration rules in force at the date when the arbitral case is initiated.

Last but not least, it is noteworthy that provisions of the new Code of Civil Procedure, entered into force on 15.02.2013 maintained the rule of prevalence of the arbitral institution nominated in the arbitral clause over the institution to which the rules mentioned in the same clause referred to. In this regard, art. 619 [*Arbitral rules*] para. 2 of the Code of Civil Procedure (2013) reads:

*„By designation of a certain institutional arbitration as having jurisdiction in settlement of a certain dispute or type of disputes, the parties automatically opt for the application of its own rules of procedure. Any derrogation from this provision is null, unless, taking into consideration the circumstances of the case and content of the rules of procedure indicated by the parties as being applicable, the management of the institutional arbitration which has jurisdiction decides that it may be applied also the rules elected by the parties, establishing if the application of the latter is effective or by analogy."*

*However, in the legal doctrine*[15] *it was emphasized that:*

*"The rules of procedure elected by the parties may be applied only exceptionally, and under certain circumstances, further to the decision of the arbitration institution management, taking into consideration the circumstances of the case and content of the rules of procedure indicated by the parties."*

## 4. Conclusions

Once adopted by G.D. no. 1405/2010 and Order no. 146/2011, the FIDIC Conditions of Contract became part of the Romanian Law. Thus, the contractual nature of their provisions was replaced by the mandatory nature of the law.

Under these circumstances the intention of the lawmaker when issued the aforementioned enactments prevail over any other argument based on interpretation of the will of contractual parties.

From the analysis of the legal framework in force at the moment of approval of G.D. no. 1405/2010 and Order no. 146/2011 it results a clear intention of the Romanian Government to submit the disputes resulted from the performance of public works to the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, which will settle such disputes pursuant to its own rules of arbitration.

These conclusions confirm the fairness of the Bucharest Court of Appeals decisions which decided in a couple of recent cases to set aside the final partial awards issued by the ICC Court of International Arbitration, considering that the institution which has jurisdiction to settle the disputes resulted from performance of the contracts concluded under G.D. no. 1405/2010 and Order no. 146/2011 is the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania instead, yet for different reasons than those analysed within this paper.

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- Order no. 146/2011 *regarding the approval of particular conditions of contract for plant and design build, and for building and engineering works designed by the employer of the International Federation of*


[15] G. Boroi and others, *"The Code of Civil Procedure commented"*, Hamangiu Publishing, 2016

*Consulting Engineers (FIDIC) for the investment objectives from the field of transportation road infrastructure of national interest financed by public funds*;

- Law no. 98/2016 *on public procurement*;
- Law no. 101/2016 *on remedies and appeals concerning the award of public procurement contracts, sectorial contracts and of works concession contracts and service concession contracts, and for the organization and functioning of the National Council for Solving Complaints*.

# HOW TO INCLUDE AND REWARD INVESTORS TO AN IDEA

**Dan-Alexandru SITARU***

**Abstract**

*More and more it can be found that platforms, mostly online nowadays, tend to fish for new idea s that some other might have and reward them by putting in contact with potential investors, of their have market value. But this opens up the big problem of sharing the burden of realising the business, sometimes the heavy task of creating and implementing and nevertheless the final share of profits. These may rise lots of judicial problems starting from the very human component. The objective of the paper is to focus on the small guide regarding what does a partnership between a person having an idea or a know-how and its potential investor might look like. As the author, from personal experience has noticed, most people are more focused in financial matters and/or on their creation rather than the fine print of the contract the investor, as more versed, gives them to sign. Since usually the one with the idea is just a simple person starting out from a garage, it does not have the expertise or the resource to pay a qualified person for assistance. Without having exhausting the subject, which is huge, one may find some stating point or some advantages or disadvantages that may give an idea what king of future partnership it should have with the investor. Also, from the investor perspective, since idea may be good or bad, profitable or not, this small presentation may provide some points to look after.*

**Keywords:** *investor, initial partner, shareholder, company, joint-venture*

## 1. Introduction

Investment is a notion that subsumes two aspects: one that refers to economics and represents the financial and money aspects of the investment and one that refers to the legal side. The latter is our main focus because however important money may be without a proper legal back setting any investment is soon to be proven a failure or result in crime or contravention that might attract fines or even penal sanctions.

But recently another aspect has arisen, started from the mistrust of the investors or from the desire to control your partner. Any mistrust might come from the fact that id a person has an amount and is willing to invest it (money must circulate) history has proven that although the investment is sound the person that takes care of the investment, sometimes the agent, is untrustworthy. Our paper however shall focus on the other idea, regarding one controlling the business partners that will invest in your business from future acquiring so much power and by becoming major shareholders or by taking over, either hostile or by more votes, and thus protecting the founder's position, not so see themselves become minority. The notorious case of Steve Jobs, the founder of Apple, sets as an example were only his resourcefulness and wit made the new investors call him back after being expunged.

Therefore, in the content of the present paper our goal is to show the most common and well used legal solutions for attracting investors but keeping them under check while returning only their investment or even if they become partners not to give them the possibility to ever threaten the founders position. At all solutions there will be a set of pro and cons that might help from a practical perspective.

All this becomes helpful in situations such as when a person launches a business plan to develop a certain idea or type of business, such as in the IT business where platforms for various aspects, selling, buying, transactions, gatherings, idea expression, debate, applications etc. Sites that advertise for finding investors for new idea, were anyone may enter a business plan and might find an investor willing to pour money into its development, is no longer an exotic concept. But taking the case of such and entrepreneur that came with the idea of an online platform for exchanging crypto currency, being a well thought plan, it got an enthusiastic response and more than fifty investors were lining up to finance his project. Of course, they all desired to pe rewarded or compensated for their initial investment, some of them only wanting the return of their investment, like a loan plus interest, and mostly wanting to participate as some form of partners.

At first glance the solution seems simple, but the Romanian Law for companies states in the chapter regarding the stock company that loans and other forms of credit from the company to the shareholders or managers are not permitted[1]. Also, the offering of bonuses or guarantees for personal endeavours of the shareholder or manager are not permitted also.

However, the Romanian Fiscal Code[2] states that under a certain amount loans may be realised and paid between the company and its shareholders, managers or third parties, but the amount is low and limited by daily transactions thus making it inconvenient for large or expanding business. Hence, the Romanian law is iv

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[1] Law no. 31 /1990 regarding companies as it was amended.

[2] Published in Official Gazette part I, no. 688 from 10 September 2015.

favour of allowing loans only to be distribute by banks and financial companies, were regulation is strict and controllable.

## 2. Content

### 2.1. Becoming a shareholder.

The fist solutions we bring forward is to insert the investors into the initial company, by means of making them shareholders, with all the legal consequences that derive from this status.

This solution presents particularities because of the two main types of companies regulated by Company law, the stock company and the limited liability company.

As for the stock company we will refer furthers below at a different section, but as for the limited liability company any person that desires to become a shareholder must be voted in by the other members[3]. This comes from the idea that such a company is set up on the idea that all members are intuitu personae. So, if all members are chosen in consideration to one another this means and leaving or entering the company must be approved by at least ¾ of the members, by law.

So, in short, being a shareholder gives the person at least the following rights:

- to participate and vote in the general assemblies of the shareholders;
- to convene and to be taken consul with it in management decisions;
- to contest and ask for annulment of the decisions of the general assembly of shareholders;
- to veto any entry or exit of shareholders, if ¾ of the remaining members do not decide otherwise;
- to receive dividends, should this be voted by the general assembly of shareholders. The value of the received dividends is always proportional to the percentage of share ownership of the company.
- to receive a portion of assets at the liquidation of the company, proportional to the percentage of share ownership of the company.

The main problem with this solution is that this procedure implies the dilution of the shares hold by the founding members. The solution is to increase the number of shares and distribute them to both the newly come shareholders and to the initial members. This will allow for the share distribution to remain the same, and the percentages of ownership to be unchanged, thus not allowing the new members to gain control or more votes.

But even so, two addiction problems arise from this, one being that the new shares must be bought and the initial members must come up with the sum from personal funds, and second that the status of shareholder is forever, until the company enters liquidation/bankruptcy or the shareholder decided to sell.

In dealing with the fists problem, one might add that a compensation for unpaid dividends may be implemented, settling thus the need to bring additional finances by the initial members. Also, since the Fiscal code allows certain minimum amounts of loans between the company and its shareholders and that there is no actual need for shareholders to actually cash in any of those loans, such operations might be only set in motion in order to prepare a near future emission of new shares and then the shareholders compensate their uncashed loans and interests with new shares, bringing them to the same or similar ownership percentage as before.

In dealing with the second problem, a contract might be drafted between the parties stipulating that the investors will only enter the company for a limited time period, until their investment is returned with interest preagreed. This contract shall be a sale-purchase agreement in advance that will enter into force once the conditions are met. If any party refuses to acknowledge and execute this agreement in the future, the other party may address the court to rule for the realisation of the sale purchase agreement[4].

As for the stages for implementing this solution, no special conditions must be fulfilled other than those stated by art. 202 of the Company law. A validation by the Trade Office and the passing of the minimum required term is mandatory.

If one should analyse the law and the scope for such solution to be implemented, the following advantages and disadvantages might be noticed.

One advantage is that it is a simple, step by step and already verified solution. It also involves very few steps, good for urgent situations.

Another advantage is that it is very advantageous for investors, conferring them trust that once they have invested, they may not be pushed out discretionary. The contract and the shareholder title make them safe against any exclusion from the company other than fraud or serious charges[5].

Another advantage is that being part of the general assembly of shareholders it may vote the sharing of dividends or contest the lack of sharing should the other members decide to vote against the investor's rights.

Another advantage, which regards all, is that neither the shareholders nor the investor may not leave the company without the approval of a minimum of ¾ of the total shareholders. This makes for a secure situation for all parties.

As for the disadvantages, one might be that the presale agreement should be carefully negotiated and drafted because of the chance that the investors might reconsider. Once the new person enters the company and gains shareholder status it becomes equal in rights

[3] Art. 202 of Law no. 31/1990 regarding companies.
[4] See art. 1279 of the Romanian Civil Code
[5] See for the causes for exclusion art. 222 of Law no. 31/1990 regarding companies.

to all other shareholders. This might become an issue since that shareholder may try to use his position to overcome the effects of the presale agreement and remain in the company.

Also, since they have equal rights the new shareholders may intervene and actively participate in the day to day affaires of the company, either blocking it or slowing it down. This does not indicate ill faith, but more likely an excessive desire to protects one's rights.

Another disadvantage it that the existing shareholders must pay, at least once, a supplement of money for the purchase of the new issued shares, in order to keep their percentages of stock ownership. Should none of the solution provided before be possible, regarding compensation with past debts owed by the shareholders, it might be very difficult if not impossible to retain control of the company.

Not the least, all amendments to the constitutive acts of the company must be taken by all shareholders. This might create all sorts of problems and arguments between shareholders. However, the unanimity condition may be fined down by vote of the shareholders.

Summing up intro some pro and cons, it could be said that the negative aspects tend to overwhelm. However, this is the case only when you take into consideration a large expansion involving lots of investors who will potentially become shareholders. But for small or step by step progressive growth that takes one of few investors at a time it might be the most effective means to controlling them, especially having signed a pre selling agreement.

### 2.2. Creation of transformation of a company intro a stock company followed by issue of shares to the new shareholders (investors)

A second solution might be either transformation of a limited liability company into a stock company or the creation of a new one and the main shareholder being the limited liability company and the inclusion of the investors as new shareholders.

Basically, the effect is the much the same as the former solution but the advantages are for the initial shareholders that a new company has its own juridical personality and it is fully independent, therefor any issues or potential risks that might be encountered will not be reflected upon the initial company. Also, having shareholders, it is much simple to enter and exit the company without having the need for a general assembly of shareholders.

Separately, this solution might also fit to creating a comandita stock company. The idea is that investors might feel threatened by the creation of stock company, either independent or resulting from conversion, because they might feel that the old shareholders could at any time leave them to go bankrupt and deprive them of the possibility of recovering their investment. In order to provide credibility, one might use a comandita stock company that, in essence, is composed by law of two types of shareholders, one with full liability, who control the company and make up the general assembly and one with liability only in the limit of its initial investment. There for the old shareholders retain the control of the company but become liable and thus give securements to the new shareholders who only come in as investors and do not participate at the day to day activities of the company.

To sum up the effect of this solution, the transformation to a stock company would have as affect the becoming of shareholders to the new company. They will gain mainly the same rights as before mentioned, such as the right to participate and vote in the general assembly (condition is is not a comandita company), the right to be informed regarding the activity and financial statements of the company, the right to contest the general assembly's decision and ask for annulment, the right to freely sell their shares etc. One special right that only shareholders of a stock company have is the right to take oneself off the company by demanding that the company buy back their shares[6]. But this right is not likely to be made us of it because it will mean losing part of the initial investment and interest.

As for the steps needed to take intro effect this solution, the procedure of rising the capital by supplementing the number of shares is to be followed[7]. This includes the steps made obligatory by the Trade Office[8].

The main advantage for this solution is that it is the most versatile one, it covers a large potential solution to different conditions and special demands that investors might have while offering credibility. Also, it is the safest one for the initial shareholders since it will always keep the investors in check.

Another advantage is that by means of modifying the constitutive acts, while implementing this solution, the voting power of the new shareholders may be diminished. So, the Company law indicates that usually 1 share gives 1 vote, but this may be modified to so that 2 shares give only one vote, this limiting the votes of certain shareholders[9]. The new shareholders have the right to either accept or not the proposal since this is a package deal modification of the constitutive acts.

Not the last, by this solution we separate all issues either to a new company or between the shareholders. Old shareholders might even have special privileges for a period of five years resulting in them taking a part of

[6] See art. 132 of Law no. 31/1990 regarding companies for conditions that need to be fulfilled and necessary procedure. Not all are allowed to take themselves off but only those who are under one criteria set forth by the law.

[7] See art. 18 and the following of Law no. 31/1990 regarding companies.

[8] See Law no. 26/1990 regarding the Trade Office.

[9] See art. 101 of Law no. 31/1990 regarding companies.

the dividends in advance and regardless of remaining other dividends for the rest of the shareholders[10].

The main disadvantage is that creating a stock company requires a minimum investment of 90.000 lei [11]. This may present as a financial challenge as it is also going to be topped with the investment need to keep the percentage of the ownership of capital at the same level. Although only 30% is required to be given at beginning, the entire sum must be put forward by the end of the procedure.

Another disadvantage, in contrary to the previous solution, here the no show of the investors as new shareholders to the special or extraordinary general shareholders meeting will result in a lack of minimum participation quorum and thus the assembly may not vote. Also, the old shareholders must always retain 51% of the votes in order not to lose the majority.

Last, also regarding the shareholders assemblies, if one may ask for annulment of a decision take by the general assembly it may also ask for suspension of the decision until the courts final rule. This equals to the blocking of the company.

Summing up the pro and cons one may still see that this is the most effective solution of them all, should the investors insist to participate of have a big role in the company that they are investing in. Otherwise, the next solution may prove the best yet.

### 3.3. Drafting joint-venture agreements with investors

Another solution consists of drafting of joint-venture contracts either of civil association[12] or independent ones. By this contract the investors come as simple persons willing to give finance and receive the guarantee of the return of their investments. The receiver of the finance participates with the idea or business plan and also will take responsibility for implementing and making profit. Profit shall be split according to the party's choice.

One partner should be manager of the joint-venture and usually that is the one who implements the contract. But exceptions are known to have been agreed.

This type of contracts is by definition free of any specific rules and do not give birth to legal entity. It is flexible, well known and hugely implemented, there for is a beaten path that may hold no surprises for any of the parties.

Each contract with all investors, regarding how many they are, can be tailor made to suit their interests or special demands. Any clause may be inserted and there is no limitation to what goods or the amount of investment that is poured into the joint-venture. Since the initial partner, has nothing beside the idea or business plan it may very well only bring into the contract this know-how and it would be enough to ask for finance. No risk involves the initial investor as due to the contract's confidentiality, that might be agreed by the parties, the know-how is protected should the deal fail. However, the investor stands to lose the investment, should it not take back the money in due time, according to a before agreed clause in the contract.

According to Romania law, the contract is only to be declared at the fiscal administration. The option of either opening or not a separate bank account for each contract or one for all is at the free to be decided by the parties. It is necessary only to keen accounting book for all contracts.

This also represents the main advantage of this solution, that it has no limitations and with the exception of the registration at the fiscal administration parties may not disclose the content or exitance. Negotiation of all the clauses is free.

Another advantage is that the investor becomes only a creditor to the company of the initial partner and does not have the status of shareholder and none of the deriving rights. It does not give the right to obtain a part of the profit of the initial partner and only gives right to taking back the investment and some interest. This investment is legal and free of the restrictions of loaning between a company and its shareholders or third parties.

Another advantage is that by not giving both to a legal entity none of the partners may need to register a group of companies, which would make them oblige special law provisions.

Last, but very important, it does not generate addition costs and the level of taxes are the same for any other transfer of goods or money.

The disadvantages consist of that fact that accountability must be kept for each contract. So, one must reflect all incoming and outgoing transfers from all contracts with precision.

And a final disadvantage, more from the investor's perspective, is that the initial partner, the one with the know-how who implements the contract, pours revenue intro the joint-venture and for this it pays taxes. Once the revenue is distributed both partners have to pay another tax, this time on the revenue that is coming t them as personal income.

Summing up the pro and cons, this solution is inclined to having more advantages for both partners. It is clean, transparent and does not tie any of them together in other than a binding contract.

## 3. Conclusions

Co-opting a partner to finance your investment is no easy task, but one may find that a negotiation is non other than the realisation of both partners dreams and the overcoming of their fears. The paper does not pretend to exploit or present all the possible ways in

[10] See art. 32 of Law no. 31/1990 regarding companies.
[11] See art. 10 of Law no. 31/1990 regarding companies.
[12] For the legal regime of civil associations see art. 1949 of the Civil code and the following.

which one can include or reward investors but hopes to cover some elements and give new thoughts to this emerging and ongoing growing market.

Institutions such as angel investor that existed in the European legislations for years are not regulated in Romania, which makes for the need to invent and combine existing legal solutions in order to give effect to effective partnerships. It is recommended that future legislation, on these sole aspects, be discussed with business forums and passed for the benefit of the society.

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# THE COURT OF JUSTICE OF THE EUROPEAN UNION'S INTERPRETATION OF REGULATION (EU) NO 650/2012

**Silviu-Dorin ŞCHIOPU***

**Abstract**

*According to the European legislator, European citizens should be able to organise their succession in advance, especially in the context of a succession having cross-border implications. To this end the European Parliament and the Council of the European Union have adopted Regulation (EU) no. 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, that applies to the successions of natural persons who died on or after 17 August 2015.*

*Since its enforcement, the Court of Justice of the European Union (CJEU) had the opportunity to interpret its provisions four times. In the Kubicka Case (C-218/16) the Court ruled on the refusal to recognise the material effects of legacies 'per vindicationem' in a Member State in which such legacies do not exist (the delimitation of the rules on succession and the rules on property). In the Mahnkopf Case (C-558/16), the Court ruled on the inclusion of an individual provision of German law in the scope of the law applicable to the succession (the delimitation of the rules on succession and the rules on matrimonial property regimes). In the Oberle Case (C-20/17) the Court ruled on the jurisdiction over procedures for issuing national certificates of succession. Last but not least, in the Brisch Case (C-102/18) the Court ruled on the nature of Form IV (Application for a European Certificate of Succession) as set out in Annex 4 of Commission Implementing Regulation (EU) No 1329/2014.*

*For a better understanding of Regulation (EU) no. 650/2012, this short overview presents, on the one hand, the premises situations which led to the CJEUs rulings mentioned above, and, on the other hand, some of the main arguments behind these decisions, without overlooking a case still pending before the Court of Justice of the European Union.*

**Keywords:** *succession, Regulation (EU) 650/2012, scope, Court of Justice of the European Union (CJEU), preliminary rulings.*

## Introduction

The European Parliament and the Council adopted on the 4th of July 2012 the Regulation (EU) no. 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession[1].

This legislative act applies throughout EU to the succession of natural persons who died on or after 17 August 2015, with the exception of the United Kingdom, Ireland and Denmark which didn't take part in its adoption and aren't bound by it or subject to its application.

Since its enforcement, the Court of Justice of the European Union (CJEU) had the opportunity to interpret its provisions four times: in the Kubicka Case (C-218/16), in the Mahnkopf Case (C-558/16), in the Oberle Case (C -20/17) and recently in the Brisch Case (C-102/18).

The interpretation of its provisions is all the more important as, on the one hand, the correct understanding of this Regulation allows citizens to organise their succession in advance, and on the other hand, the rights of heirs, legatees and of creditors of the succession can be effectively guaranteed only to the extent that its provisions are correctly applied in each given case.

That is why, in the following, we will present the four situations in which, till now, CJEU interpreted the provisions of Regulation (EU) no. 650/2012, without overlooking a case still pending before the Court of Justice of the European Union.

## 1. Kubicka Case (C-218/16)

In the first case, Ms. Kubicka, a Polish national married to a German national approached a notary practising in Poland in order to make her will. She wished to make a will containing a legacy 'by vindication' *(legatum per vindicationem)* that transfers the ownership of an object directly from the testator to the legatee, provided by Article 981[1] (1) of the Polish Civil Code, in favour of her husband, concerning her share of ownership from the jointly-owned immovable property situated in Germany.

The notary refused to draw up the will considering that such an act would be unlawful since such a legacy is contrary to German legislation and case-law relating to rights *in rem* and land registration, which must be taken into consideration under Article 1

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[1] Published in Official Journal of the European Union L 201 from 27 July 2012.

(2) (k) and (l) and Article 31 of Regulation (EU) no. 650/2012.

The German Civil Code (*Bürgerliches Gesetzbuch*) knows only the legacy 'by damnation' *(legatum per damnationem)*, provided by art. 2174, according to which a legacy creates a right for the legatee to demand delivery of the bequeathed object from the person charged and the legatee's claim arises at the time of the inheritance, so that the legatee is not *ab initio* the holder of a real right, as in the case of the legacy 'by vindication'. That's why, in Germany, a legatee may be entered in the land register only by means of a notarial instrument containing an agreement between the heirs and the legatee to transfer ownership of the immovable property.

In the end, the testator brought an appeal before the Regional Court, Gorzów Wielkopolski – Poland which decided to refer the following question: "Must Article 1(2)(k), Article 1(2)(1) and Article 31 of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession be interpreted as permitting refusal to recognise the material effects of a legacy by vindication *(legatum per vindicationem)*, as provided for by [Polish] succession law, if that legacy concerns the right of ownership of immovable property located in a Member State the law of which does not provide for legacies having direct material effect?"[2]

Article 1(2)(k) and (l) provides that the nature of rights *in rem* and any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register are excluded from the scope of the regulation.

According to Article 31 on the adaptation of rights *in rem*, where a person invokes a right *in rem* to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it.

However, as the Advocate General rightly pointed out[3], in the Kubicka Case the choice of a legacy 'by vindication' rather than a legacy 'by damnation' doesn't alter the content of the right to be exercised with regard to the asset, but it simply allows a right *in rem* to be transferred directly to the legatee, rather than being passed on indirectly by establishing a right *in personam* for the legatee. Therefore, as noted by the CJEU[4], both the legacy 'by vindication', provided for by Polish law and the legacy 'by damnation', provided for by German law, constitute methods of transfer of ownership of an asset, namely a right *in rem* that is recognised in both of the legal systems concerned. As such, the direct transfer of a property right by means of a legacy 'by vindication' concerns only the arrangement by which that right *in rem* is transferred at the time of the testator's death in accordance with the law governing succession.

The Court went on to state that Article 31 of Regulation no. 650/2012 doesn't concern the method of the transfer of rights *in rem*, but only the respect of the content of rights *in rem*, determined by the law governing the succession (*lex causae* – Polish law), and their reception in the legal order of the Member State in which they are invoked (*lex rei sitae* – German law). Therefore, since the right *in rem* transferred by the legacy 'by vindication' is the right of ownership, which is recognised in German law, there is no need for the adaptation provided for in Article 31.

It should be noted that in the present case, although, at the time of the death of the testator, the transfer of ownership will operate under Polish law, and the legatee, by virtue of the European certificate of succession, will be able to obtain the registration of the property over the inherited assets in the corresponding German register, according to recital (19) of Regulation (EU) no. 650/2012, the law of the Member State in which the register is held (the German law) will determine when the acquisition takes place[5].

## 2. Mahnkopf Case (C-558/16)

In the second case, Mr. Mahnkopf died on 29 August 2015, leaving behind as heirs a widow and a son. Until the time of his death, the deceased and his widow were subject to the German *statutory* separate property regime with equalisation of accrued gains, they had not entered into a marriage contract and the deceased made no dispositions upon death.

Since the deceased owned a half share in the ownership of a property in Sweden, his widow applied for a European Certificate of Succession in order to be used to record the transfer of ownership of the property in Sweden to the heirs of Mr. Mahnkopf. This application was rejected by the national court, which

[2] See CJEU, *Request for a preliminary ruling from the Regional Court of Gorzów Wielkopolski (Poland)*, lodged on 19 April 2016 – Aleksandra *Kubicka* (Case C-218/16), published in Official Journal of the European Union C 335 from 12 September 2016, p. 30.

[3] CJEU, *Opinion of Advocate General Yves Bot*, delivered on 17 May 2017, *Kubicka*, C-218/16, ECLI:EU:C:2017:387, paragraph 47.

[4] CJEU, *Judgement of 12 October 2017*, *Kubicka*, C-218/16, ECLI:EU:C:2017:755, published in the electronic Reports of Cases (Court Reports - general), paragraph 49.

[5] Recital (19): „The effects of the recording of a right in a register should also be excluded from the scope of this Regulation. […] Thus, where, for example, the acquisition of a right in immovable property requires a recording in a register under the law of the Member State in which the register is kept in order to ensure the *erga omnes* effect of registers or to protect legal transactions, *the moment of such acquisition should be governed by the law of that Member State*".

held that paragraph 1371(1) of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB) concerns questions relating to matrimonial property regimes, which do not fall within the scope of Regulation no. 650/2012.

Consequently, the deceased's spouse challenged this judgment by an appeal lodged with the Higher Regional Court, Berlin – Germany, which decided to refer the following question: "Is Article 1(1) of the EU Succession Regulation 1 to be interpreted as meaning that the scope of the regulation ('succession') also covers provisions of national law which, like Paragraph 1371(1) of the German Bürgerliches Gesetzbuch (BGB, Civil Code), govern questions relating to matrimonial property regimes after the death of one spouse by increasing the share of the estate on intestacy of the other spouse? […]"[6].

Article 1931 from the BGB on the right of intestate succession of the spouse provides in paragraph (1) that the surviving spouse of the deceased as an heir on intestacy is entitled to one quarter of the inheritance together with relatives of the first degree, and paragraph (3) specifies that the provisions of Article 1371 of the same code are not affected. In the Mahnkopf case, according to this provision, the widow received one-fourth of the estate.

According to paragraph (1) of Article 1371 on the equalisation of accrued gains in the case of death, if the property regime is ended by the death of a spouse, the equalisation of the accrued gains is effected by the share of the inheritance on intestacy of the surviving spouse being increased by one quarter of the inheritance and it's irrelevant whether the spouses in the individual case have made accrued gains. This legislative solution allows the simplification of the liquidation of the matrimonial regime between the surviving spouse and the other heirs of the deceased, and it is not necessary to prove any potential patrimonial growth. So the widow's total was half the inheritance in accordance with the national rules on the legal devolution of the inheritance.

Since the German lawmaker solved a problem arising from the patrimonial aspects of matrimonial regimes by resorting to succession law[7], neither the case-law, nor does the doctrine offer a united view on this matter. Some authors include this norm in the field of law applicable to the matrimonial regime, even when the deceased's inheritance is governed by a foreign law[8], while according to other authors the rule is applicable only if the German law is applicable to both the matrimonial regime and the succession[9]. On the other hand, some authors qualify par. (1) of Article 1371 from the German Civil Code as succession rule[10].

The Court of Justice of the European Union concluded that paragraph 1371 (1) of the BGB concerns not the division of assets between spouses but the issue of the rights of the surviving spouse in relation to assets already counted as part of the estate. Accordingly, that provision doesn't appear to have as its main purpose the allocation of assets or liquidation of the matrimonial property regime, but rather determination of the size of the share of the estate to be allocated to the surviving spouse as against the other heirs. Therefore such a provision principally concerns the succession to the estate of the deceased spouse and not the matrimonial property regime. Consequently, a rule of national law such as that at issue relates to the matter of succession for the purposes of Regulation no. 650/2012[11].

This interpretation follows also from the principle that the law governing the succession should govern the succession as a whole, Article 23(2)(e) of Regulation no. 650/2012 providing that it governs "the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate"[12].

However, the qualification of the norm made in the context of the application of EU law will not always lead to an identical result compared to the classification effected in the context of national conflict-of-law rules, considering that the German Federal Court of Justice decided that paragraph 1371 (1) of the BGB applies as a provision of law applicable to a matrimonial property regimes and, even if the law applicable to matrimonial property regimes is German law and the law applicable to the succession is the law of another State, the surviving spouse continues to be entitled to a share of the estate under paragraph (1) of article 1371 from the BGB[13].

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[6] See CJEU, *Request for a preliminary ruling from the Kammergericht Berlin (Germany)*, lodged on 3 November 2016 – Doris Margret Lisette *Mahnkopf* (Case C-558/16), published in Official Journal of the European Union C 30 from 31 January 2017, p. 20-21.

[7] This solution is considered by the dominant doctrine to be profoundly wrong – see Reinhard Zimmermann, *Intestate succession in Germany*, in K. G. C. Reid, M. J. de Waal, R. Zimmermann (eds.), „Comparative Succession Law. volume II: Intestate Succession" (New York : Oxford University Press, 2015), 213 and the authors mentioned in n. 310.

[8] See Dan Adrian Popescu, *Ghid de drept internațional privat în materia succesiunilor (Guide on international private law in successions matters)*, (Onești: Magic Print, 2014), 18, n. 37.

[9] Andrea Bonomi, *Le régime matrimonial et les conséquences patrimoniales des autres relations comparables au mariage*, in A. Bonomi, P. Wautelet, I. Pretelli, „Le droit européen des successions. Commentaire du Règlement (UE) n° 650/2012 du 4 juillet 2012", 2e édition (Bruxelles: Éditions Bruylant, 2016), 89, n. 30.

[10] See CJEU, *Opinion of Advocate General Maciej Szpunar*, delivered on 13 December 2017, *Mahnkopf*, C-558/16, ECLI:EU:C:2017:965, paragraph 31 and the authors mentioned in n. 6.

[11] CJEU, *Judgement of 1 March 2018, Mahnkopf*, C-558/16, ECLI:EU:C:2018:138, published in the electronic Reports of Cases (Court Reports - general), paragraph 40.

[12] *Idem*, paragraph 55.

[13] See CJEU, *Opinion of Advocate General Maciej Szpunar*, delivered on 13 December 2017, *Mahnkopf*, C-558/16, ECLI:EU:C:2017:965, paragraph 31 and the case-law mentioned in n. 5.

### 3. Oberle Case (C-20/17)

In the third case, Mr. A. Th. Oberle, a French citizen with his last usual residence in France, died on 28 February 2015. The constituent elements of the succession were located both in France and Germany. The deceased left behind two sons. A French court issued a national certificate of succession stating that the two brothers each inherit half of the estate.

Subsequently one of the heirs applied to the Local Court, Schöneberg, Berlin – Germany for the issuing of a national certificate of succession limited to the estate located in Germany[14]. That certificate was to state that the estate is inherited by the two brothers under French law. The court declared that it lacked jurisdiction to issue a national certificate of succession under Articles 4 and 15 of Regulation no. 650/2012 because the provisions of German law cannot determine international jurisdiction since the provisions of national law must yield to the provisions of Regulation no. 650/2012. In the court's view, the French courts, as the courts of the Member State where the deceased had his habitual residence at the time of death, and not the German courts, have jurisdiction to rule on the succession as a whole, including the application.

Consequently, an appeal was brought against that decision before the referring court which decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling: "Is Article 4 of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession 1 (Regulation No 650/2012) to be interpreted as meaning that it also determines exclusive international jurisdiction in respect of the granting, in the Member States, of national certificates of succession which have not been replaced by the European certificate of succession (see Article 62(3) of Regulation No 650/2012), with the result that divergent provisions adopted by national legislatures with regard to international jurisdiction in respect of the granting of national certificates of succession — such as Paragraph 105 of the Familiengesetzbuch (the Family Code) in Germany — are ineffective on the ground that they infringe higher-ranking European law?[15]

Article 4 of Regulation (EU) no. 650/2012 on general jurisdiction provides that the courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.

So, the referring court asked for clarifications as to whether Article 4 defines 'exclusive jurisdiction' also over procedures for the issuing of national certificates of succession, or in other words whether Article 4 determines jurisdiction over procedures for issuing national certificates of succession, in the case of Member States where the judicial authorities can issue national heir certificates.

The Advocate General argued that even from an earlier stage of the legislative process it was assumed that the international jurisdiction of the authorities of the Member States over the issuing of national certificates of succession would be decided not by national law but by the uniform rules of jurisdiction contained in the regulation[16], and this view is confirmed by the literal, systematic and teleological interpretation, supported by the historical interpretation of Article 4 of Regulation (EU) No 650/2012.

The Court of Justice of the European Union embraced this point of view and decided that Article 4 of Regulation (EU) No 650/2012 […] must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which provides that, although the deceased did not, at the time of death, have his habitual residence in that Member State, the courts of that Member State are to retain jurisdiction to issue national certificates of succession, in the context of a succession with cross-border implications, where the assets of the estate are located in that Member State or the deceased was a national of that Member State"[17].

This interpretation upholds its previous judgment rendered in Kubicka case[18] according to which an interpretation of the rules of Regulation No 650/2012 which would lead to the fragmentation of the succession would be incompatible its objectives and one of those objectives is precisely to establish a uniform regime applicable to successions with cross-border implications, including the harmonising the rules relating to the international jurisdiction of the courts of the Member States in both contentious and non-contentious proceedings.

### 4. Brisch Case (C-102/18)

In the fourth case A German national with the last usual habitual residence in Cologne (Germany) died on 2 June 2017. The executor of the deceased's last will, pursuant to Article 65(1) of Regulation no. 650/2012, Mr. Brisch, applied to the Local Court in Cologne on 16 October 2017 on the basis of a notarised instrument

[14] For the view that the jurisdiction of the Member States courts to issue certificates of inheritance is determined by virtue of their national law, see Felix Odersky în U. Bergquist, D. Damascelli, R. Frimston, P. Lagarde, F. Odersky, B. Reinhartz, *Commentaire du règlement européen sur les successions* (Paris, Éditions Dalloz, 2015), 59.

[15] See CJEU, *Request for a preliminary ruling from the Kammergericht Berlin (Germany)*, lodged on 18 January 2017 – Vincent Pierre *Oberle* (Case C-20/17), published in Official Journal of the European Union C 112 from 10 April 2017, p. 19.

[16] CJEU, *Opinion of Advocate General Maciej Szpunar*, delivered on 22 February 2018, *Oberle*, C-20/17, ECLI:EU:C:2018:89, paragraph 118.

[17] CJEU, *Judgement of 21 June 2018, Oberle*, C-20/17, ECLI:EU:C:2018:485, not yet published (Court Reports - general).

[18] CJEU, *Judgement of 12 October 2017, Kubicka*, C-218/16, ECLI:EU:C:2017:755, published in the electronic Reports of Cases (Court Reports - general), paragraph 57.

of 11 October 2017 for a certificate in respect of the deceased's estate located in Italy, but did not use Form IV in Annex 4 to Implementing Regulation No 1329/2014 ('Form IV').

The Court requested the use of Form IV but Mr. Brisch refused to accede to that request and asserted that he was free - but not required - to use that form. Therefore, the court rejected the application for the certificate on the ground that Mr Brisch did not use Form IV and that therefore the application had not been lodged in the prescribed form. Consequently, Mr. Brisch brought an appeal before the Higher Regional Court on the ground that it follows both from Article 65(2) of Regulation no. 650/2012 and from Form IV itself that the use of the latter is optional.

The referring court decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling: "Is the use of the form as set out in Annex 4 as Form IV, established in accordance with the advisory procedure under Article 81(2) of the EU Succession Regulation, mandatory or merely optional for the purposes of an application for a European Certificate of Succession under Article 65(2) of the EU Succession Regulation, in accordance with Article 1(4) of the Implementing Regulation for the EU Succession Regulation?"[19].

According to Article 65 on the application for a certificate, for the purposes of submitting an application, the applicant *may use* the form established in accordance with the advisory procedure referred to in Article 81(2), and Article 1(4) from Regulation no. 1329/2014 states that the form *to be used* for the application for a European Certificate of Succession referred to in Article 65(2) of Regulation No 650/2012 shall be as set out in Annex 4 as Form IV.

The Court of Justice of the European Union considered that the wording of Article 65(2) of Regulation No 650/2012 is not ambiguous as regards the optional nature of the use of Form IV and Article 1(4) of Implementing Regulation No 1329/2014 and must be read in conjunction with Annex 4 to that regulation, to which it refers and which includes Form IV, since in the section 'Notice to the applicant', which heads Form IV, it is clearly specified that Form IV is optional. Therefore, it is clear from a literal interpretation of Article 65(2) of Regulation No 650/2012, read in conjunction with Annex 4 to Implementing Regulation No 1329/2014, that, for the purposes of an application for a certificate, the use of Form IV is optional[20].

This interpretation confirms the position of the doctrine that the regulation only suggests the use of the form but the applicant has all the interest in using it as it facilitates the mission of the authority responsible for issuing the European Certificate of Succession[21]. In addition, the claimant may also use a form provided for in the national law of the issuing authority where the Member State also has a national procedure for the issue of national succession certificates[22].

## 5. WB Case (C-658/17)

Besides the four judgments outlined above, there is a case still pending before the Court of Justice of the European Union. This fifth case provides the Court with the opportunity to offer useful guidance on the limits of the notions of "decision" and "court" within the meaning of Regulation no. 650/2012, establishing in particular whether a notary to whom national law confers jurisdiction to issue certificates of succession exercises "judicial functions"[23].

In the opinion of the Advocate General the notary who draws up a certificate of succession on the joint application of all the parties to the notarial procedure under the provisions of Polish law does not fall within the definition of "court of law" within the meaning of that regulation and, consequently, the Polish national certificate of succession drawn up by the notary does not constitute a "decision" within the meaning of Article 3 (1) (g) of Regulation (EU) No 650/2012, but it constitutes an "authentic instrument"[24].

The upcoming judgement of the Court of Justice of the European Union will be particularly relevant since it will also have an impact on the national certificates of inheritance issued by notaries in Romania, as they are part of the Latin type notarial system, together with their colleagues in Poland.

## Instead of a Conclusion

This instrument in matters of succession, dealing, in particular, with the questions of conflict of laws, jurisdiction, mutual recognition and enforcement of decisions and a European Certificate of Succession, has a bright future ahead in supporting citizens to organise their succession in advance, and its clarifying interpretation by the Court of Justice of the European Union can only strengthen the freedom, security and justice in the European Union.

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[19] See CJEU, *Request for a preliminary ruling from the Oberlandesgericht Köln (Germany)*, lodged on 13 February 2018 – Klaus Manuel Maria *Brisch* (Case C-102/18), published in Official Journal of the European Union C 142 from 23 April 2018, p. 35.

[20] CJEU, *Judgement of 17 January 2019, Brisch*, C-102/18, ECLI:EU:C:2018:485, not yet published (Court Reports - general), paragraph 28.

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[23] See CJEU, *Request for a preliminary ruling from the Sąd Okręgowy w Gorzowie Wielkopolskim (Poland)*, lodged on 24 November 2017 – WB (Case C-658/17), published in Official Journal of the European Union C 134 from 16 April 2018.

[24] CJEU, *Conclusions de l'avocat général M. Yves Bot*, présentées le 28 février 2019 (édition provisoire), Affaire C-658/17, WB, ECLI:EU:C:2019:166, paragraph 110.

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# CHALLENGES OF MODERN MARRIAGES - NON-PATRIMONIAL RIGHTS AND OBLIGATIONS OF SPOUSES

**Nicoleta Roxana ŞERBĂNOIU***

**Abstract**

*The evolution of contemporary private law is due to the recognition of the importance of human rights, knowing a real progress lately, which has led to the protection of the person's subjective civil rights. It is very important that, in addition to legal coercive values, society should accept the importance of subjective rights and respect them. In terms of family law, the personal obligations of spouses are important. In order to be effective, these rights must be applied carefuly and it is necessary that they come to defend a person both physically and mentally. It is very important that, in addition to legal coercive values, society should accept the importance of civil subjective rights and respect them. Although at European level we can observe an exponential increase of the values protected due to European Convention on Human Rights and its implementation, in Romania the respect of the civil subjective rights remains at the discretion of individuals, force can not cover all the cases that may arise. Civil subjective rights and obligations, in terms of family law, are impotant, especialy the personal obligations of spouses. Personal rights and obligations are inseparable from spouses and can not be alienated. They can not be the subject of the matrimonial agreement or of any other contracts. This provides an essential principle of family law - the equality of spouses in family – that is based on the Universal Declaration of Human Rights, the Convention on the Political Rights of Women, the Convention on the Elimination of All Forms of Discrimination against Women, Civil Code.*

**Keywords:** *non-patrimonial rights and obligations of spouses, cohabitation, fidelity, name.*

## 1. Introduction

Over time, marriage has undergone significant changes due to legal regulation. Marriage, since the beginning of legal regulation, has been the union between man and woman.[1] The purpose of this union was, and continues to be, the founding of a family, the procreation and growth of children.

The family in the old Dacia was based on marriage. There are some documents that tell us that the husband had to pay a price for his wife so that when he wanted to marry, the husband had to pay a certain price to the woman's parents. The woman contributed to marriage by some material goods that constituted her dowry.[2]

In the sense of Roman law, the family was formed around the power given to the leader of the family, which could be absolute, having the power to decide the life of the persons under his power.[3] The situation of the children (*filli or filiae familiae*), but also of the married woman was that of *alieni iuris*, who designate those who can not decide for them, these being under the power of a *pater familiae*. It is fair to say that the Roman family had a patriarchal character.[4]

During Augustus reign, Roman citizens were forced to observe a series of new rules on morality. During the same period of the Roman Empire, the natality rate had a downward trend, and Augustus's main goal was to maintain the birthrate, and thus issued rules to force the citizens of Rome to raise more children.[5]

Lex Julia maritandis ordinibus established the obligation of age difference. The age of legal consent for a marriage was 12 years for girls and 14 for boys.[6]

When we talk about marriage, men and women needed to respect the morality of a relationship and to consider marriage to each other sacred. These legal provisions applied to both men and women who were never married and to those who were divorced and wanted to remarry. The noble women married earlier. This aspect had in mind that an aristocratic woman had to be virgin at the time of her marriage.

As we have seen in previous lines, the basic principle was the morality of marriage and family life. Some of the rights and obligations that husbands had in ancient Rome have been preserved today, such as the principle of monogamy, which has been preserved in our current legislation.

The main purpose of marriage at that time was procreation, though current legislation no longer

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[1] Teodor Bodoaşcă, *Dreptul familiei*, Ediţia a III-a, rev., Bucureşti, Ed. Universul Juridic, 2015, p. 91;

[2] Vl. Hanga, *Istoria dreptului românesc. Dreptul cutumiar*, Ed. „Chemarea", Iaşi, 1993, p. 15; I. C. Drăgan, *Mileniul imperial al Daciei*, Ed. Ştiinţifică şi Enciclopedică, Bucureşti, 1986; I. C. Drăgarn, *Noi tracii*, Ed. Scrisul românesc, Craiova, 1976.

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[6] Vasile Val Popa, *Drept Privat Roman*, Ed. All Beck, Bucureşti, 2004, p. 173. A se vedea și I.C. Cătuneanu, *Curs elementar de drept roman*, Ed. Cartea Românească, București, 1927, p. 150-151.

provides for an obligation in this respect, as Augustus had stated in the ancient Roman Empire, it still remains a right that spouses have today.

*Lex Iulia de adulteriis* provided a series of possible punishment for married women committing adultery. There is now a duty of loyalty, and the sanction for this violation of non-marital obligations of spouses is divorce.

## 2. The non-patrimonial rights and obligations of spouses in the context of the modern family

The rules of family law determine the pecuniary relations between its members and non-patrimonial also. The legislator wishes to establish a material solidarity between the members of the family. In the following, however, we will consider the non-patrimonial rights and obligations of family members and their consequences.

The legislator establishes certain rules regarding personal rights rights and obligations arising from family relationships, such as the regulation of marital relationships.

Values are important for family members, but especially for spouses. The laws must be in line with the collective ideals set by a society and the outcome. The functioning of the legal system is important, so the legislator had to regulate these values as predictable and desirable as possible.[7]

Decreasing sanctions clearly affects the non-marital relationship between spouses and is due to the principles of freedom and equality that have been promoted by both the legislator and the specialized doctrine. Most sanctions in previous legislation have disappeared, and criminal penalties have diminished, except for family abandonment, rape between spouses and domestic violence.

On the other hand, it is not wrong to suppress certain criminal sanctions that no longer apply to modern family law, but there are certain situations where they should be replaced by civil sanctions. We believe it is necessary to provide a legal framework that gives the spouses the opportunity to defend their rights and sanction the spouse who violates non-patrimonial obligations.

We believe it is time to give individuals a flexible right, more adapted to family transformations and modern needs. Thus, even if the legislator has lately made an act of withdrawal, non-interference in family relationships, this is not entirely wrong. With this desire not to interfere in the non-patrimonial relationship of the family and especially of the spouses, the legislator leaves free the possibility of establishing the form of the non-patrimonial legal relationship that they want during the marriage.

The contemporary legislator makes recommendations and avoids editing coecitive rules, leaving it to each family to choose the non-patrimonial relationship they want to have.

This freedom, however, must be achieved without hindering a member of the family without being able to hurt him and forcing him to do something he does not want. It is necessary to provide legal groud that gives the possibility of concluding contracts stipulating the will of the spouses. The clauses of a contract that stipulate the non-marital relationships of the spouses must be clearly stated, they must contain sanctions in case of non-exercise or guilty exercise, but, most importantly, must represent the will of each spouse.

The objective of the legislator, proposing different models of family relationship building, ensures freedom for everyone to choose what suits them best; “For every family, for every right,” wrote the famous French author Jean Carbonnier.[8]

However, it should be emphasized that if the choice of the desired non-marital relationship model is free, compliance with legal obligations must be achieved by compelling individuals to respect the legal consequences of their contractual choice. For example, in the choice of marriage, people show the option of adhering to the legal rules governing spouses' relationships.[9]

This right of option on legal consequences is an indirect process that allows individuals to influence their constraint. When such persons find themselves in breach of legal rules, they should not be subject to inappropriate individualisation of the mandatory rule, but to the one resulting from the legal regime they have chosen.

For example, at the time of divorce, the spouses can agree on the sanction for the violation, and then present this conventional agreement to the court.[10]

Through these agreements, spouses could escape an individualization that they regard as wrong. The possibility of concluding these conventions is important if a certain interest is to be protected. Thus, the protection of the interests of spouses leads to the promotion of family interests, and the protection of social justice can be achieved through clauses that establish appropriate protection and be grounded on public order.[11]

[7] Y. Alpe, *Lexicon de Sociologie*, *Dalloz*, 2010; P. Morchain, Psihologia valorilor sociale, Dunod, 2009, p. 14.

[8] J. Carbonnier, *Eseuri asupra legii*, Defrénois, ediția a 2-a, 1995, p. 181.

[9] F. Dekeuwer-Defossez, "*Divorțul și contractul*", în D. Fenoillet, P. de Vareilles-Sommieres, *Contractualizarea familiei*, Economica, 2001, p. 67.

[10] J. Hauser, P. Delmas Saint-Hilaire, *Voința și ordinea publică: un divorț intrat în domeniul contractual*, Revue Defrénois 2005, nr. 5, p. 357.

[11] J. Hauser, J. J. Lemouland, *Ordinea și morala publică*, Repertoriul Civil Dalloz 2013, spec. Art. 2, secțiunea 2.

### 3. The importance of adopting appropriate legal solutions

From a legal point of view, besides imperative rules, there have always been rules that depend on the will of the person. In general, the contractual clauses are negotiated by the parties, representing their unwarranted will. The contract even concluded between spouses, under the scope of establishing their extra-patrimonial relationship, must have the power of law between the two, both during the marriage and in the event of a divorce. Thus, the simple behavioral act that seems appropriate for the spouses needs to be well-defined by a legal framework, which results in a structured set of rights and obligations bound by a contract.

In family law, there are some examples of legal prevention that relate to the defense of the rights and obligations of spouses. Our current law seems to encourage marriage, as it gives the spouses certain advantages that are not offered to people living in concubinage. Here we mainly refer to those legal provisions that bring an advantage over the non-patrimonial relationship of spouses. An eloquent example of this is the name of the spouse, since only spouses can use a common name or can wear during marriage and the name of the other, according to art. 282 Civil Code. In case of death, spouses can inherit the other's property without any legal formality prior to the date of death. Also, only a surviving spouse can claim a survivor's pension. It should also be noted that only marriage allows the foreign spouse to obtain a residence permit, having an entitlement to the right of her husband.

Besides the advantages mentioned, the law also provides coercive techniques such as punishment. Legal sanctions are the legislator's orientation to straightening individual behavior by punishment when preventive activity reaches certain limits and becomes ineffective. In such situations, spouses must comply with a certain pattern of behavior, and a penalty is also required to ensure compliance with this obligation.[12]

We have an eloquent example of this, namely, the moral damage that may be suffered by the wife during marriage due to the husband's abusive behavior.[13] After a marriage that lasted for thirty years, the wife decides to seek divorce. Together with the divorce, the wife also seeks to cover the moral prejudice suffered by her husband's abusive behavior.[14] We consider this claim to be well founded and to be moral, in so far as it can be proved. Although moral damage is evident, in most cases the Romanian courts have agreed to reject such requests.

In a recent ruling[15] by the European Court of Human Rights, the widow of an employee exposed to asbestos at work has asked the employer for damages for the moral damage caused by her husband's death. In parallel to this action, the children of the deceased continued the civil liability action commenced by their father before his death. None of these actions had a positive result, as the national courts claimed that the action was prescribed due to a period of ten years after the last exposure to pathogens. The widow and children have appealed to the European Court of Human Rights, alleging violation of the rights guaranteed by Article 6 § 1 of the Convention. In its judgment, the Court emphasized that the right of access to a court is not an absolute right and that the States have a margin of discretion in setting the time limits for action, and that these delays must be compatible with the requirements of Art. 6§1 and must not affect the very substance of this right, but it is not the case when those periods of time could deprive a person because the damage occurs after the expiry of these time limits.

From the point of view of non-patrimonial rights and obligations of spouses, we are confronted lately with certain problems in respecting the religion of the other husband. US states allow insertion of certain clauses in this sense if there are some reasons for that husband to have a certain religion. In recent years, some couples have included social life clauses relating to the use of social media networks, stipulating provisions for use in their prenuptial agreements that may be used in the context of marriage.[16]

We recall, in this respect, the recitals of the criminal decision no. 564/2017 of the Iaşi Court of Appeal,[17] which condemned a man for accessing multiple emails and internet banking accounts without the prior consent of his wife. He has taken several actions in the criminal resolution by opening and reading conversations and monitoring his wife's bank accounts. The husband claimed in his defense that he had the initial permission of his wife, so that since she had her consent, she was presumed until her express withdrawal or change of account password, which the court did not agree with. The Court of Appeal of Iaşi recalled by the recitals no. 564/2017, that the acts committed constitute the constitutive elements of the offenses of illegal access to a computer system, provided in art. 360 par. (1) and (2), violation of the correspondence secret, provided in art. 302 par. (1) and unauthorized transfer of computer data, provided in art. 364 of the Criminal Code.

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[12] C. Chainais, D. Fenoillet, *"Legea contemporană a sancțiunilor, între tehnică și politică: prezentarea și concluziile cercetării colective"*, în C. Chainais, D. Fenoillet, *Sancțiunile în dreptul contemporan*, vol. 1, Dalloz, 2012, p. XXII.

[13] E. Mulon, *Daunele interese în materia divorțului*, Gazette Palais, 2014, nr. 21, p. 6 și urm.

[14] Curtea de Casație Franța, secția I civilă, 1 iulie 2009, nr. 08-17825, Dreptul familiei, 2009.

[15] CEDO, 11 martie 2014, Howald Moor și alții contra Elveției, nr. 52067/10 și 41072/11, 2014.

[16] Laura Effron, Te iubesc, esti perfect, dar ai grijă cum folosești Facebook-ul: Acordurile prenupțiale privind rețelele de socializare, articol pentru ABC News, 3 iunie 2014.

[17] Decizia penală nr. 564/2017 a Curții de Apel Iași.

In the same sense, we have the criminal sentence no. 183 / 26.11.2018 by the Alba Tribunal[18], the defendant was convicted of illegally accessing a Facebook account of "jealousy." This was confirmed by the Criminal Decision no. 92 of 5 February 2019, the Alba Iulia Court of Appeal dismissed the defendant's appeal and the court held that the defendant had committed a violation of privacy, and his motivation regarding jealousy did not attenuate but, on the contrary, amplified the deed. The court shows that the defendant has attempted to intimate a person, which is a serious deed, because he treated the other person as his own, his property, considering himself entitled to use his privacy, to know who she is talking to and what she is talking about.

We consider these examples to be eloquent in highlighting the need to restore values in terms of the life of the modern family, but especially with respect to the non-marital relationship of spouses.[19]

A person injured in a right of his own may request the court to defend his rights through a defensive action.[20] Depending on the situation or the moment of the action, it can be materialized in a request:

- prevention, when there is a real possibility of a violation.
- cessation, when the breach of non-patrimonial rights and obligations has occurred and persists at the date of the action.
- to find out when the touch has ceased.

If the there are facts imputable to the offender, the injured party may request compensation for the damage caused. Remedies may only be made by the holder of the non-patrimonial right or obligation infringed.[21]

The claim for reparation of the damage by the actions regarding the protection of the extra patrimonial rights and obligations of the spouses can be formulated according to the provisions of art. 253 par. 4 of the Civil Code, and actions for reparation of the damage may be in reparation of the patrimonial damage suffered or in the repair of the moral damage.

The action for reparation of the patrimonial damage involves covering the damage caused by a diminution of the patrimony of the rightholder, which must be proved. As regards the extra-patrimonial rights and obligations of spouses, this action may be brought in order to recover the damage caused by one of the spouses when it disregards a non-patrimonial right of its spouse. An example of this is the sale of the family home by one of the spouses, with the disregard of the right of the other spouse or of their children.

In order to determine the reparation of the moral damage caused, it is important to determine its nature and extent. The severity of the damage suffered, which may materialize in a suffering, due to a physical or mental injury, must be assessed. The injured person must prove the facts and the circumstances in which they happened.

## 4. Conclusions

We conclude that prevention and sanctions are coercive techniques that the legislator is relying on to impose certain behaviors and to limit actions that could cause harm.

We can, however, consider that the legislator no longer wants an absolute involvement in the rights and obligations of the spouses, so we notice a tendency to withdraw the constraint. This wish of the legislator not to interfere in the extra-patrimonial relationships of spouses results in the impossibility of applying any legal sanction in the case of a spouse's violation of the rights and obligations of the other spouse.

Under the influence of the new values of equality and freedom, indirect techniques of behavioral orientation are in decline. In couple relationships, for example, rules that seek to benefit married couples and disadvantage unmarried couples have gradually disappeared.

However, we must bear in mind that while the work of prevention tends to be reduced to the non-patrimonial right of the family due to the influence of freedom and equality, we must not conclude that it disappears. This also applies to the sanctions applicable to spouses.

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# LEGAL ASPECTS REGARDING THE EXPRESSION OF BINDING CONSUMER CONSENT

**Gabriel VASII***

**Abstract**

*The purpose of this study is to analyse the effect of the party's intent to enter into a legal relationship, in such cases where the powers of one party are significantly higher than the ones of the other contracting party. The articles aims to acquire a practical approach on the effects of lack of intent expressed by consumers which are on unequal grounds with their contracting party, from the lenses of EU principles of effectiveness, proportionality and dissuasiveness in the area of consumer protection. Given that within commercial legal relationships, the intent to produce legal effects is presumed, the question is whether the same can be affirmed in respect to consumer agreements, which are likely to be concluded for services deemed as essential by the consumer, such as electricity, utilities, telecommunications or even banking services. The proportions of the discussion regarding a party's intent have increased considering that any aspect of modern society, from the access to Google or Facebook to the access to basic survival services, requires the consumer's consent to enter into a legal relationship.*

**Keywords:** *Contractual will, legally-binding agreement, intent to create legal effects, presumption to be legally binding, consumer agreements, aggressive consumer practices.*

## 1. Introduction

Under Romanian law, the contractual theory has received a wide analysis by scholars throughout time, since its utility is establishing fundamental concepts which can be further used in practical applications. Pursuant to a well-renowned scholar[1], the theory of contracts is governed by three fundamental principles, namely contractual freedom, consensualism and mandatory force.

The contract in itself is viewed as an instrument used for individual and collective interests, in support of goods' circulation and social values. It represents an essential legal mechanism for economic activity and is one of the main instituitions of civil law, which is identified in legal systems throughout the world.

Its importance lies not only on its functionality but also on the manner in which contractual relationship stem from a valid, duly performed contract.

In clasical legal literature, the concept of contractual will and the autonomy of contractual will was of high significance but recent views show that contractual will must be correlated with the respect owed by contracting parties to the law[2]. In addition, contractual will must be analyzed both from the point of view of the real, internal will and the will expressed externally. Of course, the autonomy of a party's will must be in strict correlation with the contractual freedom said party benefits from, within the limits of the law. In certain cases, however, the court may intervene into the parties' contractual relationship, by modifying the parties' consent with respect to certain clauses. For example, legal doctrine[3] reveals that in case of imprevision (art. 1271 of Romanian Civil Code) or in case of a penal clause (art. 1541 of Romanian Civil Code) the court is allowed to intervene in order to adjust the contractual conditions in order to adapt the contract to current conditions and respectively, to reduce the value of the penalty established by the parties.

Since legal acts may be classified into consensual, solemn or formal and real acts, a party's consent plays a valuable role in the accurate performance of a duly binding contract. The element exteriorizing the party's will is the contractual consent, which can be formed prior to the execution of the agreement itself, in the negotiation phase or at the exact moment of the execution of the agreement, in which case, the consent along with the fulfilment of the validity conditions result in the conclusion of the contract[4]. In contract law, consent is generally regarded as pivotal for contractual validity.

Pursuant to art. 1179 Romanian Civil Code, the conditions for the validity of a legal act are the party's capacity to enter into a contractual relationship, the party's consent, the determined and licit object and a licit and moral cause. For solemn agreements, the ad validitatem form is added.

In order to produce legal effects, consent must be free, serious and expressed with the direct intent to produce binding legal effects (animo contrahendi negotii).

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As opposed to classical civil agreements which are characterized by formalism, commercial agreements concluded under Romanian law are generally performed without formalities. Therefore, commercial agreements may be concluded through letters, telefax, fax, verbally or telephonically or through more modern electronic means (electronic contracts or smart contracts performed via blockchain technology)[5].

Although generally, consent is viewed as a mandatory condition for the conclusion of a duly valid contract, this particular element is somewhat disrupted in consumer agreements, where the consumer may unwillingly enter contracts where the contractual balance is tilted in favour of the legal professional, whose contractual position is more characterized.

## 2. Consumer consent

### 2.1. General aspects regarding consumer consent in European Union jurisdiction

Each time an individual buys a product or service from a professional trader, they're entering into a contract, irrespective of the fact that they're buys their weekly grocery, they're ordering a gift online or they are signing up for a gym membership. In order for that contract to be concluded, the consumer must express a valid consent, for which it requires a full and adequate understanding of the commercial terms and conditions set out by the professional trader/service provider.

In the current modern world, most contracts are concluded online, in electronic form or most recently, as smart contracts using blockchain technology. Even if online concluded contracts contain standard terms, it is mandatory for the consumer to be well informed of those terms in order to express a valid consent. Also, in case the consumer was implicitly forced into accepting certain terms and conditions, where the consumer's consent was not fully provided, EU policies provide that effective remedies must be available.

In continental law, consent is viewed as a substantial condition for the materialization of a contractual relationship. The expression of consent represent an element of the contractual mechanism which is in its whole characterized by good-faith. For example, the principle of good faith (section 242, German Civil Code[6] (BGB)) is a fundamental principle of law in Germany, which applies when contract negotiations commence. Also, under German law, the parties' consent has a high value, considering that the lack of agreement is not an obstacle to the creation of the contract if the parties start implementing the contract by mutual consent and by doing so show that they do not regard the lack of conformity to be material[7].

While in continental law, consent is treated under more strict terms, under common-law, thing are a bit different.

For example, even if English contract law is based on the principle of freedom to contract without limitations, the Unfair Contract Terms Act 1977 (UCTA) applies in a number of circumstances including when a party is contracting on its 'written standard terms'. In such circumstances, the UCTA restricts a party's ability to exclude or limit its liability for breach of its obligations in such a contract. Also, in the United Kingdom, there is no implied obligation to use good faith when performing a contract[8].Good faith in negotiating commercial contracts is not presumed in Irish law, either. This aspect results from constant case law, such as the Irish Court of Appeal case of Flynn and Anor v Breccia and Anor (2017), which overturned an Irish High Court ruling that there was a general principle of good faith in Irish commercial contract law[9].

### 2.2. Recent developments and tendencies regarding consumer protection in the European Union

A press release of the Council of the EU dated March 2019 reveals that the European Union is improving the protection of consumers' rights. Member states' ambassadors meeting in the Council's Permanent Representatives Committee agreed on the Council's position on a draft directive which amends four existing EU directives protecting consumers' interests. The envisaged directive aims to amend the unfair commercial practices directive 2005/29/EC, the consumer rights directive 2011/83/EU, the unfair contract terms directive 93/13/EEC and the price indication directive 98/6/EC. It was proposed together with a proposal on representative actions for the protection of the collective interests of consumers as part of the 'New Deal for Consumers' launched by the Commission in 2017.

Most relevant provisions regarding the protection of consumers in the European Union are aimed to address the following issues:

- more transparency for consumers in online marketplaces. The directive requires online marketplaces to clearly inform consumers about:

a) the main parameters determining ranking of the different offers,
b) whether the contract is concluded with a trader or an individual,
c) whether consumer protection legislation applies and
d) which trader (third party supplier or online

[5] V. Nemes, *Commercial Law*, 3rd Edition, Hamangiu Publishing House, 2018, p. 281.
[6] Section 242, German Civil Code.
[7] https://www.lexology.com/gtdt/tool/workareas/report/commercial-contracts/chapter/germany.
[8] https://www.lexology.com/library/detail.aspx?g=001f2473-c9b4-45ab-9344-8d36d69aac42.
[9] https://www.lexology.com/gtdt/tool/workareas/report/commercial-contracts/chapter/ireland.

marketplace) is responsible for ensuring consumer rights related to the contract (such as the right of withdrawal or legal guarantee).

In addition, digital applications such as online marketplaces, comparison tools, app stores and search engines have the obligation under the envisaged directive to indicate to their users which search results contain 'paid placements', i.e. where third parties pay for higher ranking, or 'paid inclusion', i.e. where third parties pay to be included in the list of search results;

- the protection of consumers in respect of 'free' digital services, namely digital services for which consumers do not pay money but provide personal data, such as: cloud storage, social media and email accounts.

All the envisaged remedies of the draft directive are aimed to assure transparency of contractual clauses, so that consumers may express a valid and committed consent, irrespective of the form of the agreement they are entering into - a direct one or an electronic one.

## 3. Consumer Rights Directive (2011/83/EU)

The Directive[10] aims at achieving a real consumer internal market, striking the right balance between a high level of consumer protection and the competitiveness of enterprises. The Directive will apply to contracts concluded after 13 June 2014.

With respect to the conclusion of off-premises contracts, the Consumer Rights Directive provides that the trader shall give certain information to the consumer on paper or, if the consumer agrees, on another durable medium. That information shall be legible and in plain, intelligible language. Such information includes but is not limited to, as per art. 6 (1) of the Directive, the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services, the identity of the trader, such as his trading name, the total price of the goods or services inclusive of taxes, he arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the services and, where applicable, the trader's complaint handling policy and the a reminder of the existence of a legal guarantee of conformity for goods. This type of information is required so that the consumer is well aware of the legal binding relationship it is entering into and that the consent the consumer expresses is in strict connection to what the professional is offering.

Also, the Consumer Rights Directive stipulates that the trader shall provide the consumer with a copy of the signed contract or the confirmation of the contract on paper or, if the consumer agrees, on another durable medium, including, where applicable, the confirmation of the consumer's prior express consent and acknowledgement. Where a distance contract is to be concluded by telephone, Member States may provide that the trader has to confirm the offer to the consumer who is bound only once he has signed the offer or has sent his written consent. Member States may also provide that such confirmations have to be made on a durable medium.

In addition to the consumer's express consent with respect to the main elements of the contract, the Consumer Rights Directive provides that before the consumer is bound by the contract or offer, the trader shall seek the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation, thus enabling the consumer to be fully aware of all and any supplementary costs which may arise and affect its will to undertake contractual obligations. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.

Consumer Rights Directive also tackles the situations when the consumer receives certain goods or is provided services which it did not request. In such case, the consumer shall be exempted from the obligation to provide any consideration in cases of unsolicited supply of goods, water, gas, electricity, district heating or digital content or unsolicited provision of services, prohibited by Article 5(5) and point 29 of Annex I to Directive 2005/29/EC[11]. In such cases, the absence of a response from the consumer following such an unsolicited supply or provision shall not constitute consent.

The Consumer Rights Directive is completed by Unfair Commercial Practices Directive (2005/29/EC) and Alternative Dispute Resolution Directive (2013/11/EU), so that a complex legal framework is created to be comprehensive and address all the necessities of European consumers.

## 4. The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of European Union Consumer Law

Even though consent is thought to be the pillar of contracts' formation, the conditions for a validly expressed consent differ from one legal system to another. Such differencies may also result in cases

[10] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (Consumer Rights Directive).

[11] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

when the consumer's consent was not validly expressed and measures must be enforced for supporting said consumer and protecting its position within the contract. This circumstance may be the direct consequence of the application of the principles of effectiveness, proportionality and dissuasiveness in the enforcement of EU consumer law.

The principles of effectiveness, proportionality and dissuasiveness derive directly from EU secondary law provisions[12]. Effectiveness refers to the relationship between a particular goal set by the policy maker and the legal remedies available to reach the goal set by the legislator. (e.g. consumer protection or fair market competition)[13]. With respect to consumer law, Directive 2009/136/EC amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection law provide that Member States shall lay down the rules on penalties, which must be effective, proportionate and dissuasive.

The joint application of these principles leads to the conclusion that the national judge plays (and shall play) an important function in settling the procedural conditions for an "informed" remedial choice on the part of the consumer.

## Conclusions

Even in view of recent changes brought by the immersing IT revolutionary tools into law, the contract's importance has remained unchanged What previous and continous developments in connection to the conclusion of an agreement may produce are solely a consequence of the world's constantly evolving nature, manifested in legal grounds. Irrespective of such developments, the parties' consent within a contract becomes even more relevant when analyzing electronic or smart contracts, since the possibility to verify such consent, and consequenly, the possibility to verify whether the contract itself was duly concluded depends not only on legal knowledge but also on the close collaboration between legal specialists and IT experts.

Here is where the European legislator comes to amend the gaps in legislation in order to ensure a higher consumer protection policity, this being the trend of the current legislation adoption process.

Even if functionality and rapidness might be ensured by using more modern contractual methods, such as the electronic form of a contract or a smart contract, these methods bring inherent probation issued which should be carefully adressed by the legislator so that any disruptions in the contractual mechanisms may be prevented ab initio.

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[13] https://www.eui.eu/Projects/CentreForJudicialCooperation/Documents/D1.1.c-Module-3.pdf

# THE PRINCIPLE OF "POLLUTER PAYS" IN INSOLVENCY PROCEEDINGS GOVERNED BY LAW 85/2014

**Candit Valentin VERNEA***

**Abstract**

*By means of this article the author, will analyse the incidence of the fundamental principle of environmental law "polluter pays" in the current national legislation and will identify its applicability, especially in what concerns insolvency proceedings.*

*The article is structured in three parts. The first part aims to define and identify the particularities of this principle in both contemporary Romanian law and International law.*

*The second part points out how the company's liability for environmental damage can be attracted in each of the phases of the insolvency proceedings.*

*The third part correlates the provisions of Law No. 85/2014 with the provisions of Government Emergency Ordinance No. 68/2007 on environmental liability by formulating a de lege ferenda proposal designed to increase the efficiency of environmental damage coverage in insolvency proceedings.*

**Keywords:** *Insolvency proceedings, environmental damage, polluter pays, environmental liability*

## 1. Principles of environmental law applicable to companies;

The principles of environmental law applicable to companies, but especially to companies under the Insolvency Act, have particularities in their application. The need for environmental protection in our country has been stated since 1973, when Law No. 9 was passed, which stated that the environmental protection activity constitutes a matter of national interest. The Constitution passed in 1991 provides under art. 135 paragraph 2 D "the obligation that the State has in exploiting the country's natural resources, in accordance with national interests". From article 135 paragraph 3 D of the Romanian Constitution one can conclude that "no human activity can be carried out without complying with environmental protection rules, and therefore, this represents a general obligation for all public, central and local authorities, such as natural persons and legal entities"[1].

As regards the owner of an activity with an impact on the environment, we show that this person can be both a natural person and a legal entity, whichever being legally liable. The owner of a project authorising an activity shall be either the applicant, natural person or legal entity, or the public authority initiating a project.

The category of legal entities incudes those established based on Law 31/1990 on commercial companies, whether these are limited liability companies or share companies. Thus, companies may be subject to environmental law as legal entities established based on legal norms. Article 1 of law 31/1990 states that "for the purpose of carrying out lucrative activities, natural persons and legal entities may be associated and establish companies with legal personality, in compliance with the provisions of this Law".[2] The company may be established for carrying out a lucrative activity, but it can also be established without the main objective being that of the activity undertaken to gain profit. The activity which companies carry out in order to gain profit or not must be one stemming from lawful actions, as such, any activity thereof must comply with the legislation of the environmental law as well.

If the commercial company established for a lucrative purpose not only does not gain profit, but also incurs consecutive losses, which cannot be covered by external sources, it may enter in default, which is followed by insolvency. In other words, a company in default is one small step away from to the opening of insolvency proceedings, which can be followed by a successful reorganization or bankruptcy of the debtor.

The insolvency, as it has been defined, shows that it represents that state of the debtor's estate, which is characterized by the insufficiency of money funds for the payment of definite, liquid and payable debts[3]. The text of art. 5 item 29 a) and b) of Law 85/2014 distinguishes between imminent insolvency and presumed insolvency. Regardless of the state of insolvency of the debtor, be it imminent or presumed, we can speak of a commercial company in insolvency only if, following the analysis made by the syndic

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[1] D. Marinescu, M.C. Petre – *Environmental Law Treaty*, ed. V, University Publishing House, Bucharest, 2014, pg. 63

[2] Law 31/1990, company law, republished in Official Journal. No. 1066 of November 17th, 2004;

[3] In the doctrine it was shown that this definition was given by the Romanian lawmaker, in view of the potential economic and legal reality of the estate of its debtor, in other terms, the current insolvency – M.N. Costin, C.M. Costin, the conditions laid down by the law for the opening of the commercial insolvency proceedings at the request of the entitled Creditor, in Commercial law magazine No. 9/2006, pg. 9.

judge, invested with such an application, it is established that all legal requirements are fulfilled and a sentence or closure to open the procedure are issued.

Companies, being legal entities, since their establishment must comply with all legal provisions relating to environmental law, if these are applicable to the specificity of their business. Companies are entities born as a result of the will of one or more persons, either natural persons or legal entities, or a combination thereof. It is assumed that the activity that a company carries out is one of a much larger scale and with a higher complexity as compared to any activity that a natural person can carry out on an individual basis. The risk that the ecological balance is affected is even greater, as the extent of the carried out activities is greater, as such, in the case of commercial companies, the risk is high. Depending on the activity that each company will carry out, it may be necessary to have a certain authorisation, which may also be an environmental one, before its start.

The National Agency for Environmental Protection is an entity of the central public administration, whose tasks are represented by strategic planning and monitoring of environmental factors, but also the authorisation of all activities that have an impact on the environment. In Romanian legislation on the environment, there is a number of regulatory enactments (agreements, endorsements, authorisations) that economic operators will have to obtain, under specific criteria and rules. Such agreements/authorisations or endorsements are not intended to give the right for pollution or to affect the environment, but are intended to prevent or at least minimise such negative effects.

The authorisation of environmental impact activities is one of the current techniques currently used by all the States of the European Union, in order to prevent and limit environmental harm. The obligation to obtain special authorisations for the carrying out of certain activities verifies the fulfilment of minimum operating and control conditions that the future economic operator will have to carry out, in order to comply with all environmental requirements. Whether or not a company is in insolvency, it is obliged to comply with all environmental obligations regulated by the enactments in force.

The principles of environmental law have both the guiding role of the legislator, when drafting new regulations, and the role of guiding the activity of any economic operator subject to the rules laid down by that law branch. These regulations will have to be complied with by any of the current or future economic operators performing or wishing to perform activities that may affect the environment. The principles of environmental law are laid down by art. 3 of G.E.O. no. 195/2005 on environmental protection[4], these being the general principles.

The subject of environmental law may be a natural person or a legal entity, but not all the principles of law stated under art. 3 of G.E.O. 195/2005 on environmental protection shall apply to these categories of operators. As regards the application of the principles of environmental law, a particularity in their application is the application of the provisions of art. 3 h) of G.E.O. 195/2005 on environmental protection. The principle laid down by art. 3 h)[5] has two parts, one of "public information and participation of the public in the decision-making process" and another related to "access to justice in environmental matters". If all the principles of law set out by G.E.O. 195/2005 on environmental protection apply to both natural persons and legal entities, the subject of law of the first component of item h) of art. 3 may only be a natural person, commercial companies of any kind being unable to participate in the decision making process.

This principle with two different components has as subjects different persons. Subjects of law for information and participation in the decision-making process related to environmental issues can only be natural persons, and access to justice can have all subjects of law, be they natural persons or legal entities.

The principles of law stated under art. 3 of G.E.O. 195/2005 on environmental protection were designed to prevent pollution and then repair or call on the liability of persons causing environmental damage. In a sense, it is normal for the prevention to be often a much better and more accessible solution than repair, which in the environmental law, can often be very difficult to achieve or is unattainable.

One of the principles of environmental law that represents the foundation of this branch is the "polluter pays" principle.

## 2. Development of the "polluter pays" principle;

In the European Union, "polluter pays" as a principle of environmental law, was introduced in the

[4] G.E.O. no. 195/2005 on Environmental Protection, published in Official Journal no. 1196 of December 30th, 2005, under art. 3 states "The principles and strategic elements underlying the present emergency ordinance are:
a) The principle of integrating environmental policy into other sectoral policies;
b) The precautionary principle in the decision-making process;
c) The principle of preventive action;
d) the principle of withholding pollutants at source;
e) the "polluter pays" principle;
f) the principle of preserving biodiversity and ecosystems specific to the natural biogeographic framework;
g) sustainable use of natural resources;
h) public information and participation in the decision-making process, as well as access to justice in environmental matters;
i) development of international cooperation for the protection of the environment."

[5] G.E.O. no. 195/2005 on Environmental Protection, published in Official Journal no. 1196 of December 30th, 2005

Treaty on the functioning of the European Union, but also by means of Directive 2004/35/EC[6] of the European Parliament and of the Council of 21.04.2004 on environmental liability in relation to the prevention and remediation of damages. Member States were allowed to transpose the directive into national legislations by April 30th, 2007. All Member States have transposed the directive into national law. In Romania, Directive 2004/35/EC was fully transposed by means of Government Emergency Ordinance No. 68/2007[7] on environmental liability with reference to the prevention and repair of environmental damage, which has been approved by means of Law 19/2008[8].

The "polluter pays" principle is enshrined in the national legislation under art. 3 e) of G.E.O. 195/2005[9] on environmental protection, being a principle underlying both this enactment and other enactments in the field of environmental protection. The principle finds its applicability in art. 94 of G.E.O. 195/2005[10] on environmental protection, which provides for the obligation of both natural persons and legal entities to protect the environment, being obliged to bear the cost of repairing the damage and restoring the conditions prior to their occurrence.

In special laws, the principle shows the need to develop an appropriate legislative and economic framework, so that the costs of reducing pollution are borne by their producer. In G.D. 731/2004 on the approval of the National Strategy for the protection of the atmosphere, it is shown that "the polluter pays principle establishes the need to create an appropriate legislative and economic framework, so that costs for reducing emissions are borne by their generator. The responsible for deterioration of the quality of the atmosphere must pay in accordance with the seriousness of the effects produced[11]".

## 3. Environmental liability under the ' polluter pays ' principle;

This principle of environmental law shows that the polluter is obliged to bear the costs of achieving both pollution prevention measures and possible damage caused by pollution. A policy of economic operators to reduce pollution prevention costs, including by not adapting to the latest available technologies, sooner or later will lead to higher costs, in order to combat the negative effects pollution can have on human health or the environment, in its entirety. In order to avoid such situations and to "correct" the costs that the economic operator will have, there is the "polluter pays" principle, which, in the environmental law, also has the role of imputing the cost of environmental attainment to the polluter. In the doctrine,[12] it is shown that "all expenditure in relation to the protection of the natural environment is, by default, an expense leading to the creation of profit. It will always be the economy that will bear the consequences in the short term, and additional expenditure will be based on export prices." In our view, the main purpose of applying this environmental principle is to educate economic operators so that starting from the "polluter pays" we can reach the idea of the polluter does not pollute.

The economic justification for the "polluter pays" principle is that the failure to carry out expenditure, prevention and environmental protection in time will entail high costs of the economic operator, consisting

[6] Directive 2004/35/EC published on https://eur-lex.europa.eu/legal-content/RO/ALL/?uri=CELEX:32004L0035 and studied on 26.02.2019
[7] G.E.O. no. 68/2007 on environmental liability published in Official Journal no. 466 of June 29th, 2007
[8] Law 19/2008 for the approval of G.E.O. no. 68/2007 on environmental liability published in Official Journal no. 170 of March 05th, 2008
[9] G.E.O. no. 195/2005 on environmental protection published in Official Journal no. 1196 of December 30th, 2005
[10] G.E.O. No. 195/2005 on environmental protection published in Official Journal no. 1196 of December 30th, 2005 art. 94 shows that (1) the protection of the environment constitutes an obligation of all natural persons and legal entities, for which purpose: (a) it request and obtains the regulatory acts, in accordance with the provisions of this emergency ordinance and the subsequent legislation; b) complies with the conditions of the regulatory acts obtained; (c) does not put into service installations whose emissions exceed the limit values laid down by the regulatory acts; (d) legal entities carrying out activities with a significant impact on the environment shall organise specialised environmental protection structures; e) assists persons empowered with verification, inspection and control activities, providing them with the evidence of their own measurements and all other relevant documents and facilitates the control of activities whose owners they are, as well as sampling; f) provides access for persons empowered for verification, inspection and control of technological installations generating environmental impact, equipment and installations for environmental remediation, as well as in spaces or areas related to the aforementioned g) carries out, in whole and in due term, the measures imposed by the acts of identification concluded by persons empowered with verification, inspection and control activities; h) shall be subject to the written provision of termination of the activity; i) bears the cost of repairing the damage and removing the consequences produced by it, restoring the conditions prior to the damage, according to the "polluter pays" principle; j) provides its own systems for the supervision of technological installations and processes and for self-monitoring of pollutant emissions; k) ensures the recording of results and reports to the competent authority for environmental protection the results of self-monitoring of pollutant emissions, as provided for by the regulatory acts; l) informs the competent authorities, in the event of accidental eliminations of pollutants in the environment or major accidents; m) stores waste of any kind only on premises authorised for this purpose; n) does not burn the stubble, reed, bushes or grass vegetation, without the consent of the competent authority for the protection of the environment or without prior notification of the Community public services for emergencies; o) applies the conservation measures established by the Central Public Authority for environmental protection on terrestrial and aquatic areas, subject to a conservation regime, as natural habitats, which they manage, as well as for their ecological restoration; p) does not use dangerous bait in fishing and hunting activities, except in specially authorised cases; q) ensures optimum conditions of life, in accordance with the legal provisions, for wild animals kept in legal captivity, under different forms; r) ensures that the sanitation measures related to land held under any title, not occupied productively or functionally, in particular those situated along the road, railway and navigation pathways, are taken; s) to identify oneself at the express request of the inspection and control staff, provided for in this Emergency Ordinance.
[11] G.D. no. 731/2004 for the approval of the National Strategy on the protection of the atmosphere published in Official Journal no. 496/2004
[12] D. Marinescu, M.C. Petre – *Environmental Law Treaty*, ed. V, University publishing house, Bucharest, 2014, pg. 75

in combating the negative effects occurred. All costs of combating negative effects on the environment will have to be covered by the polluter, and the only option is to reflect these costs in the price of the services offered. If the price of the services offered increases with these additional costs, there is a possibility that the economic operator will suffer a significant decrease in activity, as a result of the high price that can even lead to the blocking of the entire activity and, not lastly, to the entry into insolvency, followed by its deregistration.

In the literature,[13] it is shown that "broadly, the principle seeks to cast to the polluter the load of the social cost of the pollution it causes. This implies the training of a mechanism of responsibility for ecological damage, covering all the effects of pollution, both those produced in relation to goods and persons, and those produced on the environment, as such." The same authors show that "in a narrower sense, it requires the polluters to bear only the cost of anti-polluting measures and cleaning." The polluter pays principle is nothing but an attempt to raise awareness of economic operators that if there are environmental pollutions caused by them, they will have to bear the consequences arising therefrom. On the other hand, the principle seeks to educate the economic operator, with a view to its use of the latest generation of available technologies, which have the lowest degree of pollution. The principle takes into account the liability of polluters, based on the idea of risk and guarantee for the actions perpetrated.

The application of the polluter pays principle may not be solitary, because this would lead to the situation where any economic operator would pay an amount of money as a pollution tax, which could be perceived as a payment to be able to pollute. This principle must be read in conjunction with the principle of prevention and the prohibition of pollution, in order not to lead to inadmissible consequences such as "I pay, therefore I can pollute[14]". We believe that the principle has been adopted so that the party responsible for the production of the pollution can be held accountable and pay environmental damage.

This principle of environmental law is the basis of Directive 2004/35/EC on civil liability in relation to the prevention and remediation of environmental damage. This Directive 2004/35/EC provides that the fundamental principle must be that an economic operator, whose activity has caused an environmental damage, must be financially liable. The aforementioned directive puts particular emphasis on preventive and environmental remedies, because most of the time the ecological destruction can have irreversible effects. This directive was transposed into national law by Emergency Ordinance No. 68/2007[15] on environmental liability in relation to the prevention and repair of environmental damage.

Emergency Ordinance No. 68/2007[16] on environmental liability shows, under article 1 that "it establishes the regulatory framework for environmental liability, based on the polluter pays principle, for the prevention and remediation of environmental damage". This regulation provides a guarantee in addition to the observance, prevention and repair of damage that professional activities may have on the environment. The environmental liability provided for by G.E.O. no. 68/2007 shall apply to all natural persons or legal entities (called operators) who bring harm to the environment, irrespective of the type of professional activity they carry out.

Environmental liability is not a classic tort liability, in the sense that the one who will pollute will be obliged to cover the damage caused, but the operator will also be obliged to take all measures to ensure that the work carried out by it does not pollute or if pollutes, it falls within the limits of the law, and the technology used is one that complies with the environmental law. On the other hand, the operator will have to take all measures required so that, if a disaster occurs, it may be able to remedy it. According to the provisions of the environmental law[17], the one carrying out a risk-incurring activity has no financial guarantee obligation before the action is started, the only activities subject to this regime being those of mining and waste storage.

## 4. Application of the ' polluter pays ' principle to companies in insolvency;

As regards commercial companies in insolvency, the provisions of G.E.O. no. 195/2005 on environmental protection anticipate their eventual disappearance and show that environmental obligations must be met with priority in dissolution and liquidation procedures or upon termination of the activity[18]. By means of this provision, the legislature attempted to deter the transfer of activities from one subject of law to another, without the fulfilment of environmental obligations. However, the provisions of G.E.O. no. 195/2005 on environmental protection, as well as those of G.E.O. no. 68/2007 on environmental liability are not correlated with the insolvency law, as such, the basic "polluter pays" principle cannot be applied with much success in such procedures. The "polluter pays"

[13] M. Duţu, A. Duţu – *Environmental law, edition 4*, C. H publishing house, Beck, Bucharest, 2014, pg. 117

[14] D. Anghel - Legal liability regarding environmental protection, Legal Universe publishing house, Bucharest 2010, p. 63

[15] G.E.O. no. 68/2007 on environmental liability published in Official Journal no. 466 of June 29th, 2007

[16] Idem

[17] G.E.O. no. 68/2007 on environmental liability published in Official Journal no. 466 of June 29th, 2007 and G.E.O. no. 195/2005 on environmental protection published in Official Journal no. 1196 of December 30th, 2005

[18] G.E.O. no. 195/2005 on environmental protection published in Official Journal no. 1196 of December 30th, 2005, under art. 10 paragraph 4, states that "the fulfilment of environmental obligations is of priority, in the case of procedures for: dissolution, followed by liquidation, bankruptcy, termination of activity"

principle in cases of insolvency does not have the levers necessary to be able to give maximum efficiency to the provisions of G.E.O. 68/2007 on environmental liability, although the legislator has been thinking of further laws aiming at the companies in insolvency, but this has never happened. According to art. 33 of G.E.O. 68/2007[19] on environmental liability, the obligations incumbent on companies in insolvency should have been established by a government decision, within 12 months from the entry into force of said order, a decision that has not been issued until now. The application of the "polluter pays" principle in light of the provisions of G.E.O. 68/2007 on environmental liability shall be made through the environmental agency, which is assisted by the Environmental Guard and who also has the role of notice entity. The economic operator that has caused damage to the environment has several obligations set out in G.E.O. 68/2007 on environmental liability: to notify the competent authorities, in this case the Environmental Guard, of any environmental hazard; The operator must take all preventive measures necessary to combat environmental damage; The operator is required to take all necessary measures to remedy the environmental damage. Failure to fulfil these obligations may entail contravention sanctions, but also the employment of criminal liability. The environmental agency may carry out preventive measures and repairs at its own expense, under art. 11 d of G.E.O. 68/2007[20] on environmental liability, and the amount spent will be recovered from the economic operator that had the obligation to execute them. In order to recover such expenditure under art. 29 of G.E.O. 68/2007[21] on environmental liability, the environmental agency may establish a statutory mortgage on the immovable property of the Operator. It is thus shown based on these provisions that the competent bodies do not have an obligation to intervene if the polluter operator does not, but they can do so, if the necessary amount is allocated by means of decision of the Government from the intervention fund.

As far as environmental liability is concerned, under the "polluter pays" principle, we believe that there is a discrepancy between environmental and insolvency provisions. A first issue in applying the principle for commercial companies in insolvency would be to enrol the debtor in the statement of affairs. Environmental obligations are usually obligations that entail actions, and the provisions of the Insolvency Act do not entitle the creditor to enter such an obligation in the statement of affairs. The practice shows that such obligations are not placed in the statement of affairs, although the environmental remediation value may represent an important amount of money from the total debts of the debtor company, as a result of the risk assessment[22]. We believe that the best option is for the environmental agency to have acted at its own expense, in order to remedy environmental damage before the insolvency proceedings are opened, because in this case there would be a quantified value of environmental obligations which were not executed by the debtor, and as such they could be entered in the statement of affairs. If there is also a legal mortgage prior to the opening of insolvency proceedings, then the claim to be entered in the statement of affairs shall receive orders of priority in future distributions, within the procedure. If there is no such guarantee, the environmental agency will be entered with the amount requested in the statement of affairs, with the order of priority of a budget claim, so that in order to extinguish it, distributions in insolvency proceedings must first provide for the payment of guaranteed creditors, and only thereafter the budgetary ones.

If the environmental agency intervenes, in order to carry out the necessary remedies for the environmental damage done by the operator, after the opening of the procedure, the amounts resulting from this operation may be classified under art. 102 paragraph 6[23] of Law 85/2014 on insolvency, as being current claims to be paid, in accordance with the resulting documents, which are not required to be entered in the statement of affairs of the debtor. On the other hand, these greening operations could be regarded as representing a financing during the insolvency proceedings, which would entail the prior approval of creditors, as the greening operation is not considered a current activity of the general debtor. According to the

[19] G.E.O. No. 68/2007 on environmental liability published in Official Journal no. 466 of June 29th, 2007 provides under article 33 paragraph 1 that "defining forms of financial collateral, including insolvency cases, and measures to develop the supply of financial instruments on environmental liability, enabling operators to use them for the purpose of guaranteeing their obligations under this Emergency Ordinance, shall be determined by means of decision of the Government, based on a proposal from the central public authorities for the protection of the environment and for public finances, within 12 months from the entry into force of this emergency ordinance "

[20] G.E.O. No. 68/2007 on environmental liability published in Official Journal no. 466 of June 29th, 2007 under art. 11 d) shows that "at any time the County Agency for Environmental Protection has the possibility to exercise the following duties: ... d) take the necessary preventive measures "

[21] G.E.O. No. 68/2007 on environmental liability published in Official Journal no. 466 of June 29th, 2007, under art. 29 paragraph 2 states that "in order to ensure the recovery of the costs incurred, the Environmental Protection Agency establishes a mortgage on the immovable property of the operator and a precautionary garnishment, in accordance with the legal rules in force"

[22] G.E.O. No. 195/2005 on environmental protection published in Official Journal no. 1196 of December 30th, 2005 provides under article 2 paragraph 32, the following: "risk assessment – this is the work drawn up by a natural person or legal entity who has this right, according to the law, which carries out the analysis of the probability and seriousness of the main components of the environmental impact and establishes the need for preventive, intervention and/or remedial measures "

[23] Law 85/2014 on insolvency and insolvency prevention procedures published in Official Journal no. 466 of June 25th, 2014, under art. 102 paragraph 6, states the following: "Claims arising from the date of initiation of the proceedings, during the observation period or in the judicial reorganisation procedure, shall be paid in accordance with the documents they are based on, and they are not required to be enrolled in the statement of affairs. The provision shall be applied appropriately for claims emerged after the date of opening of the bankruptcy procedure"

provisions of art. 87 of Law 85/2014[24] on insolvency proceedings, operations exceeding the company's current activity will have to be approved by the creditors' committee, at the request of the special administrator or judicial administrator, as the case may be. It is hard to believe that creditors of the debtor who are also part of the creditors' committee will agree, from any sums, which are to be distributed in the procedure, to pay the costs of greening. Because, on one hand, G.E.O. 195/2005 on environmental protection obliges the operator to pay its environmental obligations, and on the other hand, Law 85/2014 on insolvency proceedings does not provide for a priority or exception from payment related to these environmental obligations, so we can think that there are situations in which these obligations will not be complied with. We believe that we can be faced with the situation where the polluter pays principle cannot be applied, as the law provides for the pollutant operator to be held accountable by the judicial administrator/liquidator under the provisions of Law 85/2014 on insolvency proceedings.

In the fortunate event, in which the environmental agency intervenes for greening before the insolvency proceedings are opened and enters the statement of affairs of the debtor with the corresponding amounts, and these are not paid in the procedure, they may only be recovered in the situation in which persons have been identified as leading to the insolvency of the debtor, and they are also subject to liability for the not recovered liability, by means of an action filed under art. 169 of Law 85/2014[25] on insolvency proceedings.

The application of the polluter pays principle with reference to the liability of judicial administrators/judicial liquidators for unhonoured environmental obligations by the debtor company, the Statute for organising and exercising the profession of insolvency practitioner[26], allows, by means of art. 117 paragraph 2 e)[27] the insolvency practitioner to ask for funds necessary for any greenings from the National Union of Practitioners in Insolvency proceedings Fund. However, the insolvency practitioner who will request and receive these necessary funds will be obliged, under art. 116 paragraph 4 of the Statute on the organisation and exercise of the profession of insolvency practitioner[28], to ensure that these funds are returned immediately after the assets have been capitalised. If the assets, which are to be redeemed, do not cover such expenditure advanced by the Union, the judicial administrator or the liquidator, as the case may be, shall bear the amounts not covered by means of personal property, making it difficult to reach the decision to request these funds necessary for greening.

## 5. Proposals to amend the legal provisions;

The problems identified concerning the application of the "polluter pays" principle in what concerns economic operators under the Insolvency act lead to the ever-growing necessity to amend the legal provisions, but also to harmonise the provisions of the two areas of law. The necessity comes as a result of both the country's economic development and the very large number of insolvencies that UNPIR practitioners manage.

Firstly for the payment of environmental obligations, Law 85/2014 on insolvency proceedings should provide that these represent a priority, either by assimilating them to conservation costs and the administration of goods, as provided for by article 161 paragraph [29]1 of the law or by means of a distinct

[24] Law 85/2014 on insolvency and insolvency prevention procedures published in Official Journal no. 466 of June 25th, 2014, under art. 87 states that "during the observation period, the debtor will be able to continue carrying out the current activities and make payments to known creditors, who fall under the usual conditions for the exercise of the current activity, as follows: Under the supervision of the judicial administrator, if the debtor has made a request for reorganisation, within the meaning of art. 67 paragraph 1 g), and the right of administration has not been lifted; b) under the direction of the judicial administrator, if the debtor has been excluded from the right to administer it. 2. Documents, transactions and payments exceeding the conditions laid down under paragraph (1) may be authorised in the exercise of supervisory tasks by the judicial administrator; the latter shall convene a meeting of the creditors' committee for approval of the request of the special administrator, within a maximum of 5 days from the date of its receipt. If a particular operation exceeding the current activity is recommended by the judicial administrator and the proposal is approved by the creditors' committee, it will be met by the special manager. If the activity is run by the judicial administrator, the operation will be carried out by the latter, with the approval of the creditors' committee, without the request of the special administrator.

[25] Law 85/2014 on insolvency and insolvency prevention procedures published in Official Journal no. 466 of June 25th, 2014

[26] Statute on organizing and exercising the profession of insolvency practitioner, republished in Official Journal no. 712/16.08.2018

[27] Statute on organizing and exercising the profession of insolvency practitioner, republished in Official Journal no. 712/16.08.2018, under art. 117 paragraph 2 lit. e) shows that "expenditure necessary for the fulfilment of the urgent environmental obligations laid down by the competent authority, in accordance with Government Emergency Ordinance No. 195/2005 on environmental protection, approved with amendments and completions by means of Law no. 265/2006, with subsequent amendments and completions (such as liquidation of stocks of radioactive materials, PCB capacitors, hazardous chemicals, etc. for which preservation in the conditions of the law cannot be ensured), as well as expenditure related to the elaboration of technical documentation / feasibility studies / environmental reports / projects, necessary to identify feasible solutions for the fulfilment of environmental obligations and the costs associated with these solutions. The cost of environmental obligations relating to the closure of non-compliant storages will be highlighted;"

[28] Statute on organizing and exercising the profession of insolvency practitioner, republished in Official Journal no. 712/16.08.2018, under art. 116 paragraph 4 shows that "in the case of advances from the Liquidation fund, if the sentence/conclusion does not expressly provide that the amount are to be returned, the applicant, in addition to the documents referred to under paragraph (1), shall also give a statutory statement, by means of which it undertakes to repay the advance, within 10 working days, as of the recovery of the debtor's assets"

[29] Law 85/2014 on insolvency and insolvency prevention procedures published in Official Journal no. 466 of June 25th, 2014, under art. 161 paragraph 1, provides that "claims shall be paid in the event of bankruptcy in the following order: 1. Fees, stamps or any other expenditure relating to the procedure established by this title, including the expenditure necessary for the conservation and administration of assets of the

wording, in the same article, granting these priority in terms of potential distributions.

Second, when the situation requires the application of Law 85/2014 on insolvency proceedings, it must provide for an exception to the rule of approval by the creditors' committee, in terms of the necessary remedial operations and the payment of the damage produced. This modification must also be made based on the long duration of the convening and approval of any operations necessary for the remedy. If the polluter would immediately pay the damage caused, and also the measures to prevent and extend them, one could prevent in this manner other negative effects that the passage of time might have on the environment in which the operator activated.

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debtor's estate, for the continuation of the activity, and for the payment of the remuneration of persons employed under the provisions of art. 57 paragraph (2), art. 61, 63 and 73, subject to those laid down under art. 140 paragraph (6);"

# OWNERSHIP TRANSFER AND SELLER'S OBLIGATIONS. LOOKING FOR UNITY IN SALE AGREEMENT REGULATION

**Dan VELICU**[*]

**Abstract**

*The Renaissance intelectuals, mostly Italians, considered Rome the climax of the European civilization and from this assumption it seemed self - evident that the Roman law was superior to any kind of regulation of other people in the Middle Ages. Later, for almost two centuries as a consequence, in a kind of inertia, in European civil law, Roman law has been taken as the sole model in order to elaborate modern civil codes. Main legal institutions belonging to Roman law were deeply analysed and their sense were strongly disputed in the frame of the European universities.*

*If the Roman legal structure was considered a superior one to the Middle Ages peripheral usages, in the frame of the sale agreement and other contracts as well, it has looked normal that regulating seller's obligations or ownership transfer to take place under the shadow of the Roman law.*

*However, the authors of the modern civil codes have ignored the fact that Roman law had had a long evolution and sometimes contradictory or at least difficult to assess; unfortunately, they avoided that the rules designed by them will have to be analyzed beyond the perception of Roman law.*

*This article aims to briefly highlight the evolution of Roman law in order to see if the full takeover of some of its institutions is justified today. We shall try also to point out the possible way to reconcile what now it seems to be irreconcilable in the sphere of European systems influenced by ius civile.*

**Keywords:** *sale agreement, ownership transfer, seller's obligations, consensus principle, delivery*

## 1. Introduction

Undoubtedly, the sale agreement is the most complex and also the most used contract in order to exchange of goods in modern society.

Despite its obvious importance, its international regulation has been permanently obstructed even the level of international exchanges has increased strongly within the frame of the latest waves of globalization.

It is notorious that after many attempts before and after the World War Two, under the tutelage of the United Nations Organization, on 11 April 1980 it was signed in Vienna the Convention on Contracts for the International Sale of Goods (CSIG) which entered into force as a multilateral treaty on 1 January 1988, after being ratified by 11 countries.

On the other hand, the EU grounded from the first treaty on the "four freedoms". There is no need to explain that at least the free movement of goods needs a uniform regulation.

Some may say that the CSIG could be a modern regulation which would foster the economic exchanges between EU states but also between EU states and other states. However, even most of the European states ratified it in the 1990s, the parties – having expressly this option – prefer many times to avoid the application of the CSIG to their agreement.

A new attempt to create a uniform sales law was the "Proposal for a Regulation on a Common European Sales Law"[1].

Unfortunately, in some main points this project seems to be rather a compromise between great legal systems than coherent regulation.

At this moment we risk being in a real paradox – if the project would be adopted – and to have three regulations: the international, the European and the national one.

More, finding a compromise solution will lead to extensive, difficult, and perhaps contradictory regulation.

Even the sale agreement is the most complex contract its regulation is far from being similar in EU states.

Unfortunately – as we shall point to –, the successive codifications tried to solve old issues, but these only leaded to diversified rules.

The scientific research was focused mainly on the Roman law even this law was not codified until Justinian.

This paper tries to discuss some key issues of the sale regulation by focusing on the social and economic interaction between the parties rather than reinterpreting the Roman law.

## 2.The Modern Sale Regulation. Unsolved Issues

### 2.1. The Contradictions of the *Code civil*

As we know, at the climax of his power, Napoleon Bonaparte, first consul of the French republic, enacted the civil code which had to be the

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[1] See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011PC0635

main and general regulation of the contracts. The code was applied not only in the territory of the actual France, but in all the territories annexed by the republic, and later the Napoleonic Empire. It is not hazardous to affirm that in that decades there was an uniform civil law – at least in Western Europe – compared to the present diversity.

Returning to our topic, we remember that dealing with the sale[2] the code recognised the effects of the mere consent of the parties in art.1583: "Elle est parfaite entre les parties, et *la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix*, quoique la chose n'ait pas encore été livrée ni le prix payé".

According to the art. 1603 of the French Civil Code, the seller has two distinct obligations: that of delivering and that of warranting the thing which he sales [Il a deux obligations principales, celle de délivrer et celle de garantir la chose qu'il vend].

Delivery was defined by the art.1604 as the transferring the thing sold into "the power and possession of the purchaser" [la délivrance est le transport de la chose vendue en la puissance et possession de l'acheteur] meanwhile the warranty regulated by art.1625 took into account "the peaceable possession of the thing sold" and the absence of defects [la garantie que le vendeur doit à l'acquéreur a deux objets : le premier est la possession paisible de la chose vendue ; le second, les défauts cachés de cette chose ou les vices rédhibitoires].

However, despite the apparent accuracy there are some aspects which can be considered as contradictory.

Even the mere consent of the parties generated the ownership transfer on immoveable property a law of the First Republic[3] did not permit this transfer if the parties had not registered the agreement. The rule was stated again by a law as of 23 march 1855[4]. In other words, the seller could sign agreements with two different buyers, and if the second would be the first to register his agreement he would be recognised as the owner. In that specific case, the question raised would be: Which is the effect of the art.1583? And what does the second buyer register if the ownership was transferred according to the same article? For sure, there is no possibility to generate two ownership transfers.

Secondly, if the mere consent of the parties generated the ownership transfer why the seller has to warrant the buyer? If the seller was not the owner when the agreement was concluded he had nothing to transfer so he will be liable only for breaking his promise. If the seller was the owner why he has to warrant for his successive *factum*. In fact, the buyer became the new owner. More, if the thing had occult defects did the agreement generate effects? It's obviously that a defect good was not that the buyer wanted so the ownership transfer had no ground.

### 2.2. From Unity to Diversity

The regulation promoted by the *Code civil* was received literally by some civil codes of the nineteenth century. E.g. the rules we observed above were maintained in the civil code of new Italian Kingdom entered into force in 1865[5].

Despite this trend, some French authors did not agree with concept promoted by the code. Even they admitted the existence of a warranty against eviction, referring to the article 1641 they sustained that in fact there was no warranty, but a simple liability of the seller[6].

In other states, the rules were changed without modifying the sale mechanism as it was provided by the *Code civil*. For instance, the authors of the Romanian civil code from 1864 went further and modified the definition of the sale. According to the art. 1294, the sale supposed the ownership transfer [vânzarea este o convenţie prin care două părţi se obligă între sine, una a transmite celeilalte proprietatea unui lucru şi aceasta a plăti celei dintâi preţul lui].

More, the art.1603 of the *Code civil* was modified so the art.1313 of the Romanian Code did not retain the notion of warranty. In fact, on one hand, the seller had to deliver the thing, and on other hand, he is liable for it [vânzătorul are două obligaţii principale, a preda lucrul şi a răspunde de dânsul]. In other words, they extended the observations of Aubry and Rau to both warranties.

Obviously, this liability which emerged in case of eviction or for occult defects was conceived in a similar way to the warranties regulated by the *Code civil*[7].

The Spanish civil code – enacted in 1889 – maintained the traditional definition of the sale in art. 1445: "Por el contrato de compra y venta uno de los contratantes se obliga a entregar una cosa determinada y el otro a pagar por ella un precio cierto, en dinero o signo que lo represente".

Despite this, its authors removed also the notion of warranty. The art.1461 stated that "el vendedor está obligado a la entrega y *saneamiento* de la cosa objeto de la venta" while according to art.1474 "en virtud del *saneamiento* a que se refiere el artículo 1.461, el vendedor responderá al comprador:

- De la posesión legal y pacífica de la cosa vendida.
- De los vicios o defectos ocultos que tuviere".

The next European codifications oscillated between traditional views and innovation. On one hand, the German civil code – *Bürgerliches Gesetzbuch* (BGB) – did not permit the ownership transfer by mere

[2] Art. 1582 (1): La vente est une convention par laquelle l'un s'oblige à livrer une chose, et l'autre à la payer.
[3] The Law of 11 Brumaire Year VII.
[4] See Rivière, *Explication de la loi du 23 mars 1855 sur la transcription en matière*, p. 2 et seq.
[5] See artt.1447, 1462, 1481-2, 1498.
[6] See Aubry, Rau, *Cours de droit civil français : d'après l'ouvrage allemande de C.S. Zachariae*, p. 273.
[7] See artt.1336, 1352.

consent, but imposed to the seller two obligation considered essential: *to deliver* the thing and *to transfer the ownership* to the buyer (§433).

The idea of a warranty was mentioned also (e.g.§459).

On the other hand, the *codice civile* – enacted in 1942 – which was supposed to modernize the civil and commercial regulation maintained the sellers's warranties even the definition of the sale was improved so art. 1470 stated that "la vendita è il contratto che ha per oggetto *il trasferimento della proprietà* di una cosa o il trasferimento di un altro diritto verso il corrispettivo di un prezzo".

Therefore, according to art. 1476 "le obbligazioni principali del venditore sono:

1. quella di consegnare la cosa al compratore;
2. quella di fargli acquistare la proprietà della cosa o il diritto, se l'acquisto non è effetto immediato del contratto;
3. quella di garantire il compratore dall'evizione e dai vizi della cosa".

## 3. Returning to the Roman Law

The Napoleonic Code was often marked by the Roman law, whose study contributed essentially to the foundation of the Western medieval universities.

For this reason, many times the nineteenth century commentators felt compelled to resort to the study of the Roman law in order to understand better the reasons beyond the rules that they tried to interpret in the modern age.

We shall do the same thing even compared to the medieval scholars we have some hesitations in considering the Roman law as a strong and mandatory influential source of private law given the fact that the Roman law suffered many transformations between different ages and because it was probably altered by the contacts with numerous different cultures exactly at the when its main concepts were definitized.

As we all know it was generally admitted by the scholars that *emptio venditio* (the Roman sale) was possible under three forms: *mancipatio*, *in jure cessio* and *traditio*. The first two were formal institutions of the *ius civile*[8] while the latter was part of the *ius gentium*.

Learning exactly the content of the seller's obligation has been for long time a complex issue in the studies of *emptio venditio*. It was traditionally held that the Roman sale had no translative effect but to generate obligations[9].

The first two forms, the *mancipatio* and *in jure cessio* decayed in practice while *traditio* became the most used form for it was easier (by *vacuum possessionem tradere*) than the others; it was accessible even to the people which had not the Roman citizenship, it permitted to transfer a Roman goods and the seller had not a duty of *dare*[10].

A great impediment in this research was that the sources used by scholars have had a dual and contradictory nature many times[11].

Despite these features, the traditional interpretation of the Roman sources was that the vendor does not transfer the *dominium* or the ownership but "the peaceable possession of the thing sold". According to the definition provided by the art.1582 of the French "la vente est une convention par laquelle l'un s'oblige à *livrer* une chose, et l'autre à la payer" and as we have noted earlier "la délivrance est le transport de la chose vendue *en la puissance et possession de l'acheteur*".

Therefore, both articles made us think that the authors of the civil code were outlining the modern sale agreement as it was perceived by the medieval and renaissance Roman law commentators.

In other words, the vendor is obliged to *possessionem tradere* on one hand, and on other hand the same has to assure the *habere licere* intended as assuring a peaceful possession[12].

If the traditional interpretation of the *emptio venditio* was leading to an opposition between the sale as contract and the ownership transfer[13], the contradictoriality seemed to be harmful in the regulation provided by the French code.

On one hand, the sale agreement generated the seller s duty to deliver the thing sold, and on the other hand the same regulation (art. 1583) admitted that the ownership is transferred automatically by mere consent : Elle *est parfaite* entre les parties, *et la propriété est acquise de droit à l'acheteur* à l'égard du vendeur, *dès qu'on est convenu de la chose et du prix*, quoique la chose n'ait pas encore été livrée ni le prix payé.

Therefore, despite the sale definition and the enumeration of the seller s substantial obligations the ownership transfer occurred by mere consent (of course, we exclude the sale which concerns *genera* and required individualization).

Recent studies on the *emptio venditio* have argued that the sources belonging to the classic age must be interpreted again. The revisionist research has sustained that there is a link between the *emptio venditio* and the *alienatio*[14]. In fact, through the *habere licere*, the ancient formalism was transcended, and by *habere* the ownership transfer occurred[15].

[8] Mousourakis, , Roman law and the origins of the civil law tradition, p.129-131.
[9] Girard, Manuel elementaire de droit romain, p. 527.
[10] Girard, p. 523.
[11] Cristaldi, Il contenuto dell'obbligazione del venditore nel pensiero dei giuristi dell'età imperiale, p. 1
[12] Cristaldi, p. 1-5.
[13] Cristaldi, p. 10.
[14] Cristaldi, p. 74.
[15] Cristaldi, p. 277, 279-280.

## 4. Finding a solution

Unfortunately, reinterpreting the Roman law is not the solution to the key issues we have mentioned above.

The history indicated us that the diversity was created by the different interpretation of various scholars which were for sure romanists.

It could be better, in our opinion, to focus on the social and economic interaction between the parties rather than reinterpreting the Roman law.

At the end, the sale agreement has as main purpose to transfer the ownership and the good to the buyer. In fact, the latter wants to enter into the possession of the thing in order to use it and to be owner in order to have the exclusivity on the thing or to make capital out of the goods.

Therefore, the German regulation could be criticised because it states two essential obligations (§433). If the sale agreement generates the duty to transfer ownership only by *traditio* or by registration why the delivery must be considered an essential obligation?

If the sold object is moveable the ownership transfer is generated only by *traditio*; according to the §929 **Einigung und Übergabe** "zur Übertragung des Eigentums an einer beweglichen Sache ist erforderlich, dass der Eigentümer die Sache dem Erwerber übergibt und beide darüber einig sind, dass das Eigentum übergehen soll. Ist der Erwerber im Besitz der Sache, so genügt die Einigung über den Übergang des Eigentums".

If the goods is an immoveable the ownership passes from seller to buyer or by registering the (second) agreement; according to the §873 **Erwerb durch Einigung und Eintragung:**

(1) Zur Übertragung des Eigentums an einem Grundstück, zur Belastung eines Grundstücks mit einem Recht sowie zur Übertragung oder Belastung eines solchen Rechts ist die Einigung des Berechtigten und des anderen Teils über den Eintritt der Rechtsänderung und die Eintragung der Rechtsänderung in das Grundbuch erforderlich, soweit nicht das Gesetz ein anderes vorschreibt.

(2) Vor der Eintragung sind die Beteiligten an die Einigung nur gebunden, wenn die Erklärungen notariell beurkundet oder vor dem Grundbuchamt abgegeben oder bei diesem eingereicht sind oder wenn der Berechtigte dem anderen Teil eine den Vorschriften der Grundbuchordnung entsprechende Eintragungsbewilligung ausgehändigt hat.

Practically, the buyer became owner when the thing was delivered or registered and both need another agreement.

If the seller was not the owner or the thing had defects that means the agreement did not produce legal effects, but the seller is liable for breaking the contract.

In a closer sense to *Bürgerliches Gesetzbuch* –I would say softly –, according to art.184 from the Swiss Code of obligations "La vente est un contrat par lequel le vendeur s'oblige à livrer la chose vendue à l'acheteur et à lui en transférer la propriété, moyennant un prix que l'acheteur s'engage à lui payer".

Sauf usage ou convention contraire, le vendeur et l'acheteur sont tenus de s'acquitter simultanément de leurs obligations.

The ownership trasnfer is regulated by the Swiss Civil Code which state that "la mise en possession est nécessaire pour le transfert de la propriété mobilière" (art. 714).

"L'inscription au registre foncier est nécessaire pour l'acquisition de la propriété foncière" (art.656). In both cases, there is no need of a new agreement.

The sale agreement is the *titulus adquirendi* while the delivery or the registration is the *modus adquirendi*.

The French regulation could be criticised because it permits an ownership transfer even the seller had in fact transferred the ownership to the first buyer who did not register it or did not take into possession the thing.

## 5. Conclusions

It seems to me that a logical reconstruction of the sale regulation can be develop from these considerations.

Therefore, it would be better to renounce to the ownership transfer by consensus principle as the BGB did, just because it protects better the third party or the first buyer.

Secondly, if after the transfer the court declares another person as the original owner that means the agreement was broken by the seller whose duty was to transfer the ownership so he will be liable and he will return the price and pay damages to the buyer.

If the thing is defected in order "to restructure" the agreement – *saneamiento* in the Spanish code – the seller is liable to repair or to replace the good – if possible and agreed by the buyer – or to return the price and to pay damages to the buyer.

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# SUBSTITUTION OF PARENTAL CONSENT WHEN MINORS TRAVEL ABROAD: SANCTION OR REMEDY?

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**Abstract**

*Decisions on establishment of minors' place of residence fall within the sphere of application of joint parental authority, along with decisions concerning the form of education and professional training, complex medical treatments and surgical interventions, respectively administration of minors' property.*

*As a consequence, the principle is that common parental consent is necessary when minors leave national territory in order to travel abroad. In case of parental disagreement, the case-law established a specific line to be followed in courts: substitution of parental consent.*

*The scope of the present article is to analyze from a double perspective (theoretical and practical) the main issues to be considered in solving cases of this type, as well as the implications of judgements pronounced in this area on other interconnected aspects concerning both parents and the child.*

*The objectives of this study are to examine relevant procedural and substantial matters as they derive from the experience so far and propose solutions based on the vector principle of best interests of minors (e.g., the urgent procedure in Romanian Procedural Civil Code called "ordonanţă preşedinţială" is admissible, or the procedural path to follow should be the general procedure on the merits of the case; substitution of parental consent should be specific, or also accepted in a general manner, with no reference to the period and location of the minor abroad, etc.).*

*At the same time, the study will ponder on implications of judgements substituting parental consent related to other institutions in the sphere of national law (e.g., common or exclusive parental authority) or international law (incidence of 1980 Hague Convention on the Civil aspects of international child abduction).*

**Keywords:** *common parental authority, joint parental decisions, parental disagreement, substitution of parental consent, international child abduction*

## 1. Introduction

The sphere of joint parental authority applies to important decisions regarding children (including decisions on establishment of minors' place of residence) which request consent of both parents.

Exercise of the right to free movement in the European Union and, more broadly, the possibility to move freely throughout the world has led to the emergence of a new type of litigations in the field of family law, in case parents disagree on establishment of minors' place of residence, either for temporary periods (going abroad for tourism purposes) or definitive (relocation to another country).

The present study aims to analyze in both procedural and substantive terms the remedy offered by jurisprudence for this situation, namely substitution of parental consent (more precisely, substitution of consent of only one of the parents, namely the oppozant parent).

The theme under consideration is important both from theoretical and, above all, practical point of view, since case-law is not always unanimous, and practical situations raising this issue are very frequent. On the other hand, legal literature in this particular field is practically non-existent.

In this context, the study will concentrate on identifying the procedural means available in domestic law, the main substantive issues raised by this type of litigations, as well as the implications of judgments pronounced in this matter on other institutions of domestic law (parental authority) or international law (international abduction of minors).

## 2. Content

### 2.1. The framework

Article 483 of Romanian Civil Code ("Parental Authority") defines parental authority in terms of general provisions as follows: "(1) Parental authority is the set of *rights* and *obligations* concerning both *person* and *property* of the child which belong equally to both parents." (our underline)

Law no. 272/2004[1] entails special prescriptions, to be corroborated to the general provisions abovementioned.

With relevance for the subject in discussion, Article 36 of Law no. 272/2004 provides: "(1) Both parents are responsible for raising their children. (2)

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[1] Law no. 272/2004 concerning protection and promotion of children's rights, published in the Official Gazette of Romania no. 557/23.06.2004, successively modified and lastly republished in the Official Gazette of Romania no. 159/05.03.2014.

*Exercise of parental rights and obligations must be in the best interests of the child* and ensure material and spiritual welfare for the child, especially by providing care, maintaining personal relationships and providing growth, education and maintenance, as well as legal representation and administration of patrimony". (our underline)

The general rule in case of divorce is that parental authority is jointly exercised, according to Article 397 of Romanian Civil Code: "After divorce, parental authority rests jointly to both parents, unless the court decides otherwise"[2].

It can be concluded from legal provisions presented that parental authority is generally jointly exercised and includes rights and obligations of both parents, concerning the person and also the property of the child. In all cases, exercising parental authority must respect the vector principle of the best interests of the child[3].

In this context, it is of significant importance to identify decisions on which parental agreement is necessary (substitution parental consent intervenes but in case an agreement of both parents is necessary and it cannot be reached).

To this respect, Article 36 Para 3 of Law no. 272/2004 (actual form) [4] provides that: "If both parents exercise parental authority, but do not live together, *important decisions, such as type of education or training, complex medical treatment or surgery, residence of the child or administration of property* shall be taken only with the consent of both parents." (our underline)

Juridical literature explained that major decisions are to be distinguished from day-to-day decisions[5] (routine decisions) taking into account their importance and their nonrepetitive nature[6]; also, major decisions are to be considered those which "exceed daily needs of the child"[7].

Decisions on establishing minors' place of residence (which encompass the situations when minors travel abroad) are therefore important decisions requesting common parental consent.

For this particular situation, Article 31 Para 3 of Law no. 248/2005[8] provides that: "If there are disagreements between parents regarding the expression of agreement or it is impossible for one of the parents to express his or her will, the departure of minors from Romania shall be allowed only after the disputes have been resolved by the court in accordance with the law, except for situations provided in Article 30 Paras (2) and (3)"[9].

The aforementioned legal prescription is in fact a particular application in a specific matter (departure of minors abroad) of Article 486 of the Romanian Civil Code, which provides in general terms that in case of disagreement of parents on decisions concerning the child and belonging to the sphere of parental authority: "(…) the guardianship court, after hearing their parents and taking into account the conclusions of the report on the psychosocial inquiry, decides according to the best interests of the child."

Nevertheless, Article 486 offers only a solution in principle (the court decides according to the best interests of the child), without explaining *in concreto* the juridical mechanism.

It was therefore left for the case-law to conceive this mechanism, which was contrued as „parental consent substitution"[10] and explained as follows: "The mechanism of consent is regulated precisely to ensure that a decision is made when parents cannot reach an agreement, but also to prevent an abusive refusal by one of the parents, all in order to ensure that the minor's best interests are respected."[11]

### 2.2. Specific situations when (common) parental consent is not necessary

Even in case of joint parental authority, there are situations when coparental consent is not necessary so that minors should travel abroad accompanied by a single parent or another major person.

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[2] Exclusive parental authority is conceived by Romanian legislator as an exception. Nevertheless, the case-law tends to seriously analyse each particular case and grant exclusive authority either for objective situations (stipulated by Article 507 of Romanian Civil Code) or subjective situations (provided by Article 398 of Romanian Civil Code and Article 36 Para 7 of Law no. 272/2004).

[3] Per Article 2 Para 6 of Law no. 272/2004: "In determining the best interests of the child, at least the following shall be considered: a) the needs of physical, psychological, educational and health development, security, stability and belonging to a family; b) the child's opinion, depending on the age and degree of maturity; (c) the child's history, particularly with regard to situations of abuse, neglect, exploitation or any other form of violence against the child, as well as the potential risk situations that may occur in the future; d) the capacity of parents or persons to care for the child's growth and care to meet his or her specific needs; e) maintaining personal relationships with persons to whom the child has developed attachment relationships."

[4] The initial form of Law no. 272/2004 prescribed neither which types of decisions were important, nor at least general criteria for evaluation.

[5] For a detailed comparison, A.-M. Voiculescu, *Parental authority versus common custody*, Lex et Scientia International Journal, no. XXV, vol. 1/2018, published by Nicolae Titulescu University and Foundation of Law and International Relations Niculae Titulescu, Nicolae Titulescu Publishing House, pp. 43 – 44.

[6] J.S. Ehrlich, *Family Law for Paralegals*, 7th Edition, Wolters Kluwer Publishing House, New York, 2017, p. 202.

[7] D. Lupașcu, C.M. Crăciunescu, *Dreptul Familiei*, 3rd Edition amended and actualized, Universul Juridic Publishing House, 2017, p. 557.

[8] Law no. 248/2005 on the regime of the free movement of Romanian citizens abroad, published in the Official Gazzette of Romania no. 682/29.07.2005.

[9] These exceptions will be discussed further on.

[10] „Therefore, substitution of parental consent when making a decision concerning the minor can be interpreted as an exceptional measure, to be taken in the best interests of the child, when parents cannot agree (…) Another interpretation would deprive of effects legal provisions (…) seriously and irremediably affecting the superior interest of the child, thus paving the way for abusive attitudes of one of the parents on the background of the tensions that arose after the divorce." (Bucharest Tribunal - IVth Civil Section, case no. 14285/302/2018, decision no. 4131A pronounced on 05.11.2018, not published).

[11] Bucharest Tribunal - IVth Civil Section, case no. 14285/302/2018, decision no. 4131A pronounced on 05.11.2018, not published, precited.

Subsequent to numerous practical cases which have appeared, when the superior interest of the child was seriously affected by impossibility to make judicial decisions on substitution of parental consent in due time, Romanian legislator decided to modify Law no. 248/2005 and prescribed specific cases when coparental consent/consent of the minor's legal representative is not necessary for minors travelling aboad.

According to Article 30 of Law no. 248/2005:

"(2) In situations provided in paragraph (1) b-d (when the minor travels with a single parent or another major person) it is not necessary the declaration of the *parent deprived parental rights* or, as the case may be, *declared missing* according to the law, if the accompanying person proves to this effect, unless both parents are in this situation and the declaration of the minor's legal representative is mandatory".

Also, according to Para 3 of the same Article, the border police bodies allow accompanied minors to travel from Romania abroad:

a) if the attendant justifies the necessity to travel abroad by the fact that the minor needs *medical treatment* which is not possible on the territory of Romania and in absence of which his or her life or health are seriously threatened, on the condition of presentation of documentary proofs issued or endorsed by Romanian medical authorities, indicating the period and the state or states in which the respective medical treatment is to be granted, even if there is no agreement of both parents, the other parent, the surviving parent or the legal representative;
b) if the attendant demonstrates that the minor is travelling for *official studies or competitions* by presenting appropriate documents showing the period and state or States in which these studies or competitions are to be conducted, even if there is consent of a single parent.

The situations provided by the law when coparental consent/consent of the minor's legal representative is not necessary can be systematized in two categories, namely related to the parents (deprived of parental rights or declared missing), respectively to the child (medical treatment or official studies or competitions).

For the last situation (concerning the child), it should be noted that decisions on complex medical treatment and education are important decisions, to be taken in consent by both parents.

It is therefore necessary to make a distinction between major decisions on medical treatment and education on the one hand, and major decisions for minors traveling abroad on the other hand (the legislator excluded coparental consent only for the last one)[12].

Moreover, the law clearly indicates that, in case of medical treatment (as detailed in substantial terms by Artcle 30 Para 3 a), there is no need for parental consent at all for the child to go abroad (the minor can leave the country without the consent of both parents, accompanied, for example, by a relative).

### 2.3. Substitution of parental consent – procedural aspects

The most argued procedural aspect relates to admissibility of the urgent procedure regulated in Romanian Procedural Civil Code[13] as "ordonanţă preşedinţială"[14].

The case-law largely oriented towards acceptance of urgent procedures in cases of parental consent substitution[15]; there were nevertheless situations when these procedures were denied, and parties were instructed to follow the general procedure on the merits of the case.

For reasons to be explained below, we agree to the first opinion.

Article 997 Para 1 of the Romanian Procedural Civil Code enshrines the situations when urgent procedures may be used: "The court, establishing that there is the appearance of law in favor of the plaintiff, will be able to decide provisional measures in urgent cases, in order to maintain a right which would be prejudiced by delay, to prevent imminent and irreparable dammage, as well as to remove the obstacles that would arise in the course of execution."

Starting from this legal basis, juridical literature[16] systhematised conditions to be met in cases of "ordonanţă preşedinţială": urgency, transitoriness, appearance of law in favor of the plaintiff (no analyse on the merits).

We are of the opinion that all these conditions are satisfied in case of substitution of parental consent for minors traveling abroad, and therefore urgent procedures are admissible in this matter.

The *urgency* relates to the right of the child to free movement[17], which could not be exercised in case of

[12] By decision of first instance (Judecătoria Sectorului 5 București, case no. 8875/302/2017, decision no. 9150 pronounced on 19.12.2017, not published), the court decided substitution of mother's consent so that minors could travel in Germany for medical treatment accompanied by their father. No reference was made to the fact that the mother did not agree on the medical treatment itself. Bucharest Tribunal - IV$^{th}$ Civil Section changed this judgement by decision no. 4486A pronounced on 28.11.2018, not published, substituting the consent for medical treatment also.

[13] Law no. 134/2010, published in the Official Gazette of Romania no. 606/23.08.2012 and republished in the Official Gazette of Romania no. 247/10.04.2015.

[14] Articles 997 and subsequent of Romanian Procedural Civil Code.

[15] Judecătoria Sectorului 4 București, case no. 31918/4/2017, decision no. 15855 pronounced on 21.12.2017, not published.

[16] For an overview of Romanian doctrine on this aspect, V.M. Ciobanu, M. Nicolae (coordinators), *Noul Cod de Procedură civilă comentat şi adnotat*, vol. II, Universul Juridic Publishing House, Bucharest, 2016, p. 1389.

[17] Article 25 of Romanian Constitution (amended and completed by Law on the Revision of the Romanian Constitution no. 429/2003, published in the Official Gazette of Romania no. 758/29.10.2003; republished in the Official Gazette of Romania no. 767/31.10.2003); Article 3 Para 2 of the Treaty on European Union (consolidated version published in the Official Journal C 326, 26 October 2012, pp. 13 - 46) and

delay, taking into account the specific circumstances to be detailed further on.

Thus, as a premise situation and in the majority of cases, substitutions of parental consent are requested for limited periods of time and touristic purposes.

On the one hand, a vacation is generally planned for up to 2-3 months before the expected departure date.

On the other hand, a case following the general procedure on the merits cannot be expected to be solved by a definitive judgement apt to be executed eventually by forced execution (first instance and appeal) in the short period of 2-3 months.

In tis context, the only pratical solution which allows the child to exercise the right of free movement is an urgent procedure.

The *temporary nature* of the measure results from the very limitation in time (substitution of parental consent is generally granted for individual periods during scholar vacations).

Finally, the *appearance of law* in favour of the plaintiff (which is the most problematic of the conditions, considered sometimes to imply judgement on the merits) has been argued in the sense that the plaintiff, associated to common parental authority, has the right to take decisions concerning the child and ask for the intervention of the court in case of disagreements[18].

Having argued the admissibility of urgent procedures, we further consider that it is not even necessary that an application by means of the urgent procedure should be doubled by an application on the merits.

To this respect, it is obvious that a procedure on the merits cannot be decided by a definitive judgement before the established date of departure and therefore it is often the case that such applications on the merits will finally be rejected as remained without object.

In this context, we consider necessary to make a short refference to Article 920 of Romanian Procedural Civil Code, in correlation to a recent judgement of the European Court for Human Rights (although this case concerns a programme of personal ties, the reasoning of the Court is relevant and should also apply to substitution of parental consent).

Article 920 of Romanian Procedural Civil Code has a specific application limited to the period of divorce trial, and some courts considered it was derogatory from Article 997 of the same Code (although situated in the same Book of the Code, the articles mentioned reside in different Titles[19]).

As a consequence, it was argued that, in case a divorce was pending, only measures expressly and limitedly mentioned in Article 920 of Romanian Procedural Civil Code were allowed, if formulated by using of urgent procedures.

In the recent case *Cristian Cătălin Ungureanu*[20], the Strasbourg Court held violation of Article 8 of the Convention[21] in view of the fact that the applicant was unable to visit his son during the divorce proceedings (for 3 years and 5 months).

The national court rejected the emergency ordinance by which the applicant requested the establishment of the right of access until the divorce proceedings had been completed.

The denial was argued in the line of reasoning already mentioned, according to which national law did not provide for the right of access during divorce proceedings. Thus, during the divorce trial, courts were allowed to make decisions only in matters strictly indicated by Article 920 (domicile of the child, maintenance allowance, state child allowance and use of the family home), and not other measures falling under Article 997 (even if they were urgent).

Noting that other national courts have admitted similar requests by way of emergency ordinance, the Court essentially sanctioned the insufficient clarity of domestic legislation on this issue and concluded that, as regards the granting of visiting rights during divorce proceedings, Romanian authorities failed to meet their positive obligations arising from Article 8 of the Convention.

### 2.4. Substitution of parental consent – substantial aspects

Analysis of case-law revealed the existence of some problematic aspects, which will be presented and discussed in the following.

A very frequent situation is represented by applications requiring substitution of parental consent for an indefinite period and non-individualized locations (for example, supplementing *sine die* the consent for travels in the European Union).

It was decided[22] that "consent of the defender could not be supplemented except for one trip abroad, a journey in respect of which both the date of departure and the date of return were established, the country of destination, the route followed to the State of destination (…) however, the applicant's request does not include the travel data, and the court cannot substitute the consent of the defender for any journey

Article 21 Treaty on the Functioning of the European Union (consolidated version published in the Official Journal C 326, 26 October 2012, pp. 47 - 200).

[18] Bucharest Tribunal - IV$^{th}$ Civil Section, case no. 14285/302/2018, decision no. 4131A pronounced on 05.11.2018, not published, precited.

[19] Article 920 is situated in Title I, the VII$^{th}$ Book of Romanian Procedural Civil Code ("Divorce Procedure"), and Article 997 is situated in Title VI, the VII$^{th}$ Book of Romanian Procedural Civil Code ("Emergency Ordinance Procedure").

[20] ECtHR, Decision adopted on 04.09.2018, Application no. 6221/14, case *Cristian Cătălin Ungureanu v. România*.

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

[22] Bucharest Tribunal - IV$^{th}$ Civil Section, case no. 5401/300/2016, decision no. 4989A pronounced on 16.12.2016, not published.

to be made (…) this consent must be requested for each individual journey."[23]

Another common situation concerns relocations of one parent together with the child in another country, generally refused by the other parent and therefore resulting in applications in courts for substitution of parental consent.

Some courts analysed this type of applications according to Article 36 Para 3 of Law no. 272/2004 (important decision requiring parental agreement, doubled by the sanction of substitution in case of abusive refusal).

Other courts[24] took into account Article 497 of Romanian Civil Code ("Change of the child's domicile"), which states: "(1) If it affects the exercise of parental authority or parental rights, the change of the child's domicile, along with the parent with whom he or she resides can only take place with the prior consent of the other parent. (2) In the event of a misunderstanding between parents, the court shall decide the best interests of the child (…)."

It seems that Article 497 of Romanian Civil Code institutes an exception from Article 36 Para 3 of Law no. 272/2004, which qualifies the decision on establishment of minors' place of residence as major and asks for parental agreement *in all cases.*

Article 497 brings extra nuances, namely that agreement is not always necessary, but "if it affects the exercise of parental authority or parental rights".

Without choosing an excessive formalism with regard to formulation of the judgement (e.g., "disposes substitution of parental consent for change of domicile" versus "admits the request for change of domicile"), we consider that incidence of Article 497 has clearly the consequence of non-admisibility of the urgent procedure.

We argue that analyse of conditions imposed by Article 497 ("if it affects the exercise of parental authority or parental rights") exceeds the "appearance of law" specific to provisional measures and involves analysis of the merits of the case.

Finally, another situation which often appears in parctice is a double request substitution: for issuing the passport of the minor[25] and for traveling abroad with the child.

In this case, the focus transcends from juridical to practical aspects: issuance of minor's passport requires the presence of the child in front of the Service for passports for taking the child's picture.

In practice, there were cases when the child's personal ties programme did not overlap with the programme of the Service for passports, and therefore, after having gained in court the substitution case, the petitioner could not put in practice the judgement (practical inconveniences already mentioned and the refusal of the other parent to allow personal ties outside the framework of the programme).

We consider that, in such cases, the application should also ask for supplementing the personal relashionship programme with one day, necessary for the presence of the child at the Service for passports.

### 2.5. Implications of judgements substituting parental consent

Decisions for substitution of parental consent for departure of minors from the country may produce multiplied effects, which overcome the sphere of the dispute in which the decision of substitution has been pronounced.

These effects can arise both in connection with domestic law institutions (for example, exercise of joint or exclusive parental authority) and international law[26] (international abduction of children[27]).

#### 2.5.1. Institutions of national law

Repeated decisions on substitution of parental consent[28] denote a pattern of an abusive way of

[23] A similar line of reasoning was adopted by Judecătoria Sectorului 4 București, case no. 30372/4/2017, decision no. 15399 pronounced on 13.12.2017: "(…) the opposition of the defendant regarding the displacement of the minor abroad, at any time and for a period not determined in concrete terms, cannot be presumed to be a manifestation of the abuse of rights (…) substitution of the defendant's consent to the movement of the minor outside the country, anytime and anywhere, equates to deprivation of the parent (…) of parental rights (…)."

[24] Judecătoria Sectorului 1 București, case no. 71299/301/2014, decision no. 7127 pronounced on 21.05.2015, not published; Bucharest Tribunal - IV$^{th}$ Civil Section, case no. 34377/301/2016, decision no. 2683A pronounced on 03.07.2018, not published.

[25] Matters concerning issuing of the passport for a minor are considered to fall in the area of application of the concept of "parental authority" (CJEU, Decision adopted on 21.10.2015, C-215/15, case *Gogova v. Iliev*). In this case, the child was a Bulgarian national who lived in Italy (where both parents lived separately). When the mother sought to renew the child's Bulgarian passport, the father refused to grant his consent, which was required under Bulgarian law. The Bulgarian Supreme Court made a reference for a preliminary ruling to the CJEU on the issue whether the passport renewal fell within the meaning of "matters of parental responsibility" for the purposes of Article 8 of the Regulation no. 2201/2003 (Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, published in the Official Journal L338/1, 23 December 2003). The CJEU ruled that the concept of parental responsibility was given a broad definition in the Regulation and that the action in this case was clearly within that definition.

[26] For an over view of parental authority in connection to international law, A.-M. Voiculescu, Autoritatea părintească în contextul litigiilor privind răpirile internaţionale de minori, in M. Avram (coordinator) Autoritatea părintească – între măreţie şi decădere, Solomon Publishing House, Bucharest, 2018, pp. 178 – 208.

[27] For a detailed presentation of procedural and substancial interconnections between 1980 Hague Convention on the civil aspects of international child abduction and domestic litigations, A.-M. Voiculescu, Interaction between Hague Convention on the civil aspects of international child abduction and domestic litigations concerning domicile of the child and parental authority, published in Journal of International Scientific Session organised by Nicolae Titulescu University and Foundation of Law and International Relations Niculae Titulescu, The 12th International Conference "Challenges of the Knowledge Society", Nicolae Titulescu Publishing House, Bucharest, 2018, pp. 347 – 355.

[28] They may concern not only the situation when minors travel abroad, but also other important decisions which come into the sphere of common parental authority.

exercising parental authority on behalf of the parent whose consent was substituted.

In this situation, the case-law considered deciding upon exclusive parental authority on the basis of Article 398 of Romanian Civil Code and Article 36 Para 7 of Law no. 272/2004[29] (which gives the courts possibility to appreciate in subjective situations, depending on circumstances specific to each individual case).

We consider that the situation mentioned is a "serious reason" in the meaning of Article 398 of Romanian Civil Code, related to "risks for the child that would derive from the exercise by that parent of parental authority".

To this effect, it cannot be ignorred that judicial substitution of consent on every important decision obviously implies postponing the timing of the decision making until a final judgement is taken, with the inevitable consequence of affecting the best interests of the child by mere lack of decision in due time.

According to juridical literature30, Article 1628 of German Civil Code prescribes an interesting solution in such situations, namely the court may transfer authority to take that type of decisions to one of the parents.

Romanian juridical system does not have such a legislative solution, and therefore the solution of excusive parental authority offerd by the case-law should be pondered on in situations of repetitive substitution of parental consent.

**2.5.2. International institutions**

The Hague Convention on the Civil Aspects of International Child Abduction[31] (the 1980 Hague Convention) is an intergovernmental agreement which aims „to secure the prompt return of children wrongfully removed to or retained in any Contracting State (…)"[32].

The principle is that the court in the state where that child has been removed/retained will order the immediate return of the minor, except for a few situations provided in Article 12 of the Convention (integration of the child into the new environment), Article 13 of the Convention (serious psychological or physical risk to the child in the case of return) and Article 20 of the Convention (the return is not allowed by the fundamental principles of the requested state with regard to the safeguarding of human rights and fundamental freedoms).

For the matter under discussion in this study, Article 12 of the Convention presents significant relevance in the light of the provisions of two paragraphs, according to which: „(1) When a child has been illegally removed or retained (…) and *a period of less than one year has elapsed from the moment of removal or retaining* (…) the requested authority shall arrange for its immediate return. (2) The judicial or administrative authority, having been notified even after the expiration of the one-year period provided for in the previous paragraph, shall also order the return of the child, *unless it is established that the child has integrated into his/her new environment*". (our underline)

The period of 1 year to which the Convention makes reference is of high importance as to juridical consequences: if less than 1 year has elapsed from the moment of removal or retaining of the child in another state, the court shall decide immediate return of the child; on the contrary, if more than 1 year has elapsed, the court may appreciate upon integration of the child in the new environment and reject the return in the state of origin.

Taking into account the aspects presented above, we consider that substitution of parental consent so that minors should travel abroad *for periods that exceed 1 year* might lead to an interpretation of integration of the minor into the new environment and thus indirectly open the possibility to change the child's domicile in another country by a rather simple procedure[33].

This is another reason why we consider important to make the distinction between substitution of parental consent for touristic travels outside the country and the change of domicile of the child abroad.

It is also the reason why we do not agree to some (few) situations when the case-law decided to substitution of parental consent for periods of even 3 years[34].

This type of judgements was probably pronounced starting from a provision of national law

[29] Article 398 of Romanian Civil Code („Exclusive parental authority"): "For serious reasons, given the interests of the child, the court decides that parental authority is exercised exclusively by a parent. (2) The other parent retains the right to watch over the child's care and education and the right to consent to adoption" (our underline). Article 36 Para 7 of Law no. 272/2004 exemplifies the subjective reasons mentioned by Civil Code in a general manner: "There are considered serious grounds for the court to decide that parental authority is exercised by a single parent alcoholism, mental illness, drug addiction of the other parent, violence against children or against the other parent, convictions for human trafficking, drug trafficking, crimes concerning sexual life, crimes of violence, as well as any other reason related to risks for the child that would derive from the exercise by that parent of parental authority." (our underline)

[30] B.D. Moloman, L.-C. Ureche, Noul Cod Civil. Cartea a II-a. Despre familie. Art. 258-534. Comentarii, explicații și jurisprudență, Universul Juridic Publishing House, Bucharest, 2017, p. 671.

[31] Concluded at The Hague on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, which entered into force on 01 December, 1983.

[32] Article 1 of 1980 Hague Convention.

[33] If formulated by way of an emergency ordinance, the merits of the case will not be analysed, and the application will be judged taking into account the mere appearance of law.

[34] E.g., Judecătoria Sectorului 5 București, case no. 8875/302/2017, decision no. 9150 pronounced on 19.12.2017, not published, precited, decided on substitution of consent to travel abroad for a period of 3 years "considering that this is a reasonable period both for completing the medical treatment and traveling for recreational purposes".

relatively recently introduced in Law no. 248/2005 by Law no. 169/2016[35].

Article 30 Para 1 b of Law no. 248/2005 (actual form) stipulates that minors can leave the country accompanied by a single parent „if the accompanying parent shall submit a declaration of the other parent showing his or her agreement to travel abroad for *a period not exceeding three years* from the date of the declaration". (our underline)

In the larger context presented so far, we consider that a clear distinction should be made between situations when parents *agree* on minors traveling abroad, respectively there is a *judiciary judgement* on parental substitution consent.

In a logical interpretation of Article 30 Para 1 b previously cited, only the first situation (parents agree) falls within its sphere of application (period of three years), as the text automatically implies an agreement of the parent who accepts to offer the declaration for the minor to travel abroad (and therefore judicial substitution is not necessary).

The literary interpretation leads to the same conclusion, as the text associates the period of three years to the declaration of the parent (not a judgement of parental consent substitution).

Finally, if an agreement intervenes and parents decide to make an agreement declaration for 3 years on the basis of mutual trust, it significates that the parents voluntarily take the risk of a potential application of Article 12 Para 2 of the Convention (non-return of the child for integration in the new environment).

Such possibility should nevertheless not be opened in an indirect way by the court itself in a situation of substitution, when it is clear that parents disagree and do not trust each other (and therefore the risk of non-return is higher).

Moreover, there are situations when parents justify their refusal invoking exactly the fear that the other parent will not bring back the child, which should carefully be analysed depending on particular aspects of the case[36].

## 3. Conclusions

According to Romanian national legislation, the important decisions enshrined in the sphere of application of joint parental authority are decisions on establishment of minors' place of residence, form of education and professional training, complex medical treatments and surgical interventions, respectively administration of minors' property.

The principle is that the abovementioned decisions cannot be taken but with the consent of both parents.

The law prescribes nevertheless situations when coparental consent is not necessary in case of decisions on establishment of minors' place of residence (more precisely, for traveling abroad during limited periods of time).

These situations are related either to parents (deprived of parental rights or declares missing), or the child (medical treatment or official studies or competitions).

On the other hand, if co-agreement is necessary and parents cannot reach it, the remedy conceived by case-law for safeguard of the principle of the best interests of the child is substitution of parental consent by national courts (judicial limitations of common parental authority).

This remedy in favour of the child is at the same time a sanction for the parent who acts in an abusive manner and out of the scope of common parental authority.

The courts seized with applications for substitution of parental consent should therefore carefully consider the balance between the interest of the child and the reasons invoked by the oppozant parent, according to the individualities of each case.

From a procedural point of view, both urgent procedures of provisional measures, and procedures on the merits of the case should be available (although only urgent procedures can be efficient, as urgency is of the outmost importance in such cases).

Decision on substitution of parental consent should be seriously pondered on, as the effects overcome the sphere of the dispute in which the decision of substitution has been pronounced.

In terms of national law, repetitive decisions of substitution of parental consent may have the final outcome of exclusive parental authority, as they profile the pattern of an abusive parent.

In terms of international law, an unclear decision on substitution of parental consent may indirectly lead to a change of domicile of the child in another country in consideration of Article 12 Para 2 of 1980 Hague Convention (integration of the minor into the new environment if the period elapsed from departure/non-return exeeds 1 year).

For reasons presented, decisions on parental substitution for minors traveling abroad should always clearly indicate the precise location and the period during which the child may remain abroad without the consent of the other parent, which should not exceed 1 year.

[35] Law no. 169/2016 for amending and completing Law no. 248/2005 on the regime of the free movement of Romanian citizens abroad, published in the Official Gazzette of Romania no. 772/03.10.2016.

[36] "The refusal of the defendant can be considered abusive since she has not argued her reluctance in terms of the superior interest of the minor, not explaining *in concreto* why the travel is not appropriate, expressing only the concern that the applicant would not return the child to her home, without any substantiated arguments" (Judecătoria Sectorului 4 București, case no. 31918/4/2017, decision no. 15855 pronounced on 21.12.2017, precited).

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# THE RULE OF LAW-CONSTITUTIONAL AND CONTEMPORARY JURISPRUDENTIAL SIGNIFICANCE

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**Abstract**

*The doctrine of the rule of law originates from German theory and jurisprudence, but is now a requirement and a reality of constitutional democracy in contemporary society. At present, the rule of law is no longer a simple doctrine but a fundamental principle of democracy consecrated by the Constitution and international political and legal documents. In essence, the concept of the rule of law is based on the supremacy of the law in general and of the Constitution in general. Essential for the contemporary realities of the rule of law are the following fundamental elements: the moderation of the exercise of state power in relation to the law, the consecration, the guarantee and the observance of the constitutional rights of man especially by the state power and, last but not least, the independence and impartiality of justice.*

*In this study we analyse the most important elements and features of the rule of law with reference to the contemporary realities in Romania. An important aspect of the analysis refers to the separation, balance and cooperation of the state powers, in relation to the constitutional provisions. The most significant aspects of the jurisprudence of the Constitutional Court on the rule of law are being analysed.*

**Keywords:** *Conditions of the rule of law / powers separation and balance / law supremacy / guarantee of fundamental rights / contemporary realities and aspects of constitutional jurisprudence*.

## 1. Introduction

The notion of state attributes means its defining dimensions as they result from constitutional provisions, as an expression of the political will and determined by the political regime and at the same time values of principle of constitutional order.

The rule of law, pluralism, democracy, civil society are unquestionable universal values of contemporary political thinking and practice and are found to be expressed in the Constitution of Romania as well as in international documents. The state attributes configure its quality as constitutional law subject and define the power, but also the complex reports between the state and citizens and the other constitutional law subjects. The attributes of the Romanian state regulated by the provisions of art. 1 paragraph (3) of the Romanian Constitution: 1. rule of law; 2. social state; 3. pluralist state; 4. democratic state.

The rule of law is one of the most discussed concepts of constitutional law and is unquestionably related to the transition from the state law to the rule of law. In the literature, contradictory opinions were sometimes affirmed, according to which the rule of law corresponds to an anthropological necessity or is a myth, a postulate and an axiom, and on the other hand, the rule of law is a pleonasm, a legal nonsense.

The concept of the rule of law is a constitutional reality whose foundation is found in the mechanisms of the exercise of state power, in the relations between power and liberty of every individual of society and in the application of the principle of legality to the entire state activity, but also in the behaviour of each member of society.

The rule of law has formed and spread over three major models:

**1.** The *English model of* "Rule of Law" is characterized by the limitation of the monarch's power and, on the other hand, by preserving the power of the parliament, which in terms of constitutional law means:a) the restriction of the powers of the monarch and their recognition of a power constituted by the norms of positive law, b) the necessity to found acts of the executive directly or indirectly on the authority of the Parliament, c) the obligation of all subjects of law to submit to the law of jurisdiction. **2.** The *German concept* emphasizes the need to ensure the legality of the administration and its judicial control; 3. The French conception regards the rule of law as a legal state, proclaiming and maintaining the principle of legality. **3.** The *French concept* considers the rule of law as a legal state, that proclaims and defends the principle of legality.

In the expression rule of law there are two aspects of the legal, seemingly contradictory but still complementary: normativism and ideology. In the normative plane, the rule of law appears as a structural principle of the Constitution along with other essential attributes of the state, materializing the fundamental values on which the existence of society and state are based.

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## 2. Content

From the normative point of view, the requirements of the rule of law are manifested in a double sense: a) the formal meaning expresses the requirement that the state and its organs observe the laws, strictly subordinate to the juridical rules regarding the composition of the state bodies, their attributions and their functions. and b) the material meaning - the requirement that the state bodies, exercising their functions, comply with the legal guarantees concerning the exercise of citizens' fundamental rights and freedoms.

In the field of ideology, the rule of law confers a logical system of ideas by which people represent their society, the state, in all its manifestations, and which confer the legitimacy of the state.

The term "rule of law" is not a simple logical concept but it expresses a fundamental constitutional necessity according to which: a) the state is indispensable for the law in order to create for it its norms and to ensure the finality and effectiveness of the legal norms; b) the law is indispensable for the state to express power by establishing a general and binding behaviour.

In essence, the rule of law expresses a condition of power, a movement to rationalize it, but also a new conception of law, its role and functions. Professor Tudor Draganu, in his paper "*Introducere în teoria şi practica statului de drept*" (Introduction to the Law and Practice of the Rule of Law), proposes an interesting and comprehensive definition of this concept of constitutional law: "The rule of law is considered to be that state which was organized on the basis of the principle of separation of powers of the state, the application of which justice acquires real independence and pursues through its legislation the promotion of the rights and freedoms inherent in human nature, ensures the strict observance of its regulations by all its organs in all their activity. "

The definition defines the main elements of the rule of law - the separation of powers as a reality of the state activity, in the application of which justice acquires real independence and pursues through its legislation the promotion of rights and freedoms inherent in human nature, ensures the strict observance of its regulations by all its organs, in their entire activity".

This definition renders the basic features of the rule of law – separation of powers, as reality of the state activity, the application of the principle of legality in the activity of all the state bodies, the observance and the guarantee of fundamental human rights. Also, from the same definition result the basic features of the rule of law, respectively: *a)* the freedoms of the human being require guarantees of security and justice through the primacy of law and in particular the Constitution; *b)* the moderation of the execution of the power requires the organization and adaptation of the functions of the erratic organisms and a hierarchical normative system.

In the final document of the Copenhagen Summit in 1990 was stated that *the rule of law* does not simply mean a formal legality, and in the Charter of Paris from 1990 *the rule of law* is prefigured not only in terms of human rights but also of democracy, as the only governing system.

From the corroboration of the principles written in international documents, as well as in relation to the constitutional law doctrine, we consider as conditions or characters of the rule of law the following: 1. the accreditation of a new concept concerning the state, especially under the following aspects: the voluntary or consensual nature of the state, the delimitation of the state from the civil society, the responsibility of the state and the authorities that make it, and the moderation of constraint as a means of intervention of the state in society by appropriate and reasonable forms; 2. capitalization of the rations and mechanisms of the principle of separation of powers in the state; 3. the establishment and deepening of an authentic and real democracy; 4. Institutionalization and guaranteeing of the rights and freedoms of man and citizen; 5. the establishment of a coherent and hierarchical legal order and of an area of law.

The systematic functionality and consistency of the rule of law must be ensured by a number of regulatory systems, namely: *a)* political control by Parliament as one of its essential functions through various institutional means *b)* administrative control that is carried out in the system public authorities, either on their own initiative or at the initiative of citizens; *c)* judicial review of the legality of administrative acts entrusted to either the courts of common law or the specialized courts; *d)* control of the constitutionality of laws; *e)* control of the observance of fundamental rights and freedoms through the bodies of the authority and the judiciary; *f)* the conciliation and control procedure, which is carried out through the institution of the "ombudsman" or the People's Advocate; g) free access to justice and organizing the court activity in several degrees of jurisdiction.

The consecration of the rule of law in the Constitution of Romania is achieved not only by art. 1 paragraph 3 of the 1st thesis, but also by many other constitutional provisions expressing the content of this principle of organization and exercise of power in a democratic society. In this respect we reiterate the provisions of art. 16 paragraph (2), which provide that no one is above the law and those of art. 15 paragraph (2) proclaiming the principle of the unretroactivity of the law, principles essential to the entire construction of the rule of law. The content of the rule of law is expressed in particular in the constitutional provisions regarding the separation and balance of state powers as well as those regarding the organization, functioning and attributions of the state institutions. The provisions refer to the fundamental rights, freedoms and duties of the citizens, to the mechanism of the separations of powers, pluralism, free access to justice, independence of courts, and the organization and functioning of

parliamentary, administrative and judicial control. They can be considered as a constitutional normative expression of the content and requirements of the rule of law

The rule of law is not a state whose essence is exhausted by constitutional regulations and other normative acts at a given moment. The rule of law is not exclusively an institution of constitutional law but must become a reality found at the level of the conduct of each subject of law, whether it is a state organ or a simple citizen. This means and implies a complex evolutionary process in which all the structures of society participate, and at the same time a process of perfection on the ideological and moral level in order to improve the activity of the organs of state and to effectively establish the principle of legality, to form a civic behaviour in the spirit of observance the law and the fundamental values of democratism.

The Constitution of Romania establishes, in its normative content, the main guarantees of the rule of law:

a) the constitutional regime, that is, the establishment in the Constitution of the fundamental principles of organization and activity of the three powers. Establishing the legal regime applied to the revision of the Constitution;
b) the direct or indirect popular legitimacy of state and public authorities;
c) ensuring the supremacy of the Constitution through political or judicial control, as well as ensuring the rule of law, over other normative acts;
d) he exercise of fundamental rights and freedoms may be restricted only temporarily, only in cases expressly determined in proportion to the circumstance justifying the restriction and without suppressing the very right or fundamental freedom;
e) independence and impartiality of justice.

Therefore, art. 21 paragraph (2) of the Constitution of Romania stipulates that no law may impede the free access of a person to justice for the protection of legitimate rights, freedoms and interests.[1]

From the complexity of the issue of the rule of law, we further on refer to the implicit application of the principle of proportionality in the constitutional provisions on the state organization of power.

This principle is explicitly expressed in the Constitution of Romania only in the provisions of art. 53, but it is implicitly found in other constitutional regulations as it has been emphasized in the specialized literature. The constitutional principle of proportionality is a synthesis of other principles of law and expresses the ideas of fairness, and the correctness of the state's dispositions to the intended purpose. We consider it a criterion in relation to which the powers of the state are organized in a state of law because by its application a dynamic and functional balance is realized in the institutional diversity of the state system. We also underline the fact that this principle confers legitimacy and not only the legality of state decisions and is a criterion already used in jurisprudence which establishes the demarcation between the exercise of power within the limits of the Constitution and laws and on the other hand the excess of power in the activity of the organs of the state in situations where state decisions have the appearance of legality but are also not legitimate because they are not appropriate to the intended purpose defined by constitutional or secondary legislation We believe that the constitutional principle of proportionality can be considered a requirement of the rule of law.

Further on, briefly analyze the application of the principle of proportionality to the state organization of power in our country, as it results explicitly or implicitly from the constitutional provisions applicable.

The principle of the separation of powers in the state, considered to be a foundation of democracy, is at the same time a reflection on the moderation and rationalization of state power. “Balancing these powers by judiciously distributing the powers and equipping each of them with effective means of control over the others, thus defeating the inherent tendency of the human power to grasp the whole power and to abuse it is the condition of social harmony and the guarantee of human freedom”. In its classical form, as it is known by the decisive contribution of Montesquieu, the principle of separation of powers in the state affirms that in any society there are three distinct powers: legislative, executive and judicial power. These three powers must be exercised by separate organisms independent of each other. The purpose of this division is that power should not focus on a single state organ, which would naturally tend to abuse the prerogatives entrusted to it. “In order that power not be abused, it is necessary that by the arrangement of things power stop power” -says Montesquieu. At the same time, the division of state power is necessary to respect individual rights and freedoms, so that one power opposes the other and creates itself instead of a single force, a balance of force.

In order to achieve these goals, the organs of the state must be independent of one another in the sense that no one can exercise the function entrusted to the other. Consequently, it is not possible for an organ of the state to be subordinated to another, if it exercises a separate power.

The doctrine states that: “The theory of separation of powers is in fact an ideological justification of a very concrete political purpose: weakening the power of the governors as a whole, limiting one another. It is considered that the separation of powers has two well-defined aspects: a) separation of parliament from the government; b) separation of jurisdictions against the governors, which allows them to be controlled by

[1] To develop, see: Marius Andreescu, Andra Puran, *Drept constituțional. Teoria generală a statului*, 3rd edition, (Bucharest: C.H. Beck, 2018) , 65-75.

independent judges[2]. The theory and principle of the separation of powers in its classical form were criticized in doctrine. "Montesquieu's error", wrote Carré de Malberg, "is certainly to have thought it possible to regulate the game of the public powers by their mechanical separation and, in a certain way, mathematical, as if the problems of the state organization were susceptible to be solved by procedures of such rigor and precision"[3]

In the doctrine, other inaccuracies and limitations were noted as well, among which we recall: from the terminology used, it is not clear whether a "state body" or a "function" is to be understood by power; power is unique and indivisible and belongs to a single titular - the people. That is why we cannot speak of the division of powers, but, possibly, the distribution of the functions involved in the exercise of power; the separation of powers, conceived in the form of opposition between them, is likely to block the functioning of state authorities. It is not possible for the sovereign exercise of the completeness of each of the static functions to be assigned to a separate authority or group of authorities. None of the state organs perform a function in integrity, and consequently the steady organs cannot be rigidly and functionally separated; in most constitutional systems, as a result of the existence of political parties, the real problem is not the separation of powers, but the relationship between the majority and the minority or, in other words, between the governors and the opposition. There is no antagonistic relationship between parliament and government. A government that has a parliamentary majority will work in close association with the parliament, which is considered a modern state of their efficiency; the legislative function is not equal to the executive function. Execution of the law is by definition subject to legalization. If the two functions are in hierarchical relations, then the organs that perform those functions are in the same ratios.

It should also be underlined that, in doctrine, there is more and more talk of a decline of legislative power in favour of the executive; the separation of powers does not solve the issue of guaranteeing fundamental human rights. Constitutional justice is the main guarantor of respect for fundamental rights, but it does not find its place in the classic scheme of separation of powers in the state[4].

In the case of the theory of separation of powers in the state it was said that "the myth" far exceeds the reality. In fact, it is the dogmatic confidence to impose on a concrete reality a pre-established theoretical and abstract framework[5]. The criticisms formulated and the modernization tendencies cannot result in the abandonment of this principle. "The great force of the theory of separation of powers in the state - said Professor Ioan Muraru - lies in its fantastic social, political and moral resonance[6]. It should not be forgotten that the principle is enshrined, explicitly or implicitly, in the constitutions of the democratic states. From the perspective of our research theme, it is important to consider the autonomy of the state authorities and the relations between them in order to prevent separatism and rigidity.

The myth of absolute separation of powers is in fact, Carré de Malberg says, irreconcilable, "with the principle of unity of the state and its powers"[7]. The will of the state, he continues, being necessarily a single one, must be maintained between the authorities that held a certain cohesion, without which the state would risk being harassed, divided and destroyed by the opposite pressures to which it would be subjected. It is thus impossible to conceive that the powers in the state are equal. "That is why, in any state, even in those whose Constitution is said to be based on Montesquieu's theory and pursues a certain equalization of powers, invariably will find a supreme organ that will dominate all the others and thus achieve the unity of the state".[8] As the author states, it is not so much about separation, but rather about the "gradation of powers". There would then be a single power that would first manifest through acts of initial will - the legislative power - and would be exercised at a lower level through law enforcement acts - the executive power.

It follows that the powers of the state are unequal, but this cannot have the significance of subordination, nor can allow for excess power. "State means also force, hence the risk of escaping from the control of the holder, of considering himself being the owner of the power"[9]. At the same time, a coherent functioning of the organs of the state is not possible, nor can it be conceived, unless there are some relations between them.

It was said that, given the existence of political parties and their access to power, "the real problem is not that of the relations between the institutionalized powers but of the relations between the majority and the minority, between the government and the opposition, especially when the government comes from a parliamentary majority, comfortable and homogeneous and leaning on it".[10]

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[2] Ioan Muraru, Elena Simina Tănăsescu, *Drept constituţional şi instituţii politice*, Vol. II, (Bucharest: All Beck, 2003), 121.

[3] Carré de Malberg, *Contribution á la théorie géneral de l'Etat*, vol. II, (Paris: Tenin, 1922), 35.

[4] See also: Charles Eisenmann, „L'espirit des lois et la separation des pouvoirs", in *Cahiers de philosophie politique* no. 2-3 (1984): 198; Dominique Rousseau, *Droit du contentiux constitutionnel*, (Paris, 1990), 365, 256-265; Ioan Muraru, Elena Simina Tănăsescu, *op. cit.*, vol. II, 9-11.

[5] See: Olivier Duhamel, Yves Meny, *Dictionnaire constitutionnel*, (Paris: PUF, 1992), 972-975.

[6] Ioan Muraru, Elena Simina Tănăsescu, *op. cit.*, vol. II, 11.

[7] Carré de Malberg, *op. cit*., vol. II, 23.

[8] Carré de Malberg, *op. cit*., vol. II, 52.

[9] Ioan Muraru, Elena Simina Tănăsescu, *op. cit.*, vol. I, 19.

[10] Ion Deleanu, *Drept constituţional şi instituţii politice*, vol. I (Bucharest: Europa Nova, 1996), 95.

In a wider sense, it must be stressed that democracy generates a majority that leads, imposing its will and values to minorities, but they also have the opportunity to express themselves and their rights have to be respected. Achieving the democratic and functional balance between the majority and the minorities is the solution to avoid what the doctrine is called the "tyranny of the majority". Undivided power - says Giovani Sartori - is always an excessive and dangerous power. Thus, the tyranny of the majority, relevant from a constitutional point of view, is defined according to the rights of the minority, especially if the right to opposition is complied with or not[11]. The main problem in this context is that the minority or the minorities have the right to oppose, have the right to opposition.

The relationship between the majority and the minority involves the analysis of the very complex interaction between those that govern and the ones that are governed. Interaction consists of a multilevel process in which majorities and minorities are materialized in different ways and at different levels. The rule that allows the functioning of such a complex system of democracy is the application of the principle of majority in decision-making. However, Hamilton observed very well: "Give all the power to many, and they will oppress the few. Give all the power of the few, and they will oppress the many".[12] Therefore, the problem is to avoid giving all or most of the power to all, by distributing it, alternately and/or at the same time to the majority and minority.

Therefore, in order to avoid dogmatism, in order to respond to these problems of social, political and state realities, it is necessary to reconsider the theory of the separation of powers in the state from the point of view of the principle of proportionality. The fundamental idea has already been stated: the moderation of power and the balance in the exercise of power that actually reflects, to a certain extent, the balance of social forces[13]. When discussing the content and meanings of the separation of powers, it is less about separation, but especially about the balance of powers[14]. Balancing the powers in the state by judiciously distributing the powers and equipping each with effective means of control over the others, thus stabilizing the tendency to capture the whole power and to abuse it, is essentially the application of the principle of proportionality to the organization of state power. This is the condition of social harmony and the guarantee of human freedom [even though, until now, an explicit reference to the principle of proportionality has not been made in the specialized literature, it results from the context of supporting some authors: "So, weight and counterweights in the power tiles so that none of them dominates the others. It would not be so much a separation of powers, but especially about their relative autonomy and their mutual dependence: the balance of powers ".[15]

Rethinking the separation of powers in terms of the constitutional principle of proportionality can be answered, in our opinion, to all the problems listed above.

**The principle of the separation** of powers in the state was not explicitly enshrined in the Constitution of Romania before its revision in 2003, but from the analysis of the constitutional texts, the doctrine ascertained that the balance of state powers as a principle was found in the content of the norms of the Constitution Through the Review Law, the Romanian derived constituent expressly enshrined this principle, referring not only to the separation of powers but also to the balance between them: "The State is organized according to the principle of separation and balance of powers - legislative, executive and judicial - within constitutional democracy"[Art. 1 paragraph (4)].

The necessary balance between state authorities is the expression of the principle of proportionality applied in the matter of organizing the institutional system of power in Romania. State authorities are neither equal nor independent in the absolute sense. The balance that a proportionality relationship implies is based on differences but also on interrelations that allow the functioning of the institutional system so as to avoid excessive concentration of power or exercise of the same, as well as the excess of power, especially by violating human rights and fundamental freedoms. The finality of the proportionality ratio between public authorities is "the establishment of balanced correlations between the governors and the ones that are governed, complying with the public freedoms"[16]. We will refer to some of the constitutional regulations concerning the Romanian state institutional system, which reflects the principle of proportionality:

**A**. Elements of *difference* between state authorities, meaning the autonomy of each category of organs and their position within the system: public authorities are governed distinctly by the rules contained in Title III of the Constitution. These are the "three classic powers" in the traditional order: legislative, executive and judicial power.

The Constitution confers a certain degree of prerogative to Parliament in relation to the other state authorities: "Parliament is the supreme representative body of the Romanian people and the sole legislator authority of the country" (art. 61 paragraph (1).

Besides the classic scheme of the separation of powers in the state, the Constitutional Court achieved constitutional power (art. 142 and subsequent of the

[11] Giovani Sartori, *Teoria democraţiei reinterpretată*, (Bucharest: Polirom, 1999), 137.
[12] Jonathan Elliot, *Debates on the Adoption of the Federal Constitution*, (Philadelphia: Lippincott, 1941), 203.
[13] Constance Grewe, Helene Ruiz Fabri, *Droit constitutionnels europeans*, (Paris: PUF, 1995), 361 and next.
[14] Ion Deleanu, *op. cit*., vol. I, 80.
[15] Ion Deleanu, *op. cit*., vol. I, 80.
[16] Ioan Muraru, Mihai Constantinescu, „Rolul Curţii Constituţionale în asigurarea echilibrului puterilor în stat", in *Dreptul* no. 9 (1996).

Fundamental Law), which is the guarantor of the supremacy of the Constitution, the only constitutional jurisdictional authority of Romania, independent of the any other public authority [art. 1 paragraph (3) of the Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished]. The People's Advocate is also independent of any other public authority. He is appointed by the Parliament in the joint session of the Chambers [art. 65 paragraph (2) letter i)]. Ex officio or at the request of persons injured in their rights or freedoms, the People's Advocate may refer the matter to the public authorities in order to take measures to eliminate acts or facts that affect subjective rights or legitimate protected legal interests (article 58 and subsequent). It has the power to notify the Constitutional Court, in the situations provided by art. 146 letters a) and d);

The bicameral structure of Parliament is an expression of the balance involved in the principle of proportionality. Thus, Chambers are equal but are functionally differentiated in the exercise of their legislative powers. The distinction between the Chamber referred first (of reflection) and the Decision Chamber, made by article 75, expresses the "quasi-perfect" bicameralism, which is a proportionality ratio. We agree with the opinion expressed in the literature, according to which "the system of parliamentary bicameralism in Romania must be preserved, but it must be transformed into a differentiated bicameralism. Thus, to the law of democratization and efficiency can be ensured, and to the legislative organ a representativeness and responsibility increment."[17]

The difference between the length of the term of office of some state authorities contributes to a proportionate ratio between the powers of the state, is the expression of the balance and not of the formal equality, in order to ensure the good functioning of the Romanian institutional system. Thus, the duration of Parliament's mandate is 4 years (Article 63), of the President of Romania is 5 years (Article 83), of the members of the Superior Council of Magistracy is 6 years (Article 133), the mandate of the judges at the Constitutional Court is 9 years, and the president of this institution is elected for a period of 3 years (Article 142), the judges of the courts appointed by the President of Romania have practically an indefinite mandate in time because they are irremovable under the law (art. 125). The People's Advocate mandate is 5 years (Article 58).

**B.** The specialty literature highlighted the particularities of the relations between the state authorities, which in our opinion materialize the principle of proportionality, because the relational balance also implies the difference. In this respect, it was stated that: "The election of the President of Romania by the people, an essential feature of the presidential republics, combines in our country with the pre-eminence of the Parliament, as a result, mainly, of the parliamentary origin of the government, thus defining a semi-presidential political regime" [18].

The set of interrelations between the different categories of organs of the state is the form of achieving the balance and mutual control of the powers. These relations, which form the "identity card of the state power system"[19], presuppose the autonomy of the state authorities and the differences between them. The complex structure of the state power system is a concretisation of the principle of proportionality, in other words, it strikes a balance between the powers of the state, which are based on autonomy, differentiation and interrelations. The more the constitutional regulations in the field manage to materialize the requirements of the principle of proportionality, the more exists the guarantee of avoiding some forms of concentration of the state powers, the tyranny of the majority or minorities and obviously the excess of power.

The concern of the Romanian constituent legislator to achieve a functional balance between the powers of the state, between these and society, is obvious, if we refer to the provisions of art. 80, according to which: "The President exercises the function of mediation between the powers of the state as well as between state and society", but also to the provisions of art. 146 letter e) according to which our constitutional court has the competence to resolve constitutional legal conflicts between public authorities. We also need to remember the role of mediator and balance factor for the powers of the state, but also for the society that justice has. In this respect, the provisions of art. 124 of the Constitution consecrate the general "uniqueness, impartiality and equality" of justice, which represents important guarantees for the achievement of the functions of the judicial power in society.

Of course, the system of state power is an open, dynamic one, implying not only the multiplication of its constituent elements or their reorganization, but also of the functions that correspond them and of the interrelationships between the elements of the system. Within the internal system, the social-political system, and externally the system of the international community of states represent the "environment" with which the state authorities interact. Therefore, the balance, as a particular aspect of the principle of proportionality, between the powers of the state must be understood in its dynamics, including in the continuous process of interpreting and applying the constitutional provisions in the matter.

Proportionality, as a principle of constitutional law, has a concrete dimension. The existence of a proportionate, balanced relationship between the state authorities, between them and society, is verified in practice through the functioning of the political and

[17] Ioan Muraru, Andrei Muraru, ,,Scurtă pledoarie pentru un bicameralism parlamentar diferențiat", in *Revista de drept public* no. 1 (2005):.8
[18] Mihai Constantinescu, "Echilibrul puterilor în regimul constituțional din România", in Dreptul no. 3 (1993): 3.
[19] Ion Deleanu, *op. cit.*, Vol. II, 201.

social system, the avoidance of crises, or, when they occur, through the capacity of the state authorities to manage these, complying in any situation with the principles of the rule of law. Essential for the fulfilment of the requirements of separation and balance between the powers of the state, but also for stability, in its social and political system dynamics, from the perspective of pluralism in society, there is the existence of a proportionate balance between the majority and the minorities between the government and the opposition, "especially when the government comes from a comfortable and homogeneous parliamentary majority and relies on it".[20]

At the end of this analysis we shall refer to some decisions of the Constitutional Court which we consider relevant to the rule of law.

The Constitutional Court identifies the fundamental feature of the rule of law, namely the supremacy of the Constitution and the obligation to observe the law. See to that effect[21].

At the same time, it has been stated in the jurisprudence of the constitutional court that the rule of law, ensuring the supremacy of the Constitution, also realizes "the correlation of all laws and all normative acts with it"[22] .

The requirements of the rule of law concern the major purposes of state activity, namely the supremacy of law, which implies the subordination of the state to the law. In this respect, the law provides the means by which the political options or decisions can be censored and performs the abolition of any abusive and discretionary tendencies of the state structures. Further on, the rule of law ensures the supremacy of the Constitution, the existence of the regime of separation of the public powers and establishes guarantees, including of a judicial nature, that ensure the observance of citizens' rights and freedoms, primarily by limiting the state authority, which represent the framing of the public authorities' activities within the limits of the law.

The jurisprudence of the Constitutional Court expresses the main requirements of the rule of law in relation to the goals of the state activity. Thus, by jurisprudence is achieved a very eloquent synthesis of the doctrine on the notion and features of the rule of law. It is significant in this respect the Decision no. 17 of January 21st 2015[23], by which the Constitutional Court gives an explanation concerning the state of law, enshrined in art. 1 paragraph (3) thesis I of the Constitution: "The requirements of the rule of law concern the major purposes of its activity, prefigured in what is commonly called the reign of law, a phrase involving the subordination of the state to the law, the guarantee of the means to allow the law to censor political choices and, in this context, to weigh the potential abusive, discretionary tendencies of the static structures. The rule of law ensures the supremacy of the Constitution, the correlation of laws and all normative acts with it, the existence of the regime of separation of the public powers that must act within the limits of the law, namely within the limits of a law expressing the general will. The rule of law enshrines a series of safeguards, including jurisdictional, to ensure that citizens' rights and freedoms are complied with by the state's self-restraint, namely the involvement of public authorities in the coordinates of law".[24]

The principle of stability and security of legal relations is not explicitly enshrined in the Constitution of Romania, but, like other constitutional principles, it is involved in the constitutional normative provisions, respectively art. 1 paragraph (3), which enshrines the rule of law. In this way, our constitutional court accepts the deduction, by way of interpretation, of the principles of law implied by the express rules of the fundamental Law. In this respect, by means of the Decision no. 404 of April 10th 2008[25], the Constitutional Court stated that: "The principle of stability and security of legal relations, although not explicitly enshrined in the Romanian Constitution, is deduced both from the provisions of art. 1 paragraph (3), according to which Romania is a state of law, democratic and social, and from the preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights in its jurisprudence". See also Decision no. 685 of November 25th 2014[26]. Furthermore, our constitutional court has considered that the principle of security of civil legal relationships is a fundamental dimension of the rule of law[27]

Constitutional Court decides constantly for clarity and predictability of law, which are requirements of the rule of law. Thus, "the existence of contradictory legislative solutions and the annulment of legal provisions through other provisions contained in the same normative act lead to the violation of the principle of security of legal relations, due to the lack of clarity and predictability of the norm, principles which constitute a fundamental dimension of the rule of law, as it is expressly enshrined in the provisions of art. 1 paragraph (3) of the fundamental Law[28].

[20] Ion Deleanu, *op. cit*., vol. I, 95.

[21] Decision no. 232 of July 5th 2001, published in the Official Gazette no. 727 of November 15th 2001, and Decision no. 53 of January 25th 2011, published in in the Official Gazette no. 90 of February 3rd 2011.

[22] Decision no. 22 of January 27th 2004, published in the Official Gazette no. 233 of March 17th 2004.

[23] Published in the Official Gazette no. 79 of January 30th 2015.

[24] See also Decision no. 70 of April 18th 2000, published in the Official Gazette no. 334 of July 19th 2000.

[25] Published in the Official Gazette no. 347 of May 6th 2008.

[26] Published in the Official Gazette no. 68 of January 27th 2015.

[27] See Decision mo. 570 of May 29th 2012, published in the Official Gazette, no. 404 of June 18th 2012, Decision no. 615 of June 12th 2012, published in the Official Gazette no. 454 of July 6th 2012.

[28] Decision no. 26 of January 18th 2012, published in the Official Gazette no. 116 of February 15th 2012).

Concerning the rule of law, the Constitutional Court has shown that justice and social democracy are supreme values. In this context, the militarized authorities, in this case the Romanian Gendarmerie, exercise, under the law, specific powers regarding the defense of public order and tranquillity, of citizens' fundamental rights and freedoms, of public and private property, of prevention and detection of crimes, and other violations of applicable laws, and the protection of state institutions and the fight against acts of terrorism. Consequently, the Constitutional Court ruled: "By the possibility of militarized authorities to find contraventions committed by civilians, art. 1 paragraph (3) of the Constitution is not affected in any way, regarding the Romanian state, as a rule of law, democratic and social"[29]

Human dignity, together with the freedoms and rights of citizens, the free development of human personality, justice and political pluralism, are supreme values of the rule of law (art. 1 paragraph (3)). In the light of these constitutional regulations, it has been stated in the Constitutional Court's jurisprudence that the state is forbidden to adopt legislative solutions that can be interpreted as being disrespectful of religious or philosophical beliefs of parents, which is why organizing school activity must achieve a fair balance between the process of education and teaching religion, and on the other hand with respect for the rights of parents, to ensure education in accordance with their own religious beliefs. Activities and behaviours specific to a certain attitude of belief or philosophical, religious or non-religious beliefs must not be subject to sanctions that the state requires for such behaviour, regardless of the person's motivation for faith. "As part of the constitutional system of values, freedom of religious conscience is attributed to the imperative of tolerance, especially to human dignity, guaranteed by art. 1 paragraph (3) of the fundamental Law, which dominates the entire value system as a supreme value"[30]

It is also interesting to note that our constitutional court considers human dignity as the supreme value of the entire system of values constitutionally consecrated, value that is found in the content of all human rights and fundamental freedoms. At the same time, it is an important aspect that requires the state authorities in their entire activity to first consider respecting the human dignity.

It should be noted that in its jurisprudence the Constitutional Court also identifies the content components of human dignity, as a moral value but at the same time constitutional, specific to the rule of law: "Human dignity, in constitutional terms, presupposes two inherent dimensions, namely the relations between people, which refers to the right and obligation of the people to be respected and, in a correlative way, to respect the fundamental rights and freedoms of their peers, as well as the relation of man to the environment, including the animal world".[31]

## 3. Conclusions

Antonie Iorgovan said that an essential problem of the rule of law is to answer the question: "where discretionary power ends and where the abuse of law begins, where the legal behaviour of the administration ends, materialized in its right of appreciation and where the violation of a subjective right or legitimate interest of the citizen begins?" Therefore, the application and observance of the principle of legality in the activity of state authorities is a complex issue because the exercise of state functions presupposes the discretionary power with which the organs of the state are invested, or in other words the authorities' "right of appreciation" regarding the moment of adoption and the content of the measures imposed. What is important to emphasize is that discretionary power cannot be opposed to the principle of legality, as a dimension of the rule of law.

The excess of power can be manifested in these circumstances by at least three aspects: a) the appraisal of a factual situation as an exceptional case, although it does not have this significance (lack of objective and reasonable motivation); b) the measures ordered by the competent authorities of the State, by virtue of discretion, to go beyond what is necessary to protect the publicly threatened public interest; c) if these measures unduly and unjustifiably restrict the exercise of fundamental rights and freedoms constitutionally recognized.

The key issue for the practitioner and the theorist is to identify criteria by which to establish the limits of the discretionary power of the state authorities and to differentiate it from the excess of power that must be sanctioned. Of course, there is also the question of using these criteria in court practice or constitutional litigation.

Concerning these aspects, the opinion of the specialized literature was that "the purpose of the law will be the legal limit of the right of appreciation (of opportunity). For discretionary power does not mean a freedom beyond the law, but one permitted by law. Of course, "the purpose of the law" is a condition of legality or, as the case may be, the constitutionality of the legal acts of the organs of the state, and can therefore be considered a criterion for delimiting discretionary power from excess of power.

As can be seen from the case law of some international and domestic courts in relation to our research theme, the purpose of the law cannot be the only criterion to delimit discretionary power (synonymous with the margin of appreciation, term

[29] Decision no. 1330 of December 4th 2008, published in the Official Gazette no. 873 of December 23rd 2008.
[30] Decision no. 669 of November 12th 2014, published in the Official Gazette no. 59 of January 23rd 2015.
[31] Decision no. 1 of January 11th 2012, published in the Official Gazette no. 53 of January 23rd 2012. See also Decision no 80 of February 16th 2014, published in Official Gazette no. 246 of February 7th 2014.

used by the ECHR) of the State may be an excess of power not only in the case where the measures adopted do not pursue a legitimate aim but also in the case that the measures ordered are not appropriate to the purpose of the law and are not necessary in relation to the factual situation and the legitimate aim pursued.

The adequacy of the measures ordered by the state authorities to the legitimate aims pursued is a particular aspect of the principle of proportionality. Significant is the opinion expressed by Antonie Iorgovan, who considers that the limits of discretionary power are set by: "positive written rules, general principles of law, principle of equality, principle of nonretroactivity of administrative acts, right to defense and principle of contradictory, principle of proportionality Therefore, the principle of proportionality is an essential criterion that allows the discretionary power to delimit excess of power in the work of state authorities. And by this is an essential principle of the rule of law.

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# CASE-LAW CONTRIBUTIONS TO CONSTITUTIONAL REVIEW'S DEVELOPMENT IN ROMANIA

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**Abstract**

*To the Romanian system of law, jurisprudence does not have the quality of a formal source of law. Nevertheless, a legal reality, viewed from a historical perspective, has demonstrated the essential role of judicial practice in interpreting and enforcing the law, in constructing argumentative practices, in clarifying the will of the legislator, and in discovering the less obvious meanings of legal norms and, last but not least, in unifying thought and legal practice. Therefore jurisprudence, along with doctrine, is an important component of the Romanian system of law.*

*Based on these considerations, we intend to highlight some aspects of constitutional jurisprudence in this paper. We underline its contribution to the constitutional review of laws in Romania. Under the Constitution of 1866, which did not regulate institutionally such a control, the courts have assumed this competence by interpreting the law and by way of jurisprudence.*

*Important aspects of the Constitutional Court jurisprudence and of the courts in the development of constitutional review in our country are presented and analysed. We support the idea that jurisprudence currently plays an important part in the interpretation of constitutional norms, including with regard to deepening the constitutional review forms.*

**Keywords:** *The emergence of constitutional review in Romania / jurisprudential reasoning / the interpretation of the Constitution by case-law/ the role of jurisprudence in the calibration and development of constitutional review*

## 1. Introduction

Constitutional supremacy would remain just a theoretical matter if not for proper guarantees. Indisputably, constitutional justice and its particular form, constitutional review is the main guarantee of Constitution's supremacy, as is expressly stipulated by the Basic law of Romania.

Teacher Ion Deleanu believed: "*Constitutional justice may be deemed, alongside many other things, a paradigm of this century*"[1]. The emergence and evolution of constitutional justice is determined by several factors to which the doctrine refers; of these, we mention: man, as a citizen, becomes a cardinal axiological benchmark of civil and political society, and the fundamental rights and freedoms are no longer just a theoretical speech, but a normative reality as well; democracy is reconsidered, within the meaning that minority's protection becomes a key requirement of the rule of law and, at the same time, a counterweight to the principle of majority "parliamentary sovereignty" is submitted to the primacy of law and especially to the Constitution; as a consequence, the law is no longer an infallible act of Parliament, but conditional upon the Constitution's norms and values; last, but not least, reconsideration of the role and place of constitutions, within the meaning of qualifying them, especially as: "fundamental establishments of the governed, not of the governing people, as a dynamic act, as a continues shaping and as an act of society"[2].

The regulatory activity of law elaboration should continue by the activity of enforcing the rules; in order to enforce them, the first logical operation to carry out is to construe them.

Both the Constitution, and the law come as an assembly of legal rules, but these rules are expressed under the form of a legislative text. This is why it is not the legislative texts that constitute an object of interpretation, but the legal texts or the one of the Constitution. A legal text may comprise several legal rules. By way of interpretation, a constitutional rule can be deduced from a constitutional text. The Constitution text is drawn-up into general terms, which influences the determination degree of the constitutional rules. The constitutional rules are identified and determined via interpretation.

What also needs to be underlined is that a Constitution may comprise certain principles that are not clearly expressed *expresis verbis*, but they can be deduced by systematically interpreting other rules.

Within the meaning of the above, the speciality literature stated: "The determination degree of constitutional rules using the basic law text may justify the need for interpretation. The Rules in the Constitution are very suited for a progress of their course, because the text is par excellence imprecise, formulated into general terms. Constitution's formal

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[1] Ion Deleanu, *Justiţia constituţională,* (Bucharest: Lumina Lex, 1995), 5.

[2] For more information, see Ion Deleanu, *op. cit*., p. 5,6.

superiority, its rigidity prevent its review under very short time-spans and then the interpretation remains the only way to adopt the normative content, usually older, to the social reality which is permanently changing. As the meaning of constitutional rules is by their very nature of outmost generality, its precise determination depends on the interpreter's will"[3].

The scientific justification of the interpretation arises from the need to ensure the effectiveness of the rules comprised both by the Constitution, and by the laws via institutions mainly carrying out the activity of interpreting the rules provided by the author.

These institutions are first the courts of law, and the constitutional ones.

Checking compliance of a normative act with constitutional rules, institution which represents the constitutional review is not a formal comparison or mechanical juxtaposition of the two categories of rules, but a complex work relying on the interpretation techniques and procedures both of the law, and the Constitution.

Consequently, the need to construe the Constitution is a condition of applying it and securing its primacy. The constitutional review is essentially an activity of construing the Constitution, and the law. There need to be independent public authorities competent to construe the Constitution and to examine in this manner compliance of the law with the Constitution. These authorities are the Courts and the Constitutional Courts within the European template of constitutional justice.

## 2. Content

Evaluation of the constitutionality of the laws is the constitutional justice's main form and it is the basis for democracy, guaranteeing a democratic government is to be accomplished, complying with the Constitutional and law supremacy.

George Alexianu thinks legality is an attribute of modern state. The idea of lawfulness in the author's conception is formulated as follows: all state bodies operate based on a rule of law decided by the lawmaker, which needs to be complied with.

When referring to the Constitutional supremacy, the same author claimed with full justification and in relation to today's realities: "When modern state organizes its new look, the first idea with which it is preoccupied is to crack down the administrative abuse; hence the intervention of constitutions and jurisdictionally, the establishment of an examination of legality. Once this abuse established, another one arises, much more serious, that of Parliament. Constitution's supremacy is then invented and various systems to guarantee it. The idea of legality thus acquires a strong strengthening leverage"[4].

An important aspect is also that of defining the notion of evaluation of the constitutionality of the laws. The legal doctrine[5] has underlined that this duty's problematic should be included in the principle of legality. Legality is a fundamental principle for the organization and operation of the social and political systems. This principle has several coordinates: existence of a hierarchized legal system, on top of which lies the Constitution. Consequently, the ordinary law should be compliant with the Constitution in order to meet the legality condition; State's bodies should carry out their duties by strictly complying with the competency set out by law; normative acts' drafting should be made by competent persons, by a predetermined procedure, complying with the provisions of the superior normative acts with legal force and by complying with the law and the Constitution by all State bodies.

The doctrine has defined constitutional review as: "Organized activity of checking the conformity of the law with the constitution and from the point of view of the constitutional right, it comprises rules about the competent authorities making this check, the procedure to follow and the measures which can be taken after this procedure has been fulfilled"[6].

It follows, from the definition's examination that the constitutional review has a complex meaning. This is an institution of the constitutional law, i.e. the assembly of legal norms on the organization and operation of the competent authority of exercising control, as well as the assembly of legal norms with procedural character, which regulate and may be ordered by a constitutional court.

At the same time, there is also an organized activity whereby Constitutional supremacy is guaranteed, as compliance of the norms comprised by laws and other normative acts with constitutional regulations.

Essentially, constitutional review supposes checking compliance of the law as a legal act of Parliament, but also of other categories of normative acts with the rules comprised by the Constitution. Compliance should exist both in terms of a formal aspect (competency of the issuing body and the drafting procedure), as well as from a material standpoint (content of the norm in the ordinary law should be compliant with the constitutional requirements).

Historically, the judicial review of constitutionality established in the U.S.A. in the beginning of the 19th century holds particular

[3] Ioan Muraru, Mihai Constantinescu, Elena Simina Tănăsescu, Marian Enache, Ghorghe Iancu, *Interpretarea Constituției. Doctrină și practică* (Bucharest: Lumina Lex, 2002), 67.

[4] George Alexianu, *Drept constituțional*, (Bucharest: Casei Școalelor, 1930), 71.

[5] See, in that regard, Ion Deleanu, *Instituții și proceduri constituționale*, (Bucharest: C.H.Beck, 2006), 810; Ioan Muraru, Elena Simina Tănăsescu, *Drept constituțional și instituții politice*, Vol. II, (Bucharest: C.H.Beck, 2014), 191; Marius Andreescu, Andra Puran, *Drept constituțional. Teoria generală a statului*,2nd edition, (Bucharest: C.H. Beck, 2017), 205-206.

[6] Muraru and Tănăsescu, *op.cit*., 191.

importance, although the Constitution does not regulate procedural rules.

The Supreme Court ruled on the case of *Marbury v. Madison* for the first time in a case of this nature, declaring the Federal Constitution as a supreme law of the state and removing an act of Congress contrary to the Federal Constitution. The Court's decision is drawn-up by Judge John Marshall and is the basis on which the American case-law is founded in the matter of constitutional review.

The rationale that the American judge employed was as follows: the judge should enforce and construe laws. Constitution is the supreme law of a state which should be enforced with priority towards any other law. As Constitution is a law, it shall be construed and enforced by the judge, including to a particular case being the subject matter referred for trial.If the law is not compliant with the constitutional rules, the latter shall be enforced given the Constitution's supreme character.

The European template of constitutional justice is characterized from an institutional point of view in constitutional courts or district courts. During the inter-war period, this template was noticed in: Austria (1920), Czechoslovakia (1979), Spain (1931) and Ireland (1938).

In our country, constitutional review has evolved, being marked by the national particularities and successive application of the two templates presented above.

The Constitution from 1866 did not regulate the constitutional review. However, the provisions of Art. 9 of the Constitution may be mentioned, according to which the Lord "punishes and promulgates the laws" and that He "can refuse its punishment". Consequently, the head of State could refuse to promulgate a law if they believed it to be unconstitutional. Obviously, this wasn't exactly an evaluation of the constitutionality of the laws, but it is a precursor means to such a check. During the period in which the Constitution of 1866 was in force, the head of State never resorted to such a procedure.

The constitutional review made by a court of law, not by a specialized institution, different from the judicial power, was accepted on the European continent as well. The constitutional history mentions a Romanian priority in this case. Thus, during the period 1911/1912, first Ilfov County Court, then the High Court of Cassation and Justice extended their powers to check the constitutional compliance of laws in the dispute known as "the tramway matter" from Bucharest.

What is interesting is that the rationale employed by Ilfov County Court and by the High Court of Cassation and Justice in arguing the possibility to achieve, using a pretorian way, constitutional review. Essentially, the considerations were the following: 1) the Court did not assume competency ex officio to rule on the constitutionality of a law and to cancel it, since such procedure would have constituted a mixture of the judicial power in the law making powers' duties. Consequently, the court undertook this competency, since it had been referred to check the constitutionality of a law; 2) based on the duties given, judicial power's main mission is to construe and enforce all the laws, either ordinary or constitutional. If an invoked law contravenes the Constitution, the court may not refuse to settle the matter; 3) There is no provision in the Constitution of 1866 by which to expressly prohibit the judicial power's right to check whether a law is compliant or not with the Constitution. The provisions of Art. 77 of the Constitution are invoked; according to them, a judge, as per the oath taken, is under the obligation to enforce the laws and the country's Constitution; 4). Unlike ordinary laws, the Constitution is permanent and it can only be revised as an exceptional measure. As it is the supreme force law, Constitution is imposed by its authority on everybody and this is why the judge is obligated to enforce it with priority, including in the hypothesis where the law based on which the dispute is settled is contrary to the Constitution[7].

Decisions ruled by Ilfov County Court and by the High Court of Cassation and Justice have been well received by the specialists of that time. Here is a brief comment: "This decision was a great satisfaction to all the people of law. It is a big step in the advancement of this country toward progress, for it enshrines the principle that this country's Constitution, its foundation, the palladium of our rights and freedoms, and no one should disobey them. We are proud our justice is showing even to the justice in the Western countries what is the true path to progress in the matter of public law"[8].

In exercising its duties, the Constitutional Court regulates a work of interpreting the law and the Constitution. The constitutional court cannot amend, complete or repeal a law.

In its former drafting, before the Constitution's review, Law no. 47/1992 prohibited the Constitutional Court to construe those normative acts making the subject matter of the constitutional review. Naturally, the current regulation has removed this ban, since the activity of checking compliance of the normative regulations with the provisions of the Constitution the constitutional judge carries out is essentially a work of enforcing the law relying on the interpretation of the legal rules.

The Constitutional Court participates in the fulfilment of the legislative function in the State, but not as a positive lawmaker, but as a negative lawmaker, whose purpose is to remove the "unconstitutionality venom" from a normative act. This is why the Court, by its duties, is not subrogated to the Parliament's activity, since the amendment, completion or repealing of a law is an exclusive attribute of the Parliament.

[7] See *Curierul Judiciar*, No. 32 (29 April 1912): 373-376.
[8] N.D.Comşa, Notes from *Curierul Judiciar*, No. 32 (29 April 1912): 378.

The Constitutional Court's constructive interpretation by case- law of the Basic Law also arises from this institution's role to "support the good operation of public powers in the constitutional reports of separation, balance and mutual control". The principle of separation and balance of powers in the State is still, despite all the critiques some authors expressed, the fundament of democratic exercise of state power and the main constitutional guarantee of avoiding excess or abuse of power from any of the State's authorities.

The relationships between State's authorities are complex in nature, but they must also secure their proper operation, by complying with the principle of Constitution's legality and supremacy. To carry out this desideratum, it is very important that a state balance is maintained between all its forms and variants, including as social balance.

The separation and balance of powers no longer concerns just the classical powers (legislative, executive and judicial). Other powers are added to these, rendering new dimensions to this classical principle. The relationships between the participants in the state and social life can also cause conflicts which need to be settled in order to preserve the balance of powers. Some constitutions refer to disputes of public law (Constitution of Germany- Art. 93), to conflicts of jurisdiction between the State and autonomous communities or conflicts of duties between the State's powers, between the State and regions and between regions (Constitution of Italy – Art. 314).

Romania's Constitution speaks of judicial conflicts of constitutional nature between the public authorities [Art. 146 sub-par. c)] and regulates the mediation function between State powers that the President exercises.

The Constitutional Court is an important guarantor of the separation and balance of the State's powers, since it settles legal conflicts of constitutional nature between public authorities and by the duties it has in the matter of control of constitutionality prior to laws and checking constitutionality of regulations of chambers, it intervenes in ensuring balance between the parliamentary majority and minority, effectively ensuring the opposition's right to express itself.

The Constitutional Court is a guarantor that the fundamental freedoms and rights are complied with. This fundamental part the constitutional court plays in the rule of law is accomplished by interpreting Constitution's case-law and of the laws. As a general rule, there are three key guarantees from a constitutional point of view on the rights and freedoms of citizens established by the Constitution:

Constitutional supremacy; b) Constitution's rigid character; c) citizens 'access to the constitutional review and to the control of legality for the acts subordinated to law.

In Romania, the procedure of the exception of unconstitutionality ensures citizens 'indirect access to the constitutional justice.

Our constitutional court's case-law brings its contribution to the constitutional review in Romania by several aspects. We would like to analyse some relevant decisions in this matter next.

The Constitutional court has construed the notion of "law" in order to determine the scope of competency of the constitutional review on normative acts. The case-law has mentioned that the term of "law" provided under Art. 146 sub-par. b) of the Constitution is not widely used consisting of all normative acts, but only in its strict meaning, of law, by which the normative act is understood, adopted by the Parliament and promulgated by the President of Romania. At the same time, this scope also includes ordinances which are normative acts adopted by the Government based on a legislative delegation. "The concept of law arises from the combination of the formal criterion to the material one, since the content of law is determined by the importance paid by the lawmaker to the regulated aspects…settlement of the exception of unconstitutionality concerning other normative acts is not of the Constitutional Court's competency, as these acts are controlled in terms of legality by the administrative disputes courts" [9]. This decision of the Constitutional Court is important, particularly because it follows that the courts, particularly the administrative disputes ones, in relation to the legal rules of competency, may check the legality of a normative act, including in terms of its constitutionality.

The Court has determined that its role is to set out that the provisions of law criticised are constitutional and, at the same time, if the interpretation given to them abides by the Constitution's requirements, as such that, to the extent the legal text criticised may be conferred a constitutional interpretation, the Court shall find the legal provision's constitutionality in this interpretation and shall exclude any other possible interpretations from this application[10]. This solution of our constitutional court is important because it identifies, from a constitutional point of view, the so-called interpretative decisions of the Court, by which the legal text criticised for unconstitutionality is not removed, but interpreted within the meaning of the constitutional rules to produce legal effects.

The Constitutional Court has constantly, in its case- law, decided that it does not have the competency to control facts materialized into actions or inactions, but only the "extrinsic and intrinsic conformity of the normative act adopted with the Constitution"[11] in connection with the scope of the Constitutional Court's competency to exercise constitutional review *a priori*

[9] Decision no. 435 of 13 September 2005, published in the Official Journal no.924 of 17 October 2005.

[10] Decision no. 223 of 13 March 2012, published in the Official Journal no.256 of 18 April2012; Decision no. 448 of 29 October 2013, published in the Official Journal no .5 of 7 January 2014.

[11] Decision no. 1237 of 6 October 2010, published in the Official Journal no.785 of 24 November 2010.

on the laws, especially if the constitutionality check is required by a normative act amending a law whereby it was decided by the case-law that "In accordance with Art. 146 sub-par. a) of the Constitution, the a priori constitutional review s exercised by the Constitutional Court only on the laws before they are promulgated, not on the provisions of laws in force. Irrespective of the connections that can be made between the amending text and the amended text, the Constitutional Court, on grounds of Art. 146 sub-par. a) of the Constitution, cannot make a ruling within the a priori control over the law-amending text to be submitted to promulgation and it cannot expand constitutional review over the amended text from a law in force"[12].

Decision no. 799 of 17 June 2011 made by the Constitutional Court is important, because it established competency of this court of ruling over the constitutionality of the review law, adopted by the parliament before being subjected to referendum. In this regard, it decided that: "The review law adopted by the Parliament needs to be submitted to referendum, under the conditions of Art. 151 par. 3 of the Basic Law to be examined by the Constitutional Court to find out, on the one hand, whether the Court's decision on the law draft or proposal for review of the Constitution was respected or not and, on the other hand, whether the changes and completions made to the draft or proposal for review in the procedure for parliamentary debate and adoption complies with the constitutional provisions concerning the review."[13] .

More decisions have been ruled by our constitutional court in connection with the determination of its competency of ruling on the constitutionality of decisions made by the Parliament. In this regard, we refer to an important matter arising from the case-law in connection with the scope of constitutional review in this matter. In this regard, the Constitutional Court has constantly ruled that only decisions made by the Parliament can be subjected to the constitutional review, adopted after this competency has been conferred by the lawmaker, affecting constitutional values, rules and principles or, as applicable, the organization and operation of authorities and institutions with a constitutional rank.[14].

At the same time, the Constitutional Court stated that the task of controlling the decisions made by the Parliament "is an expression of the Rule of Law's requirements and a guarantee of the fundamental rights and freedoms… lack of jurisdiction control is equal to a transformation of the parliamentary majority into judges of own acts"[15] In the same regard, it was claimed that accepting the contrary thesis, leading to the exclusion of the exercise of constitutional review of the decisions made by the Parliament, made by violating the express provisions of the law, would lead to the placement of the supreme representative body of the people- the Parliament- above the law and accepting the idea that it is precisely the authority which legitimately adopts the laws constitutionally may breach them without any sort of punishment.[16]

One of the most important problems to have made the object of analysis by the Constitutional Court refers to the competency of this court of ruling on the conformity of a normative act with a legal act of the European Union institutions. In this regard, the case-law has constantly stated that the constitutional court has no competency to carry out a conformity control between a directive and the national normative act whereby it is transposed. A potential non-conformity of the national act to the European one does not implicitly draw the unconstitutionality of the national act of transposition. The competency of conferring greater protection in the national law towards the legal instruments of the European Union devolves on the lawmaker.[17]

In connection with the constitutionality check of the decisions ruled by the High Court of Cassation and Justice in settling appeals in the interest of the law, the Constitutional Court has ruled in its case-law that according to the legal rules in force, it has not such competency[18]). However, if, by a decision ruled in an appeal for the interest of the law, a legal text is given a certain interpretation, it cannot exclude the competency of the Constitutional Court of analysing the respective text, in the interpretation given by the court of last instance. "From the perspective of relating to the Constitution's provisions, the Constitutional Court checks the constitutionality of the applicable legal texts, in the interpretation enshrined in the interest of the law. Admitting a contrary thesis contravenes to reason of existence itself of the Constitutional Court, which would deny its constitutional role, accepting that a legal text is applied under the limits which would collide with the Basic Law[19]."

The case-law has established that the constitutional disputes court may rule in connection with the constitutionality of a repealing rule, seeing as, on the one hand, the presumption of constitutionality of

[12] Decision no. 498 of 8 June 2006, published in the Official Journal no.554 of 27 June 2006.

[13] Decision no. 799 of 17 June 2011 on the law draft concerning the review of Romania's constitution published in the Official Journal no.440 of 23 June 2011.

[14] Decision no. 53 of 25 January 2011, published in the Official Journal no.90 of 3 February 2011. See also : Decision no. 54 of 25 January 2011, published in the Official Journal no.90 of 3 February 2011; Decision no. 307 of 28 March 2012 , published in M.Of.no.293 of 4 May 2012; Decision no. 783 of 26 September 2012, published the Official Journal no.684 of 3 October 2012.

[15] Decision no. 727 of 9 July 2012, published in the Official Journal no.477 of 12 July 2012; Decision no. 80 of 16 February 2014, published the Official Journal no. 246 of 7 April 2014.

[16] Decision no. 251 of 30 April 2014, published in the Official Journal 376 of 21 May 2014.

[17] Decision no. 415 of 7 April 2011, published the Official Journal no.471 of 5 July 2011.

[18] Decision no. 778 of 16 June 2011, published the Official Journal no.668 of 20 September 2011.

[19] Decision no. 854 of 23 June 2011, published the Official Journal no.672 of 21 September 2011.

the law is a relative presumption and, on the other hand, the provisions of Law no. 24/2000 lay down that it is impossible to reinstate the initial normative act by repealing of an prior repealing act.[20]

With regard to the competency of the Constitutional Court of settling legal disputes of constitutional nature, several relevant decisions have been ruled.

A first aspect is the definition given by the Constitutional Court to the legal dispute of constitutional nature: "The legal conflict of constitutional nature implies specific acts or actions whereby one or more authorities assign themselves powers, duties or competencies which, according to the Constitution, belong to other public authorities or the omission of public authorities, consisting in the declination of their jurisdiction or refusal to carry out certain acts falling within their obligations". Consequently, according to the court's case-law, legal disputes of constitutional nature are not limited to just disputes of positive or negative jurisdiction, which could create institutional blockages, but aim at any conflicting legal situations whose occurrence reside directly in the Constitution's text.[21].

The case- law has set out that political parties, public persons of public law are not in the category of public authorities that are susceptible of being parties involved in a legal dispute of constitutional nature which, according to the provisions of Art. 8 par. 2 of the Basic Law, contributes to the definition and expressing of the public will of the citizens. Hence, it is the Constitutional Court's opinion that political parties are not public authorities. Also, parliamentary groups as well are not public authorities, but structures of the chambers of Parliament. "A potential conflict between a political party or a parliamentary group and a public authority does not fall within the category of conflicts that can be settled under the jurisdiction of the Constitutional Court, as per Art. 146 sub-par. a) of the Constitution".[22]

By the same decision, the Constitutional Court ruled that opinions, judgments of value or allegations of a public dignity mandate holder- as is the President of Romania, or the leader of a public authority- concerning other public authorities cannot, by themselves, constitute legal disputes between public authorities, because they cannot trigger institutional blockages, if not followed by actions or inactions which may prevent these public authorities from carrying out their constitutional tasks.

**Judicial review** is an important way to guarantee the Basic Law's supremacy, since the courts, by the nature of their duties, they construe and enforce the law, which also implies the obligation to analyse compliance of the legal acts subjected to judicial review with the Constitution's rules. Consequently, the courts have competency in the matter of constitutional justice. We are taking into consideration not only the general obligation of the judge to comply with and enforce the Constitution rules or the duties conferred by law to refer the constitutional court by an exception of unconstitutionality, but particularly the possibility to censure a legal act in terms of constitutionality.

Recent case-law and doctrine in the matter look into the competency of the courts to check some legal acts in terms of compliance with the constitutional rules. An unconstitutional legal act is an act issued with misuse of power.

The unconstitutionality of a legal act may be ascertained by a court if the following conditions are cumulatively met:

1. the court exercises its duties within the limits of the competency set out by law;
2. the legal act may be individual or normative; it may be binding or elective;
3. not to have to the case the exclusive jurisdiction of the Constitutional Court to rule over the constitutionality of a legal act;
4. settlement of the case should depend on the legal act being criticized for its unconstitutionality;
5. there is a pertinent, sufficient and reasonable motivation of the court on the legal act's unconstitutionality.

If these conditions are cumulatively met, the boundaries of the courts 'duties are not exceeded, but on the contrary, the principle of the Constitutional primacy applies and effectiveness is given to the judge's role of applying and interpreting the law correctly. Such a solution is justified in relation to the judge's role in the rule of law as well: to construe and enforce the law.

Fulfilment of this constitutional mission, particularly important and difficult at the same time, requires the judge to enforce the law by complying with the principle of Constitutional primacy; consequently, to evaluate the constitutionality of legal acts forming the object of the dispute referred for trial or which apply to the settlement of the case. Enforcement of the legal acts is made by the judge taking account of their legal force, by complying with the principle of Constitutional primacy. In this regard, the provisions of Art. 4 par. (1) of Law no. 303/2004 also need to be mentioned, which force the magistrates to ensure the supremacy of law through their entire activity.

Another problem is that of knowing what are the solutions that the courts can rule, by complying with the conditions shown above, where they find the unconstitutionality of a legal act. There can be two situations: In a *first hypothesis,* the courts can be directly vested with checking the legality of a legal act, as is the case of the courts of administrative disputes. In this case, the courts can find by making a decision, the absolute nullity of legal acts, on grounds of

[20] Decision no. 20 of 2 February 2000, published the Official Journal no.72 of 18 February 2000.
[21] Decision no. 901 of 17 June 2009, published the Official Journal no. 503 of 21 July 2009.
[22] Decision no. 53 of 28 January 2005, published the Official Journal no. 144 of 17 February 2005.

unconstitutionality. *The other situation* takes into consideration the hypothesis in which the courts are not vested directly with checking the legal act criticised for unconstitutionality, but that legal act applies for settling the case referred for trial. In this case, the courts can no longer order the cancellation of the unconstitutional legal act; however, they shall no longer enforce it to settle the case.

## 3. Conclusions

In our opinion, the Constitutional Court's role as a guarantor of the Basic Law should be enhanced by new duties aiming at limiting the excess of power of the State's authorities. We do not agree to what the specialty literature states, i.e. that a potential improvement of constitutional justice could be achieved by reducing the constitutional disputes court's duties[23]. It is true that the Constitutional Court ruled some questionable decisions in terms of abiding by the limits of exercising the duties incumbent upon it under the Constitution, by undertaking the positive lawmaker role.[24]. Reduction of the duties of the constitutional court for this reason is not a solution as legal basis. Surely, reducing the duties of a state authority leads to the removal of the risk of faultily exercising such duties. This is not how the activity of a state authority is improved in a rule of law, but by searching for legal solutions of carry out the duties which turn out to be necessary to the state and social system under better conditions.

Proportionality is a fundamental principle of the law explicitly enshrined by constitutional, legislative regulations and international legal tools. It is based on the values of the rational law of justice and equity and it expresses the existence of a balanced or suitable relationship between actions, situations, phenomena; it is a criterion for limiting the measures set out by the state authorities to what is necessary to reach a legitimate goal, this way guaranteeing the fundamental rights and avoiding the abuse of power by the state's authorities. Proportionality is a basic principle of the European Union's law, being expressly enshrined by the provisions of Art. 5 of the Treaty on the European Union[25].

We estimate that this principle's express regulation just in the contents of the provisions of Art. 5 of the Constitution, applied in the field of narrowing the exercise of rights is insufficient to emphasize the principle's entire meaning and significance for the rule of law.

In a future review of the basic law, it would be useful to add another paragraph at Art. 1 of the Constitution, foreseeing that "*The exercise of State power should be proportional and non-discriminating".* This new constitutional regulation would become a genuine constitutional obligation for all State authorities, and they would exercise their duties as such that the measures adopted would register within the limits of the discretionary power recognized by law. At the same time, the possibility is created for the Constitutional Court to penalize the abuse of power in the Parliament and Government's activities, via the constitutional review of laws and ordinances, using the principle of proportionality as a criterion.

Among the Constitutional Court's duties can be included the one of ruling on the constitutionality of those administrative acts exempted from the legality control of the administrative disputes court. This category of administrative acts, to which Art. 126 par. 6 of the Constitution refers, along with the provisions of Law no. 544/2004 of administrative-disputes are particularly important to the whole social and state system. Consequently, constitutionality review is necessary since, in lack thereof, discretionary power of the issuing administrative authority is limitless and it may lead to the excessive narrowing of the exercise of the fundamental rights and freedoms or to the breach of important constitutional values. Our constitutional court should, for the same arguments, be able to review the President's decrees instituting the proceedings of referendum, in terms of their constitutionality.

The High Court of Cassation of Justice has the competency to adopt decisions in the appeal procedure for the interest of the law, which are binding for courts. If there is no legality or constitutionality control, practice has demonstrated that the court of last resort has, in numerous situations, exceeded its duty of construing the law and, by such decisions, has amended or completed normative acts, acting like a genuine lawmaker, thus violating the principle of separation of powers in the State[26]. We believe that, under these circumstances, the Constitutional Court must be given the competency to rule on the constitutionality of the decisions made by the High Court of Cassation and Justice adopted in the appeal proceedings for the interest of the law, in order to avoid the abuse of power from the court of last instance.

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[23] Genovevia Vrabie, "Natura juridică a curţilor constituţionale şi locul lor în sistemul autorităţilor publice", in *Revista de Drept Public*, no. 1 (2010): 33.

[24] As an example, we refer here to the Decision no. 356/2007, published the Official Journal no. 322 of 14 May 2007 and to the Decision no. 98/2008 published the Official Journal no. 140 of 22 February 2008.

[25] For more information, see Marius Andreescu, "Proporţionalitatea, principiu al dreptului Uniunii Europene" in *Curierul Judiciar* no. 10 (2010): 593-598.

[26] For more information, see Andreescu Marius, „Constituţionalitatea recursului în interesul legii şi ale deciziilor pronunţate", in *Curierul Judiciar* no. 1 (2011): 32-36.

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# CONSIDERATIONS RELATING TO THE ROLE OF THE COUNCIL IN THE INSTITUTIONAL UNION OF THE EUROPEAN UNION

**Dragoș Adrian BANTAȘ***

**Abstract**

*As a part of what the specialized doctrine calls the "bicameral legislative of the European Union", the Council, representing the Member States, is undoubtedly one of the most important decision-making institutions in the EU. Its modus operandi, however, can be analyzed on two levels. One of these, consisting of the rules according to which the acts are adopted (in particular, the necessary majority) is found in the treaties on which the European Union comes. The second level, however, which can be called "diplomatic", is the work of the representatives of the Member States, meeting in the Committee of Permanent Representatives. Although it enjoys less visibility, compared to the Council formations, it is in fact responsible for most of the acts adopted in the Council. In the following paper we will analyze the functioning of this institution and its role in the institutional ensemble of the European Union.*

**Keywords:** *European Union, Council, role, member states, Permanent Representatives, decision making*

## 1. Introductory considerations. The characteristics of the institutional set-up of the European Union.

Since the beginning of the implementation of the European Union project, through the building of the European Communities, they have been endowed with an institutional system designed to ensure the achievement of their objectives. This system had different traits than those of the classical, intergovernmental, international organizations that have until then and after that time. On one hand, for example, this unique institutional system and the way in which the institutions interact in the decision-making process have provided a part of the doctrine with the necessary arguments to characterize the European Communities and later the European Union as a closer construction by the notion of a federal entity, rather than by an international organization.

On the other hand, the institutional system of the European Union, which, as I said in the above lines, differs from that of the international classical organizations, cannot be considered the same as that of the states, whether unitary or federal.

In support of these statements, we invoke, for example, those emphasized in the specialized doctrine, in that „*the division of responsibilities between the four (as for that moment) institutions does not overlap with the Montesquieu inherited scheme, a scheme according to which the Parliament is the legislative, the government is the executive, the judges exercising the judicial power*."[1]

Also, the Treaty establishing the European Coal and Steel Community "enshrined 4 principles, taken from the Schuman Plan (...) which constitute the basis of the current European Union, namely the superiority of institutions, the independence of institutions, collaboration between institutions and equality between states."[2]

One specific element of the institutional framework of the European Union is that it must ensure the sharing of sovereignty, which *"represents at a Union level the fact that the Member States delegate a part of their decision-making powers to the joint institutions they have decided to take in some areas of common interest, through a democratic process at European level."*[3]

Due to space considerations, we do not intend in this study to detail the content of these principles. What we consider to be important, however, is that their existence and the differences between those principles and those governing the relations between the central institutions at the level of a state (in particular the principle of the separation of powers) lead to the existence and a different role of each institution of the Union within it.

In this context, we raise the central question of our study, namely: what is the place and role of the Council in the institutional ensemble of the European Union and whether it can be assimilated to different roles fulfilled by national institutions, for example, those in Romania that have the advantage of a understandings superior to those in other states, with which the author is not as familiar.

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[1] Augustin Fuerea, *Manualul Uniunii Europene, Ediția a VI-a revizuită și adăugită*, Editura Universul Juridic, București, 2016, p. 18.

[2] Ibidem, p. 33.

[3] Augustina Dumitrașcu, Roxana-Mariana Popescu, *Dreptul Uniunii Europene:sinteze și aplicații, Ediția a 2-a, revizuită și adăugită*, Editura Universul Juridic, București, 2015, p. 24.

## 2. The Council - General Aspects.

As stated in the specialized doctrine, in a Union which, unlike the Member States, does not function to a considerable extent on the principle of separation of powers but after the representation of interests, *"the Council is and has always represented national interests. We cannot know for sure whether those who drafted the Treaty of Rome were surprised or not by the way the Commission and the Council interacted with the foundation of the Community. They hoped that the establishment of the EEC would announce an era of greater collaboration, in which class, national interests would diminish, in relation to the interests of the Community as a whole. The initial decision-making structure of the EEC was certainly proof of the central role assigned to the Commission, which was also reflected in its broad spectrum of tasks. Clearly, the Council had to approve the legislation, but the Commission was the one who held the reins. This was due to the Commission's competence to establish the legislative agenda, its institutional resources for the development of Community policies, and the fact that, although the adoption of the legislation required the approval of the Council to amend any Commission proposal, unanimity was required in the Council."*[4]

Moreover, the Treaty on European Union enshrines, even if not exactly in these words, the representation of the interests of the Member States by the Council. According to him, *"the Council shall be composed of a representative at ministerial level of each Member State empowered to employ the government of the Member State which it represents and to exercise the right to vote"*[5].

As far as its functions are concerned, we can see from the same Treaty on the European Union that the Council institution *"carries out legislative and budgetary functions together with the European Parliament"*[6] as well *as "policy-making and coordination functions, in accordance with the conditions set out in the Treaties"*[7].

Although at first glance, the expression of Article 16 of the Treaty on European Union may, as far as we consider it, be sufficiently comprehensive with the doctrine of specialty that it does not cover all the functions assigned to the Council by the Treaties. Therefore, in the continuation of our study, we will try, following a structure inspired by the author Robert Schutze, to identify the different roles that the Council occupies in what the Court of Justice considered to be the system of the *"basic constitutional charter"*[8] of the European Union.

## 3.The Council as guardian of respect for the values listed in Article 2 of the Treaty on European Union.

We start our analysis by stating the first role the Treaties devote to the Council, namely the guardian of respect for the values listed in Article 2 of the Treaty on European Union.

On this occasion, we make it clear that we prefer to treat the places and roles enshrined in the treaties of this institution in the order in which they appear in the TEU and the TFEU, as we do not want to achieve a hierarchy of them, which we believe can only be based on inherently subjective criteria. In this idea, a presentation that follows the order of the Treaties presents both the advantage of avoiding hierarchy and the pursuit of the logic of the Treaties.

The Treaty on European Union therefore sets out, in Article 2, a series of values that the Union is founded on. In its Article 7, it also establishes a mechanism for monitoring compliance by Member States and for sanctioning their violation.

The history of this mecanism, although not particulary long, is nevertheless rich. Thus, according to the specialized doctrine, *"the initial text established the competence and described the procedure which allowed the Council to determine the existence of a serious and persistent breach by a Member State of the principles mentioned above and to apply the sanction of suspending certain rights of that state deriving from membership status, such as the right to vote in the Council. Further, the Treaty of Nice added a first paragraph that permitted the Council to determine even just the existence of a clear risk of a serious breach of the principles and to address appropriate recommendations to that state. This leaves the necessary room for a diplomatic solution before the fait accompli (...). The last amending treaty that reformed EU constitutional law, the Treaty of Lisbon, inserted current Article 2 in TEU and modified Articles 7 and 49 TEU accordingly, replacing the reference to the principles set out in former Article 6 paragraph 1 TEU with the reference to the values EU is founded on. It also replaced the words <<The Council, meeting in the composition of the Heads of State or Government and acting by unanimity>> with <<The European Council, acting by unanimity>>, in order to differentiate between the Council and the European Council"*[9].

In particular, the article referred to states that "*on a reasoned proposal from one third of the Member States, the European Parliament or the European Commission and with the consent of the European*

[4] Paul Craig, Grainne de Burca, Dreptul Uniunii Europene: comentarii, jurisprudență și doctrină, Ediția a VI-a, Editura Hamangiu, București, 2017, p. 49.

[5] Treaty on European Union, art. 16(2).

[6] TEU, art. 16(1)

[7] Ibidem.

[8] In the wording of the ECCJ, Case 294/83, Les Verts împotriva Parlamentului European, www.eul-lex.europa.eu.

[9] Iuliana-Mădălina Larion, *Protecting EU values. A juridical look at article 7 TEU*, article presented during The International Conference Challenges of the Knowledge Society, Bucharest, 11th - 12th May 2018, 12th Edition, and published in the Conference volume, „Nicolae Titulescu" University Publishing House, p. 539.

*Parliament, the Council, acting by a majority of four fifths of its members, may find that there is a clear risk of a serious infringement of the values laid down in Article 2 by a Member State. Before proceeding with this finding, the Council shall hear the Member State concerned and may issue recommendations to it, acting in accordance with the same procedure.*"[10]

In addition, "the Council shall regularly verify that the reasons which have led to this finding remain valid".[11]

In a more severe situation, finding a serious violation of the values in art. 2 TEU, this time taken by the European Council, "acting unanimously on a proposal from one third of the Member States or the European Commission and with the consent of the European Parliament," [the Council] "acting by a qualified majority may decide to suspend certain rights to the Member State concerned following the application of the Treaties, including the right to vote in the Council of the representative of the government of that Member State. In so doing, the Council shall take into account the possible consequences of such suspension on the rights and obligations of natural and legal persons. [The] Council, acting by a qualified majority, may subsequently decide to amend or withdraw the measures taken pursuant to paragraph 3 in response to a change in the situation which has led it to impose such measures."[12]

Therefore, we note that, without diminishing the importance of this issue, the Council is not the only guardian of the Member States' compliance with the values in Article 2 but, together with the institutions of the Commission, the European Parliament, and the European Council, , in the tradition of the system of mutual equilibrium, from a "special unit" whose mission is to ensure that the values to which the candidate states have had to prove to be able to be among the Member States of the Union do not become a letter dead on reaching this goal. However, the extreme political difficulties associated with the activation of such a mechanism have made it play a role similar to Cold War nuclear weapons, a deterrent element whose use can draw consequences to blur the differences between the victors and the losers.

## 4. The role of ensuring the democratic representativeness of the institutional framework of the European Union.

Although, when we refer to the concept of democratic representativeness, the first institution to which we think is that of Parliament (be it European or national), and the Council is not totally deprived of this feature.

Moreover, the Treaty on European Union states that "*the functioning of the Union is based on the principle of representative democracy"*[13] and this is ensured by the European Parliament, representing the citizens of the Union, by the European Council, made up of Heads of State (directly elected by the to the citizens of their own countries or to the national Parliaments, composed of elected representatives of the citizens) or to the government (invested after the trust of the national Parliaments) and, albeit to a different extent, by the Council, made up of representatives at the ministerial level of the Member States, *"who in turn respond democratically either to national parliaments or to their citizens."*[14] Together, the European Parliament, the European Council and the Council give the Union double legitimacy (democratic) from citizens directly and from Member States, who also receive this legitimacy from citizens. In practice, the Union benefits from direct democratic legitimacy (through Parliament) and indirect (through the European Council and the Council), both from citizens.

## 5. The role of a component of the bicameral legislature of the European Union. Legislative and budgetary responsibilities.

The next role we find in the Council is that part of the bicameral legislature of the European Union. In this respect, Article 14 TEU states that "*the European Parliament shall, together with the Council, exercise legislative and budgetary functions*"[15]. Moreover, the same Treaty also stipulates that "*the Council shall exercise, together with the European Parliament, legislative and budgetary functions. It shall exercise policy-setting and coordination functions in accordance with the conditions laid down in the Treaties"*.[16]

Basically, in the above expression we find the main functions that national parliaments have and which they exercise according to the unicameral or bicameral system applied in each state. As regards the Council, however, it appears both as a component of the bicameral legislature and as a legislative one, so to speak, unicameral. In this section we only refer to the first of these.

Article 228 of the Treaty on the Functioning of the European Union states that "for the exercise of Union competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions"[17]. As regards the procedures under which

[10] TEU, art. 7 (1).
[11] Ibidem.
[12] TEU, art. 7 (2) and (3)
[13] TEU art. 10( 1)
[14] TEU art. 10 (2)
[15] TEU art. 14 (1)
[16] Ibidem..
[17] Treaty on the Functioning of the European Union, art. 228.

these acts are adopted, the Treaty on the Functioning of the European Union has two categories: the ordinary legislative procedure, defined by the TFEU as "**the joint adoption by the European Parliament and the Council of a regulation**, directive or a decision on a Commission proposal"[18] and what the doctrine calls[19] "special legislative procedures, which may consist of" the adoption of a regulation, a directive or a decision by the European Parliament with the participation of the Council or the Council with the participation of the European Parliament"[20].

The totality of *'acts adopted by [a] legislative procedure constitutes legislative acts'*[21], thereby exercising the competences of the Union in order to achieve its objectives.

Regarding the ordinary legislative procedure, it is used, according to the doctrine of specialty, in almost 95% of possible situations[22]. As far as their list is concerned, it would be too broad to circumscribe our approach, but in the specialized doctrine we find the following examples: "*services of general economic interest (Article 14 TFEU); citizens' initiatives (Article 24 TFEU); applying the rules on competition to the common agricultural policy (Article 42 TFEU); Common Agricultural Policy (Article 43 TFEU); the exclusion of a Member State from certain activities from the scope of the provisions on the right of establishment (Article 51 (2) TFEU); extending the benefit of provisions on the provision of services to third-country nationals established in the Union (Article 56 (2) TFEU); liberalization of services in certain defined sectors (art. 59 paragraph. (1) TFEU]; immigration and the fight against trafficking in human beings (art. 79 par. (2) TFEU]; judicial cooperation in criminal matters (art. 82 par. (1) and (2) TFEU); Eurojust [Art. 85 par. (1) paragraph. 2 TFUE]; Europol [Art. 88 par. (2) TFEU]; measures necessary to use the euro (Article 133 TFEU); public health (art. 168 par. (4) TFEU]; Structural Funds (Article 177 (1) TFEU); energy [art. 194 par. (2) TFEU]; the Staff Regulations and the Conditions of Employment of other servants of the Union (Article 336 TFEU)"*[23]etc.

Under these circumstances, "it is no surprise to assert that we are witnessing the existence of a bicameral legislation at the level of the European Union, if we consider the primary headquarters of the matter, namely the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union )"[24]. Moreover, "the reference to the bicameralism of the European Union legislature is also present in the Protocol no. 2 on the principles of proportionality and subsidiarity, which, at art. 4, regulates the fact that the draft legislative acts and the Commission's amended drafts are transmitted to national parliaments and to the <<European Union legislative body>>"[25]. In addition, "it is worth mentioning that, for the first time, we find the use of this syntagm (in singular!), Which means that it is a single legislative entity made up of the two institutions (the European Parliament and the Council) are enshrined in art. 14 par. (1) TEU and Art. 16 par. (1) TUE"[26]. It seems almost natural that, under these conditions, a parallel between the European Union and the federal states should be made, in which "<< Parliament is compulsorily composed of two legislative bodies. The first room comprises the representatives of the nation>>[27] (in the case of the European Union, it is the European Parliament) and <<the second chamber consists of the representatives of the states that form the federation" >> (at the level of the European Union such a composition is known to the Council)"[28].

As far as the actual implementation of the ordinary legislative procedure is concerned, it is detailed in Article 294 of the Treaty on the Functioning of the European Union. The same Treaty regulates the budgetary procedure, which has many similarities to the one regulated in art. 294 TFEU.

Apart from this, where the European Parliament and the Council behave like a bicameral legislature, adopting together the legislative acts that the Treaties state that they must be adopted under the ordinary legislative procedure, there are also many cases in which the Council behaves as if it is allowed to speak, one-chamber legislative, by adopting acts on the initiative of the Commission (or, in some cases, the Member States[29]), without the participation of Parliament. We will refer to these in the following.

## 6. Council as single-chamber legislation. Special legislative procedures.

Unlike the ordinary legislative procedure, which has a unitary enshrinement in the Treaty on the

[18] TFEU, art. 289 (1).
[19] See Augustin Fuerea, *Legislativul Uniunii Europene între unicameralism și bicameralism*, Dreptul Magazine, no. 7/2017.
[20] TFEU, art. 289 (2).
[21] TFEU art. 289 (3)
[22] Sean van Raepenbusch, *Drept instituțional al Uniunii Europene*, Editura Rosetti, București, 2014, p. 233.
[23] Augustin Fuerea, *Legislativul Uniunii Europene între unicameralism și bicameralism*, Dreptul Magazine, no. 7/2017.
[24] Ibidem.
[25] Ibidem.
[26] Ibidem.
[27] C. Ionescu, *Tratat de drept constituțional comparat*, ediția a 2-a, Editura C.H. Beck, București, 2008, p. 255 apud Augustin Fuerea, *Legislativul Uniunii Europene între unicameralism și bicameralism*, în Revista Dreptul, nr. 7/2017.
[28] Augustin Fuerea, Legislativul Uniunii Europene între unicameralism și bicameralism, în Revista Dreptul, nr. 7/2017.
[29] See art. 76 TFUE, which stipulates that „The acts referred to in Chapters 4 and 5, together with the measures referred to in Article 74 which ensure administrative cooperation in the areas covered by these Chapters, shall be adopted: (a) on a proposal from the Commission, or (b) on the initiative of a quarter of the Member States".

Functioning of the European Union, the special legislative procedures are not regulated in the same way, and their inclusion in a single article of the Treaties is likely to present neither so many advantages practical. Instead, the Treaties opt for the description of each legislative procedure used in each provision referring to a special legislative procedure. Thus, when the Treaties have excluded the application of the special legislative procedure and are in the process of making use of a special legislative procedure in the decision-making process, it is described in the following, which in a way facilitates their application.

However, classifications of special legislative procedures not only can be carried out, they have even been done in doctrine. For example, starting from the content of art. 289 TFEU, which states that "*in specific cases provided for in the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council or the Council with the participation of the European Parliament constitutes a special legislative procedure"*[30], Professor Augustin Fuerea asserts that "*from the contents of the headquarters of the matter referred to above, we appreciate that the wording*" special legislative procedures "*is appropriate given the existence of the two ways of adopting legal acts, as follows (...) Analyzed by comparison, we find that in <<the ordinary legislative procedures>>, compared to the ordinary legislative procedure, the Commission lacks the legislative initiative belonging either to the Council or to the European Parliament. Depending on the areas subject to legislation, a procedural or other procedure is followed, in accordance with the Treaties, in full agreement with the established competencies and the principles governing the matter"*[31].

We also appreciate that the special legislative procedures in which acts are adopted by the Council can also be classified according to the role of the European Parliament, which can be adopted after consultation of the European Parliament, in which case its position does not oblige the Council, either with the approval of Parliament , where his position is ignored by the Council, which cannot adopt the acts in question without Parliament's approval, but in which, as pointed out by the specialized doctrine, the non-dominant institution (in our case the Parliament) cannot influence the content of the adopted act, may or may not agree with it in its entirety[32].

Here are some examples of special legislative procedures that illustrate the situations outlined above.

Thus, art. Article 21 of the Treaty on the Functioning of the European Union provides that "for the same purposes as those referred to in paragraph 1, and where the Treaties have not provided powers for action, the Council, acting in accordance with a special legislative procedure, may adopt measures in the field of social security or social protection. The Council shall act unanimously after consulting the European Parliament".[33]

Or, in an example corresponding to the second hypothesis, art. Article 19 of the same Treaty states that "Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred on it by the Union, the Council, acting unanimously in accordance with a special legislative procedure and with the consent of the European Parliament, may take the necessary measures to combat any discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation"[34].

In any case, examples of special procedures can be identified throughout the duration of the Treaty, but their number and scope do not allow us to list them within the space boundaries of this approach. We consider, however, that the examples set out above are appropriate for illustrating the exposed principle.

It should be noted that, by virtue of organizing the institutional framework of the European Union on the basis of checks and balances, even if the Council or another institution adopts seemingly unilateral acts, a role may be identified, albeit secondary, of at least one of the other institutions, as is the case of the Parliament in the examples above. For its part, the Council can also play such a role, for example in the three situations in which the European Parliament adopts acts with the participation of the Council, but, for space-related reasons, we will not devote a special section of our study to this situations.

## 7. The Council as part of the Union Executive.

We make an exception to the above-mentioned rule that we look at the roles of the Council in order of their consecration in the Treaties to present a hypostasis closely related to the constituent part of the legislature. Thus, at the state level, after the adoption of legislation, it has to be put into practice, executed, adapted to concrete situations. In general, this prerogative lies with the executive power. One of the ways in which, at least in Romania, the described process is carried out is the issue of law enforcement acts, such as government decisions, ministerial orders, etc.

At European Union level, this is generally the case for the Commission. For example, art. Article 291 (2) TFEU provides that "where uniform conditions for the implementation of legally binding Union acts are required, those acts confer on the Commission implementing powers or, in special and duly justified cases, as well as in cases referred to in Articles 24 and

[30] Tratatul privind Funcționarea Uniunii Europene, art. 289 (2).
[31] Augustin Fuerea, Legislativul Uniunii Europene între unicameralism și bicameralism, în Revista Dreptul, nr. 7/2017.
[32] Robert Schutze, European Constitutional Law, Editura Cambridge University Press, New York, 2012.
[33] TFEU, art. 21 (3).
[34] TFEU, art. 19 (1).

26 of the Treaty on European Union [both concerning the Common Foreign and Security Policy], the Council"[35].

Nowadays, "*the Regulation (EU) no 182/2011 of the European Parliament and the Council lays down the rules and general principles concerning mechanisms for control by EU countries of the Commission's exercise of implementing powers*"[36]. "*This control is performed by means of what is known in EU jargon as 'comitology' procedures*[37]*, i.e. the Commission is assisted by committees consisting of EU countries' representatives and chaired by a representative of the Commission*"[38]

In the literature, reservations were expressed regarding the provisions of art. 291. More specifically, the author Robert Schutze considers that constitutionally, the exercise of the executive function by the Council appears problematic, because it assumes that one of the components of the Union legislature puts into effect its adopted acts.[39] However, the fact that, through the Lisbon Treaty reforms, this situation is definitely the exception (as demonstrated by the wording of Article 291, which we have just mentioned above), makes the frequency of such an occurrence overlaps between powers remain low.

## 8. Delegator of the legislative duties.

Just like a national legislature, art. 290 TFEU provides that "a legislative act may delegate to the Commission the power to adopt non-legislative and non-legislative acts which supplement or amend certain non-essential elements of the legislative act"[40]. As a legislative act, we conclude that the delegation will be the institution or the institutions that adopt the legislative act in question, i.e. the Parliament and the Council, the Council or the Parliament. The same institutions shall be empowered to exercise control over the manner in which delegated powers are exercised and may decide, including revocation, under the conditions set forth in art. 290 of the Treaty on the Functioning of the European Union.[41]

## 9. Platform for coordinating Member States' policies

The Treaty on the Functioning of the European Union has, for the first time in the history of European construction, enshrined the existence of categories of competence. Among these, we also find the category enshrined in Article 6 TFEU, the powers ...

Examples of Member State policy co-ordination appear in different areas, and the Council behaves in almost all of these situations as a platform for the interaction of the states concerned.

For example, art. 71 TFEU provides that "*a Standing Committee is set up within the Council to provide for the promotion and strengthening of operational cooperation in the field of internal security within the Union*"[42]. The task of the Committee is to promote coordination of the action of the competent authorities of the Member States.

Also, Art. 121 states that "*Member States shall regard their economic policies as a matter of common concern and coordinate them within the Council in accordance with Article 120. [To that end] "The Council, on a recommendation from the Commission, shall draw up a draft general guidelines economic policies of the Member States and of the Union and shall report to the European Council on this. The European Council, on the basis of the Council's report, discusses the conclusions on the broad guidelines of the economic policies of the Member States and of the Union. On the basis of these conclusions, the Council adopts a recommendation setting out these general guidelines. The Council shall inform the European Parliament of its recommendation*."[43]

In the same vein, "*for the purpose of ensuring closer coordination of economic policies and sustainable convergence of Member States' economic performance, the Council, on the basis of the reports submitted by the Commission, oversees economic developments in each of the Member States and in the Union, and aims to ensure closer coordination of economic policies and sustainable convergence of the economic performance of the Member States. the consistency of economic policies with the general*

[35] TFEU, art. 291 (2).

[36] Oana-MIhaela Salomia, Delegated Acts and Implementing Acts – new legal acts of the European Union, article presented during The International Conference Challenges of the Knowledge Society, Bucharest, 12th - 13th May 2017, 11th Edition, and published in the Conference volume, „Nicolae Titulescu" University Publishing House, p. 553

[37] Andrew Duff, The logic of the Lisbon Treaty, London: Shoehorn, , 2009, 57, apud Oana-Mihaela Salomia, op.cit.

[38] Oana-Mihaela Salomia, op.cit.

[39] Robert Schutze, op.cit, p.115

[40] Tratatul privind Funcționarea Uniunii Europene, art. 291 (2).

[41] Article 290 TFEU: (1) A legislative act may delegate to the Commission the power to adopt non-legislative and non-legislative acts which supplement or amend certain non-essential elements of the legislative act. Legislative acts shall explicitly define the objectives, content, scope and duration of the delegation. The essential elements of a given area are reserved to the legislative act and can not therefore be subject to the delegation of powers. (2) The legislative acts expressly lay down the conditions for the application of the delegation; these conditions may be the following: (a) the European Parliament or the Council may decide to revoke the delegation; (b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within the period laid down in the legislative act. For the purposes of points (a) and (b), the European Parliament shall act by a majority of its component members and the Council shall act by a qualified majority. 3. The title of the delegated acts shall enter the adjective "delegated" or "delegated".

[42] TFEU, art. 71.

[43] TFEU, art. 120.

*guidelines referred to in paragraph 2 and shall regularly carry out an overall assessment*"[44].

Similarly similar provisions can also be found in Article 146 TFEU (with reference to the coordination of national employment policies, to achieve the objectives referred to in Article 145 TFEU) and beyond. Although the role of the Council may appear to be different in these articles, their commonality is its relatively low involvement, which appears either as a platform for the reunification of Member States or as the issuer of recommendations or other non-binding acts , The Treaties leaving Member States the task of adopting concrete measures.

## 10. External action

As regards the Union's external action, we can see that the role of the Council can be classified according to the general or specific nature of the procedures followed for the Union's external action, understood as the totality of the situations in which the Union acts as a subject of public international law , in relation to third parties.

Thus, with regard to the Common Foreign and Security Policy, its principal place of business can be identified in the Treaty on European Union. Accordingly, "*the Council shall develop the common foreign and security policy and adopt the necessary decisions for its definition and implementation, on the basis of the broad guidelines and strategic lines defined by the European Council*"[45]. Moreover, "*the Council and the High Representative of the Union for Foreign Affairs and Security Policy shall ensure the unity, consistency and effectiveness of Union action*"[46].

Article 28 TEU also states that "where an international situation requires an operative action by the Union, the Council shall take the necessary decisions. They shall set out the objectives, the importance, the means to be made available to the Union, the conditions for their implementation and, where appropriate, their duration. [In addition] "where there is a change in circumstances which has a clear incidence on a situation which is the subject of such a decision, the Council shall review the principles and objectives of that decision and take the necessary decisions' [and in the event of] the implementation of a decision referred to in this Article, any Member State shall refer the matter to the Council, which deliberates and seeks the appropriate solutions.[47]

Also within the CFSP, "the Council adopts decisions defining the position of the Union on a certain issue of a geographic or thematic nature"[48] and exercises its authority over the Political and Security Committee, which it may authorize "for a crisis management operation and during its term, in accordance with those established by the Council, take appropriate decisions on political control and strategic direction of the operation. "[49] By the same token, the Council "may entrust the task of a group of Member States with a view to defending the Union's values and serving its interests"[50].

Of course, these are just the main coordinates of the Council's role in the CFSP. For space considerations, we summarize these, making it clear that this section can be developed by exposing the concrete mechanisms for transposing the mechanisms presented.

Turning to the issues covered by the TFEU, we can identify the procedure with general applicability for the negotiation and conclusion of international agreements, the procedure applicable to exceptional situations, such as the Common Commercial Policy, but also other distinct regulated procedures.

Thus, Article 218 TFEU is the seat of the matter for the procedure applicable, as a rule, to the negotiation and conclusion of international agreements. According to him, the Council authorizes the opening of negotiations, adopts negotiating directives, authorizes signing and concludes agreements. The same Council may address directives to the negotiator and may designate a special committee, the negotiations having to be conducted in consultation with this committee. The Council, on a proposal from the negotiator, shall adopt a decision authorizing the signing of the agreement and, where appropriate, its provisional application before entry into force and at the proposal of the negotiator, adopt a decision on the conclusion of the agreement.[51]

Similar, but not identical, procedures are also regulated in Art. 207 TFEU, art. 213 (granting financial assistance to third countries), art. 215 (interruption or restriction, in whole or in part, of economic and financial relations with one or more third countries and restrictive measures against natural or legal persons, groups or non-State entities, etc.

Also, as regards the procedures for the accession of third countries to the Union or the withdrawal of a State within it, the Council also plays a leading role. Thus, under the first hypothesis, art. 49 TEU provides that "*the requesting State shall address its request to the Council, acting unanimously after consulting the Commission and after obtaining the consent of the European Parliament, which shall act by a majority of its constituent members. The eligibility criteria approved by the European Council are taken into*

[44] Ibidem.
[45] TEU, art. 26 (2).
[46] Ibidem.
[47] TEU, art. 28
[48] TEU, art. 29.
[49] TEU, art. 38.
[50] TEU, art. 42 (5).
[51] TFEU, art. 218.

*account."*[52] As to the contrary hypothesis, art. 50 stipulates that "*any Member State may decide, in accordance with its constitutional rules, to withdraw from the Union. The Member State which decides to withdraw shall notify its intention to the European Council. On the basis of the European Council guidelines, the Union negotiates and concludes an agreement with that State setting out the conditions for withdrawal, taking into account its future relations with the Union.* ***This agreement is negotiated in accordance with Article 218 (3) of the Treaty on the Functioning of the European Union*** *[therefore, on the basis of the above procedure, the dominant role of the Council being maintained]. It shall be concluded* ***on behalf of the Union by the Council****, acting by a qualified majority, after obtaining the consent of the European Parliament*[53].

## 11. The role of the Council in economic and monetary policy

A special situation arises in the aspects related to Economic and Monetary Union, as well as other aspects related to the economic aspects. In particular, the Council is entrusted with decision-making powers and occasionally complements the action of the European Central Bank. In this sense, we might consider that the institution under consideration behaves like a unicameral parliament, but with the same ease we can give up trying to assimilate this Council role with a similar domestic function, accepting the sui generis character of its prerogatives.

According to the Treaty on the Functioning of the European Union, in particular, "*in the event of exceptional circumstances where the movement of capital from or to third countries causes or threatens to cause serious difficulties for the functioning of the economic and monetary union, the Council may, adopt, on a proposal from the Commission and after consulting the European Central Bank, with regard to third countries, safeguard measures for a period of up to six months where such measures are strictly necessary* ".

Also, if it is established, in the procedure provided for in paragraph 3, art. that "the economic policies of a Member State (...) risk compromising the proper functioning of the economic and monetary union, the Commission may address a warning to that Member State and the Council, on a recommendation from the Commission, may address the necessary recommendations to the Member State concerned. The Council, acting on a proposal from the Commission, may decide to make its recommendations public and to decide, in a spirit of solidarity between Member States, to take appropriate measures in the economic situation, particularly where serious difficulties arise in the supply of certain products, energy ".

Where a Member State is in difficulties or is seriously threatened with serious difficulties due to natural disasters or exceptional occurrences outside its control, the Council, acting on a proposal from the Commission, may grant financial assistance to the Member State concerned from the Union, under certain conditions.[54]

Where the Commission considers that there is an excessive deficit in a Member State or is likely to occur, it shall address an opinion to the Member State concerned and shall inform the Council accordingly. It shall, on a proposal from the Commission, taking into account any observations by the Member State concerned and after a global assessment, decide whether or not there is an excessive deficit. When making this finding, the Council, acting unanimously without delay, shall adopt, on a recommendation from the Commission, the recommendations addressed to the Member State concerned with a view to bringing the situation to an end within a given time limit. If the Council finds that no effective action has been taken within that timeframe in response to its recommendations, it may make its recommendations public. If the State concerned continues to disregard the Council's recommendations, it may decide that the Member State concerned shall within a given time adopt the deficit reduction measures which the Council considers necessary to remedy the situation. In such a case, the Council may require the Member State concerned to submit reports according to a precise timetable in order to examine the adjustment efforts accepted by that Member State. As long as a Member State does not comply with a decision adopted in the context above, the Council may request the Member State concerned; to publish additional information to be specified by the Council before issuing bonds and securities; to invite the European Investment Bank to revise its lending policy towards the Member State concerned; to require the Member State concerned to establish, besides the Union, until the date on which the Council considers that the excessive deficit has been corrected, an interest-free deposit in an appropriate amount or, finally, to impose fines in an appropriate amount.[55]

The Council shall wholly or partly abrogate its decisions or recommendations in so far as it considers, from its point of view, that the excessive deficit in the Member State concerned has been corrected. Where the Council has previously made its recommendations public, it shall publicly declare, as soon as the said decision has been repealed, that there is no excessive deficit in the Member State concerned.[56]

[52] Tratatul privind Uniunea Europeană, art. 49.
[53] Tratatul privind Uniunea Europeană, art. 50.
[54] Tratatul privind Funcționarea Uniunii Europene, art. 122
[55] TFEU, art. 126
[56] Ibidem.

The Council, acting either on a proposal from the Commission and after consulting the European Parliament and the European Central Bank or on a recommendation from the European Central Bank and after consulting the European Parliament and the Commission, shall adopt the provisions referred to in Articles 4, 5.4, 19.2, 20, 28.1, 29.2, 30.4 and 34.3 of the Statute of the ESCB and of the ECB.

In order to ensure the place of the euro in the international monetary system, the Council, on a proposal from the Commission, shall adopt a decision establishing common positions on issues of particular interest to the economic and monetary union within the competent international financial institutions and conferences. The Council shall act after consulting the European Central Bank.

After consulting the European Parliament and after discussion within the European Council, the Council, acting on a proposal from the Commission, shall decide which Member States qualify for a derogation fulfil the necessary conditions on the basis of the criteria set out in paragraph 1 and terminate the derogations concerning those Member States. irrevocably the rate at which the euro replaces the currency of that State and decides the other measures necessary for the introduction of the euro as the single currency in that Member State.

The Council also intervenes in the competition policy. In particular, "at the request of a Member State, the Council, acting unanimously, may decide that aid granted or to be granted by that State shall be considered compatible with the internal market by way of derogation from Article 107 or from the regulations provided for in Article 109, where such a decision is justified by exceptional circumstances ".

## 12. The Council as a component of the Union Constituent

If we accept the theory of the existence of a Constitution of the European Union, stated, among others, by the author Robert Schutze, then we should also accept the existence of a constitutive power. Of course, in this capacity, we are mainly meeting the Member States, gathered at an Intergovernmental Conference that can review the existing Treaties, but outside of it, the review procedures set out in the TEU and the TFEU also play a role for the Council.

Thus, in the ordinary revision procedure, its place is not a dominant one, and the Council is mainly endowed with the prerogative of receiving Parliament's and Commission's draft revisions initiated by any of the Member States, to submit them to the European Council and be notified to national parliaments.

But a much more important role is left to the Council by Article 352 TFEU. It states that "where Union action proves necessary in the policies defined in the Treaties, in order to attain one of the objectives set out in the Treaties, without their having provided the necessary powers, the Council, acting unanimously at the Commission proposal and after approval by the European Parliament, shall adopt the appropriate measures. Where those provisions are adopted by the Council in accordance with a special legislative procedure, it shall act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament. " In other words, in the case of application of Article 352 TFEU, the Council presents itself as a constituent of the Union, although, as I said above, that role is exercised in cooperation with the other Union institutions referred to by the legislation in question.

## 13. Conclusion.

As a conclusion of our study, instead of resuming the issues we have already presented to the distinguished reader, we would like to ask a question about which we would be happy to represent a starting point for an interesting debate: to what extent does the role of the Council in the institutional architecture of the European Union resemble the role of a single-chamber legislative or of a chamber of the bicameral legislative in the Member States? To draw an answer, let us resume the functions we have assigned to the Council. Thus, we considered that it behaves as one of the "guardians" of respecting the values of art. 2 TEU. But if we give these values a constitutional nature, do we not find the same role in the national parliaments in procedures such as the referral of the Constitutional Courts or the suspension of the Presidents? We have further stated that the Council acts as a component of a bicameral legislative or as a one-chamber legislative. In this case, a comparison with the National Parliaments appears almost redundant. As far as the component of implementation of legislative acts is concerned, national parliaments are generally not competent here, but the general framework and the means by which the executive exercises this power, internally, are determined by laws as acts of parliaments. Legislative delegation, especially during parliamentary holidays, or the approval of emergency ordinances are also mechanisms known by the constitutional systems of the Member States. The role of platform to coordinate the actions of the Member States is, by its nature, not to be exercised internally. On the other hand, national parliaments play a less powerful role in foreign policy than the Council at EU level, almost by merely ratifing the agreements concluded by the executive branch, but some means of controlling the exercise of these prerogatives exist, and I have addressed them in a previous study. Also, in budgetary matters, national parliaments have an important and obvious role, mainly in adopting laws on the state budget or those relating to its sources, such as taxes and duties. These issues are closely related to monetary policy, although this is in the Member States and the Union, mostly exercised by the central banks. Last but not least, the National Parliaments find themselves in the position to act as constitutive powers, the last of the positions we have found in our study.

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# THE ROLE OF THE PRESIDENCY IN THE FUNCTIONING OF THE EUROPEAN UNION ROMANIAN PRESIDENCY OF THE EU COUNCIL - CHALLENGES AND OPPORTUNITIES

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**Abstract**

*This year, for the first time in the history of its membership in the European Union, Romania exercises the rotating presidency of the Council of the European Union. As far as the Council is concerned, it is undoubtedly one of the most important decision-making factors, part of what the specialized doctrine calls the "bicameral legislative of the European Union". The manner of exercising the presidency, the role of the Presidency in the proper functioning of the Council, the challenges and opportunities related to it are, in our opinion, topics of interest for the Romanian public and their approach can bring more clarity to the debates held in this honorable, but the difficult period. That's exactly why the aforementioned subjects are the research topic of the research paper that we submit to your attention in the lines below.*

**Keywords:** *Romania, EU, Council, Presidency, role, opportunities, difficulties.*

## 1. Introductory considerations.

As we said in the abstract of the research that we are now subbmiting to your attention, this year, Romania exercises, for the first time in the history of its membership of the European Union, the Presidency of the Council. This gives us the opportunity to analyze both the role of the Council in the institutional set-up of the European Union and the role of its Presidency, in two related research.

Thus, if in the previous study we analyzed the place and the role of the Council in the institutional structure of the EU and we noticed the multiple postures in which it can be found, in the present study we are going further in the same direction and, without repeating the above, making a step towards a detailed analysis of the role of the Council Presidency. To this end, unlike the previous study, we will focus especially on the provisions of the Council's Rules of Procedure and its Annex, complementing our statements with aspects underlined by the specialized doctrine.

Having said that, we will proceed to the analysis of the relevant provisions of the Rules in question.

## 2. The role of the Presidency in the finctioning of the EU Council.

Thus, Article 2 of the Annex to the above-mentioned Rules of Procedure contains general aspects concerning the Council formations and the role of the General Affairs and Foreign Affairs formations. It deepens some of the provisions of the Treaties, stipulating how the General Affairs Council *"ensures the consistency of the work of the various Council configurations" and "prepares the meetings of the European Council and aims to implement the measures taken in cooperation with the President of the European Council and the Commission"*[1]. Apart from these aspects, the same rule reminds us that *"its responsibilities include general policy coordination, institutional and administrative issues, horizontal dossiers affecting several Union policies, such as the multiannual financial framework and enlargement, as well as of any dossier entrusted to it by the European Council, taking into account the rules of operation of the economic and monetary union"*[2].

All these duties are exercised, however, under the coordination of the rotating presidency of the institution concerned. This, as provided for in the Treaties, *"provides for a period of 18 months pre-established groups of three Member States* (...) *formed on the basis of an equal rotation of the Member States, their diversity and the geographical balance of the Union* "[3]. Regarding the balanced constitution of these groups of Member States, it seems useful to remember that the current group includes, besides Romania, two Member States from different geographical regions of Europe, such as Austria and Finland. Within these groups, *"each member of a group ensures, for a six-month period, the rotating presidency of all Council configurations, except for the Foreign Affairs configuration"*[4] (this is always ensured by the High Representative for Foreign Affairs and Security Policy except for the situation in which he is *"replaced, if necessary, by the member of that formation representing the Member State holding the six-month*

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[1] *Council Decision of 1 December 2009 adopting the Council's Rules of Procedure* (2009/937/EU) , OJ L 325, 11.12.2009, p.35, Annex (reffered to, in the following, as Council's Rules of Procedure), art. 2 (2), own translation.

[2] Ibidem.

[3] *Council's Rules of procedure*, art. 1(4), first paragraph.

[4] *Council's Rules of procedure*, art. 1(4), second paragraph.

*presidency of the Council"*[5] or by another exception - by exception - representing the *"the situation in which the Foreign Affairs Council is convened to deal with matters of common commercial policy and when its chairman can be replaced by the six-monthly presidency in accordance with Article 2 (5) second subparagraph)"*[6]. In regard to the other members of the group, they *"support the Presidency in fulfilling all its responsibilities on the basis of a joint program"*[7] and each of them, *"at the request of the Presidency and acting in accordance with its instructions, replaces it, as if necessary, release certain tasks and ensure the continuity of the Council's work. "*[8] In other words, the groups in question (or the troika, as sometimes called in the doctrine or in the public space) must, in my view, be regarded as a whole, that is the meaning we infer from the Rules of Procedure. In this way, instead of each Presidency of each state being a strictly individual exercise, by virtue of the fact that each state participates in virtually 3 rotating Presidencies of 6 months (one as the State to take over the Presidency, one in a state holding it and one as a state holding it), a link is made both between the member states of a group and between them and the following groups.

Also, the Rules of Procedure offer states a fairly high degree of flexibility in making mutual arrangements between members of a group, stipulating that they *"can reach other understandings"*[9].

In a general look at the role of the Council Presidency, it can be said that the Presidency has an important role to play in the Council's debates, not only because the Presidents are calling for the meetings, but also that the states holding the presidency will be held responsible for the way in which the meetings of the Council are held during their term of office[10]. Therefore, the ministers whose states run the Presidency will have the task of preparing and leading the work of the Council. The practice so far has been to stress the role of the Council Presidency and, in particular, the Presidency of the General Affairs Council. It is responsible for establishing the main coordinates of the work of the Presidency, convening the Council and establishing its provisional program. In reality, however, depending on the main points of the program, it is possible that all ministers of the Romanian Government will be involved in the presidency of the EU Council.[11]

But what, in fact, does the work of the member states of a group, of what we refer to? According to the Rules of Procedure, "for each period of 18 months, the predetermined group of the three Member States holding the Presidency of the Council during that period shall (...) draw up a program of Council activities for the period in question."[12] which is almost impossible to avoid), the program includes issues that interfere with the activities of the Foreign Affairs party, it must be drafted together with its President, in this case, with the High Representative. Also in all cases, the draft program "shall be drawn up in close cooperation with the Commission and the President of the European Council, following appropriate consultations (...), in the form of a single document, at least one month before the beginning of the period concerned, so that it can be approved by the General Affairs Council"[13]. We deduce from them that the program of 18 months of presidency is the work of the members of the group of 3 states that exercise it materially and formally but cannot be drawn up without consulting the representatives of the Commission and the Council European institutions, so these institutions also have a decisive contribution, and the program as a whole is approved by the General Affairs Council, so it must be mastered by all Member States. In other words, the program of a period of 18 months for the exercise of the Presidency must be the result of an interinstitutional collaboration and, consequently, of a broad consensus, without this expression being a cliché, a consensus of which each 3 states must take into account.

So, we described, in the aforementioned the elaboration of the program for a period of 18 months of exercising the Presidency. Naturally, the next step would be to analyze what role the program plays in the economy of the Presidency.

Thus, the Rules provide in this respect that "*the Presidency which will carry out its mandate during that period shall draw up, after appropriate consultations, for each Council formation, draft agendas for the meetings of the Council scheduled for the following semester, legislative and operational decisions envisaged. These projects shall be drawn up at least one week before the start of the semester concerned, on the basis of the 18-month program, after consulting the Commission. Projects for all Council configurations are included in a single document. Where appropriate,*

[5] *Council's Rules of procedure*, art. 2(5), second paragraph.
[6] Ibidem, (a) Declaration.
[7] *Council's Rules of procedure*, art. 1(4), second paragraph.
[8] *Council's Rules of procedure*, art. 20 (2).
[9] *Council's Rules of procedure*, art 1(4), second paragraph.
[10] Walter Cairns, *Introducere în legislația Uniunii Europene*, Universal Dalti Publishing House, 1997, p. 33, apud Augustin Fuerea, *The exercise of the presidency winthin the European Union* article published at the International Conference Current Issues of the Political and Legal Area of the EU , Third Edition, October 27, 2016, and published in Suplimentul Revistei Române de Drept European, October 27, 2016, pp. 67-75.
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[12] *Council's Rules of procedure*, art. 2(6).
[13] Ibidem.

*additional Council meetings may be envisaged in addition to those previously planned. If, during one semester, any of the meetings planned during that period is no longer justified, the Presidency shall not convene that meeting again*"[14].

Further development is described in article 3(1) of the Annex to the Council's Rules of Procedure. Specifically, the provision in question states that *"in view of the Council's 18-month program, the chairperson shall draw up the provisional agenda for each meeting (which he / she) sends to the other members of the Council and the Commission at least 14 days before the beginning of the meeting (and, at the same time, national parliaments and Member States) "*[15]. In other words, the cooperation referred to above expands, knowing also a dimension that we can call qualitative (regarding the nature of acts subjected to it) as well as quantitative (in its exercise a part of the institutions of the Union are involved and some of the components of democratic legitimacy at Union level, national parliaments).

The provisional agenda we have referred to "*contains the points for which the request for inclusion on the agenda submitted by a member of the Council or the Commission and any related documents were submitted to the General Secretariat at least 16 days before the start of that meeting [and] (...) shall indicate (...) by an asterisk the points on which the Presidency, a member of the Council or the Commission may request a vote. Such an indication shall be made after all the procedural requirements laid down by the Treaties have been met.*"[16]

The way of exercising the above is also described in one of the footnotes (sic!) of the Annex, which refers to the statements relating to this article, which states that *"the President shall endeavor to ensure that in principle, the provisional agenda for each meeting of the Council devoted to the implementation of the provisions of the TFEU title on the area of freedom, security and justice and any documents relating to those items shall be forwarded to the members of the Council at least 21 days before the beginning of the meeting"*[17].

*"The Presidency shall remove from the provisional agenda the items relating to draft legislative acts whose examination has not been finalized by Coreper by the end of the week preceding the week preceding that meeting, except where a different form of action is required urgency reasons"*[18].

Once the agenda is transmitted, it is time to move our attention to the actual meetings of the Council. In this respect, the Rules stipulate that it *"votes at the initiative of the President"*. In other words, we have already identified one of the roles of the President, to put to the vote the adoption of the acts on the agenda of the Council meeting. But this action is not done in a discretionary manner. The same Rules provide that *"the President must initiate a voting procedure on the initiative of a member of the Council or of the Commission, provided that a majority of the Council members so decides"*[19]. *"The Council can vote only in the presence of the majority of the members of the Council entitled to vote in accordance with the treaties*[20] (which, moreover, respects the general philosophy of the rules regarding the conditions under which they may decide the other institutions involved in the Union decision-making process) . *When voting, the President, assisted by the Secretariat-General, shall verify that the quorum is met. "*[21]

At this point, we must also refer to voting procedures within the Council so that we can become a less visible body, but where the presidency plays a role perhaps even more important than that of its own meetings - the Council said.

Thus, Article 12 of the Rules enshrine the existence of two types of procedures for the adoption of Council acts, written and tacit. The latter is also called the simplified written procedure.

In particular, "*Council acts on an urgent matter may be adopted by a vote in writing, if the Council or Coreper decides unanimously to use the said procedure. In special circumstances, the Chair may also propose the use of this procedure; in this case, the written vote may be used if all the members of the Council agree to this procedure. Where the written vote relates to a matter which the Commission has submitted to the Council, the Commission shall be required to accept the use of the written procedure.*"[22]

At the initiative of the Presidency, however, the Council may also use a simplified written procedure. It is used: "*for the purpose of adopting the text of a reply to a written question or, as the case may be, a question for oral answer to the Council by a Member of the European Parliament, after the draft reply has been examined by Coreper; for the purpose of appointing the members of the Economic and Social Committee and the members of the Committee of the Regions and their alternates after the draft decision has been examined by Coreper; for the purpose of making the decision to consult other institutions, bodies, offices or agencies, whenever consultation is required by the Treaties and for the purpose of implementing the common foreign and security policy through the << COREU >>*

[14] Council's Rules of procedure, art. 2(7).
[15] Council's Rules of procedure, art. 3(1).
[16] Council's Rules of procedure, art. 3(2).
[17] Council's Rules of procedure, art. $3^{(3)}$
[18] Council's Rules of procedure, art. 3(5), second paragraph.
[19] Council's Rules of procedure, art. 11(1), second paragraph.
[20] Council's Rules of procedure, art. 11(4).
[21] Ibidem.
[22] Council's Rules of procedure, art. 12(1)

*network.*[23] *In cases where this procedure is used, "the relevant text shall be deemed adopted at the end of the period set by the Presidency, depending on the urgency of the matter, unless a member of the Council objects*."[24]

In turn, the Presidency plays an important role in the way in which Council meetings take place, for example in determining whether they are public or closed. It may decide that the Council's further deliberations on non-legislative proposals *on "the adoption of rules that are legally binding in or for Member States through regulations, directives, framework decisions or decisions on on the basis of the relevant provisions of the Treaties, with the exception of internal measures, administrative or budgetary acts, acts on interinstitutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions)*[25]*,* which are initially public, to preserve this character unless the *"Council or Coreper decides otherwise"*. Also, the Presidency, but also the Member States or the Commission, may propose *"specific themes or topics for these debates, taking into account the importance of the issue and the interest it presents to citizens."*[26]

The Presidency is also responsible for complying with the Rules of Procedure and the smooth running of the Council's work, particularly with regard to its working arrangements.

In this regard, it may, "s*ave where the Council decides otherwise, take all appropriate measures to ensure that the time available during meetings is as effective as possible, in particular: (a) to limit, for a particular debate point, the number of persons in each delegation present in the meeting room and decide whether or not to authorize the opening of an additional room; (b) establish the order in which the points and the duration of the debates are addressed; (c) organize the time allocated to the debate on a particular point, in particular by limiting the time for the participants to speak and setting the order of their interventions; (d) request delegations to submit their proposals in writing for the modification of a text under discussion before a certain date, accompanied, where appropriate, by a brief explanation; (e) request delegations having identical or similar positions on a specific point, text or part of a text to designate one of these delegations to express their common position at the meeting or in writing before the meeting*. "[27]

In addition, for the smooth and operational conduct of the Council's work, "*the Presidency shall organize the Council's agendas by grouping the items on the agenda which are linked to each other in order to facilitate the participation of the national representatives concerned, especially if a specific Council formation a number of distinct topics need to be addressed.*"[28]

Following the adoption of the acts, they must be signed by the *"acting President at the time of their adoption and by the Secretary-General"*[29] who may delegate the signature of the Directors-General of the Secretariat-General.

In the framework of mechanisms relating to the democratic functioning of the Union's institutions, "*the Council shall be represented before the European Parliament or its committees by the Presidency or, with the latter's agreement, by a member of the pre-arranged group of three Member States (...) , by the next Presidency or by the Secretary-General* "[30].It may also be represented by senior officials of the General Secretariat, but they also act in accordance with the instructions of the Presidency. As a rule, these provisions do not apply to the Foreign Affairs Council, where representation of the Council before the EP rests with the High Representative, but as an exception, it "may be replaced by the member of that Council formation representing the Member State exercising half-year presidency of the Council "[31].

We are now moving to another important role of the Presidency to note that it does not concern only Council formations, with the exception of the General Affairs group, but also the chairmanship of certain bodies coordinated by the Council or whose activities are closely related to it.

Coreper is mainly responsible for preparing the work of the Council. Coreper is also empowered to adopt procedural decisions in the cases provided for in the Council's Rules of Procedure. Although it does not have the power to decide on the merits, in practice, Coreper has become a genuine decision maker.[32]

Or, as the doctrine emphasizes, based on the provisions of the Council's Rules of Procedure, "*Coreper is responsible for preparing the work of the Council and for carrying out the mandates entrusted to it by the Council. In all cases, it ensures the consistency of the policies and actions of the European Union and ensures that the (...) principles of subsidiarity, proportunity (...), justification of acts, rules (s) for determining the competences of institutions, bodies and*

[23] Council's Rules of procedure, art. 12(2)(a).
[24] Council's Rules of procedure, art. 12(2).
[25] Council's Rules of procedure, art. 8(1).
[26] Council's Rules of procedure, art. 8(2), second paragraph.
[27] Council's Rules of procedure, art. 20(1), second paragraph.
[28] Council's Rules of procedure, Annex I, third paragraph (7).
[29] Council's Rules of procedure, art. 15.
[30] Council's Rules of procedure, art. 26, first paragraph.
[31] Council's Rules of procedure, art. 26, second paragraph.
[32] Paul Craig, Grainne de Burca, Dreptul Uniunii Europene: comentarii, jurisprudență și doctrină, Ediția a VI-a, Editura Hamangiu, București, 2017, p. 47.

*agencies Union, budgetary provisions, rules (procedure), transparency and quality of drafting*".[33]

Coreper brings together senior civil servants (from Member States) and operates on two levels: Coreper II, consisting of permanent representatives of the ambassadorial rank, with competence in sensitive or controversial affairs, such as economic and financial affairs or external relations, and liaises with national governments, and Coreper I, consisting of permanent deputy representatives, responsible for issues such as the social affairs, the internal market and transport.[34]

The role of Coreper in the internal decision-making process, the Council, and the Union as a whole is, in our view, more important than the primary or secondary law provisions could refer to.

"Coreper shall examine all items on the agenda of a Council meeting, unless the latter decides otherwise. (He) makes every effort to reach an agreement at its level, which is submitted to the Council for adoption. It shall ensure that the dossier is adequately submitted by the Council and, where appropriate, provides guidance, options or suggestions for solutions. In the event of an emergency, the Council, acting unanimously, may decide to deliberate without this prior examination to take place."[35]

In particular, Coreper examines the legislative proposals that emanate from the Commission and helps set the agenda for Council meetings. This agenda consists of Parts A and B. The first part (List A) covers the subjects on which Coreper has agreed that they can be adopted by the Council without debate, while the second part (list B) contains the themes on which they are additional debates are needed. In the specialized doctrine it is estimated that approximately 70-80% of Council decisions prepared by Coreper and / or working groups are then only formally passed through the Council as points A. "Coreper's decision-making process tends to be a consensus, and in cases where voting rules make it necessary for a qualified majority[36], which contributes both to facilitating this process and to greater legitimacy and acceptance of adopted acts.

For its part, Coreper is supported by about 150 working groups, composed of national experts, examining the Commission's proposals, and can also receive information from specialized committees set up by the Treaties or secondary legislation.[37]

Article 19 of the Rules of Procedure lists, more specifically, part of the tasks of Coreper. It may "*adopt the following procedural decisions, provided that the items relating to them have been included on the provisional agenda at least three working days before the meeting. A unanimous decision shall be taken within Coreper for any derogation from that period: (a) the decision to hold a Council meeting in a place other than Brussels or Luxembourg; (b) the authorization to make a copy or extract of a Council document for use in legal proceedings; (c) the decision to hold a public debate in the Council or not to hold a specific deliberation of the Council in public; (d) the decision to make public the results of the votes and the statements entered in the minutes of the Council (...); (e) the decision to use the written procedure; (f) the approval or amendment of Council Minutes (...); the decision to publish or not to publish a text or an act in the Official Journal (...); (h) the decision to consult an institution or body whenever such consultation is required by the Treaties; (i) the decision to establish or extend a deadline for consultation of an institution or body; (j) the decision to extend the deadlines laid down in Article 294 (14) TFEU; and (k) the approval of the wording of a letter to be sent to an institution or body*. "[38]

Before returning to the role of the Presidency, we also need to emphasize the fundamental distinction between Coreper and the approximately 150 committees and working groups. Thus, in the specialized doctrine, it has been stressed how Coreper occupies a fundamental place in the Union's decision-making process (which I have described above), prepares the Council's work and executes the tasks assigned to it, and establishes and controls the Council's working groups, while committees and working groups only assist the Council (and Coreper) in preparing the work.[39]

First of all, under the Rules, "*Coreper's Presidency is assured, depending on the items on the agenda, by the Permanent Representative or the Deputy Permanent Representative of the Member State holding the Presidency of the General Affairs Council*."[40] "*The chair of the training groups shall be assisted by a delegate of the Member State holding the Presidency of that formation, except where the Council decides otherwise, by a qualified majority*."[41] Moreover, the Rules also provides that "*for the preparation of meetings of Council configurations meeting once a semester, where such meetings take place during the first half of the semester, meetings of committees other than Coreper and those of working parties the course of the preceding semester shall be chaired by the Member State delegate who shall chair*

[33] Augustin Fuerea, *Manualul Uniunii Europene*, Ediția a VI-a revizuită și adăugită, Editura Universul Juridic, București, 2016, p.114.
[34] Ibidem, p. 47.
[35] Augustin Fuerea, *Manualul Uniunii Europene*, Ediția a VI-a revizuită și adăugită, Editura Universul Juridic, București, 2016, p.114.
[36] Ibidem, p. 47.
[37] Ibidem, p. 48.
[38] *Council's Rules of procedure*, art. 19.
[39] Augustina Dumitrașcu, Roxana-Mariana Popescu, *Dreptul Uniunii Europene:sinteze și aplicații, Ediția a 2-a, revizuită și adăugită*, Editura Universul Juridic, București, 2015, pp. 65-66.
[40] *Council's Rules of procedure*, art. 19(4).
[41] ibidem.

*the meetings of the said Council."* [42]*Also, assuming that we are not in the presence of an exception, and subject to an agreement between the Presidencies concerned, "if a case is mainly dealt with during a semester, a delegate of the Member State holding the Presidency during that semester may, during the previous semester, chair meetings of the committees, with the exception of Coreper, and of the working groups, when they debate the dossier*."[43]

An exception is also the situation of the examination of the Union budget for a given financial year, in which case "*the meetings of the Council's preparatory bodies other than Coreper, which are responsible for preparing the items on the Council's agenda for the examination of the budget, are chaired by a delegate of the Member State holding the Presidency of the Council in the second half of the year preceding the financial year in question (which happens, with the agreement of the other Presidency) and when discussing the above-mentioned budget items. The Presidencies concerned shall consult on practical arrangements*. "[44]

As far as committees and working groups are concerned, the Presidency "*organizes their meetings so that their reports are available before the Coreper meetings at which they are to be considered*."[45]

She "*ensures that working groups or committees transmit their files to Coreper only when there is a concrete prospect of advancing or clarifying positions at this level. Conversely, files are returned to working groups or committees only when necessary and in any case only for the purpose of resolving precise and well-defined issues*. "[46]

It is also up to the presidency to ensure that work progresses between meetings. In doing so, it may, with the agreement of the working group or the committee concerned, carry out "*the most effective consultations on specific issues with a view to reporting possible solutions to the working group or committee concerned [and] written consultations requesting delegations to respond in writing to a proposal before the next meeting of the working group or the committee*."[47]

For the smooth running of the preparatory work of the Council, "*the Presidency shall, as soon as possible, present to Delegations, in preparation for Coreper, all necessary information to enable Coreper to carry out a thorough preparation, including information on the objective which the Presidency is trying to achieve following the discussion of each item on the agenda. To the contrary, the Presidency, if necessary, encourages delegations to inform the other delegations, in preparing Coreper work, on the positions they will adopt in Coreper. In this context, the Presidency finalizes Coreper's agenda. If the circumstances so require, the Presidency may convene more frequently the preparatory work groups for Coreper.* "[48]

For reasons of efficiency, "*the Presidency avoids the inclusion on Coreper's agenda of purely informative points, (...), [such as] the outcome of meetings in other fora, with a third State or another institution, the problems of procedure or organization, etc. [which must be] transmitted to delegations in the preparation of Coreper, in writing, whenever possible, and shall not be repeated during the Coreper meetings*"[49].

Once the Coreper meeting is opened, the presidency provides all the necessary additional information on the deployment and particularly indicates the time it intends to allocate to each point, avoiding *"long introductions and repeating information already made available to delegations"*[50].

If need be, and if urgency does not require the adoption of another mode of action, *"the Presidency shall postpone for a subsequent meeting of Coreper the points relating to legislative acts on which the committee or working group has not completed its work for at least five days working before the Coreper meeting "*[51].

In the course of deliberations on substantive issues, *"the Presidency shall, subject to the type of debate required, provide the delegations with the maximum duration of their intervention* [which ideally] *shall not exceed two minutes."*[52]

Surprisingly, it is in principle excluded that all participants take the floor, and this can only happen "*in exceptional situations where specific issues arise, with the Presidency setting a time for each speech*"[53], and "the Presidency focuses as much as possible much more to the deliberations, especially by inviting delegations to respond to compromise texts or specific proposals"[54]. In the context of the almost tortious search for operability, in which the Presidency's main role is to speed up the pace of Coreper work,"during the meetings and the conclusion the presidency avoids long summaries of the debates and confines itself to concise conclusions on the (substantive and / or procedural)

[42] Council's Rules of procedure, art.19(5).
[43] Council's Rules of procedure, art.19(6), first paragraph.
[44] Council's Rules of procedure, art.19(6), second paragraph.
[45] Council's Rules of procedure, art.21, first paragraph.
[46] Council's Rules of procedure, Annex V(1).
[47] Council's Rules of procedure, Annex V(2).
[48] Council's Rules of procedure, Annex V(5).
[49] Council's Rules of procedure, Annex V(7).
[50] Council's Rules of procedure, Annex V(8).
[51] Council's Rules of procedure, art. 21, second paragraph.
[52] Council's Rules of procedure, Annex V(9).
[53] Council's Rules of procedure, Annex V(10).
[54] Council's Rules of procedure, Annex V(11).

results obtained."[55] Finally, let us further point out that, unless the presidency states otherwise, ”delegations do not speak when they agree to a particular proposal; in this case, silence is considered as a principle agreement "[56].

In a way, the Council Presidency is also linked to the work of other institutions. For example, the Rules of Procedure of the European Council provide that, at least four weeks before each ordinary meeting of the European Council (...), its President, in close cooperation with the member of the European Council representing the Member State holding the six-monthly Presidency of the Council and the President of the Commission, shall submit to the General Affairs Council an annotated draft agenda.[57]

## Conclusions.

At first glance, out of all the above, the role of the Council Presidency would appear to be a technical one, mainly linked to the most operative deployment of the works. This perspective, though it would provide a multitude of challenges, would not leave much room for opportunities for the Member State holding the Presidency. However, we are of the opinion that, in a direct relationship with the abilities of the representatives of a state, the Presidency's ability to streamline Council meetings offers appreciable opportunities for the closure of numerous dossiers, some of which are of particular interest to the State concerned, without neglecting the Union's overall interests. In fact, this is the opportunity that this period offers to Romania, but its actual capitalization is related to the capacity of our country's representatives to act as a balancing and dynamic factor in the general economy of the Council's work.

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[55] Council’s Rules of procedure, Annex V(12).
[56] Council’s Rules of procedure, Annex V(16).
[57] Council’s Rules of procedure, art. 2(3)(a).

# AN ATYPICAL FORM OF CIVIL LIABILITY – THE LIABILITY FOR THE ENVIRONMENTAL DAMAGE

**Florin Octavian BARBU**[*]

**Abstract**

*The problem of environmental pollution is one of the most serious of today's society, with the consequence of deteriorating man's living conditions and the development of the future civilization.*

*Environmental law appears as a mixed right, being at the limit of public law with private law, and thus the right of civil liability can be considered as a means of enforcing environmental regulations , with the same title as administrative law.*

*Thus, civil liability does not make distress between damage (damage) and as such extends to the ecological field, the two cohabiting, based on interfering principles: the precautionary principle, the polluter pays principle and the principle of prevention.*

*Art. 44 para. Article 7 of the Constitution refers to the protection of the environment in the scope of the right to property: "The right to property oblige to observe the tasks related to the protection of the environment and to ensure good neighbourliness, as well as the observance of the other tasks which, according to law or custom, belong to the owner".*

*As regards the responsible person / person who may request the prevention or repair of environmental damage, it is necessary to consider, first of all, the general provision of art. 94 par. 1 lit. i from GEO no. 195/2005, which establishes the "polluter pays" principle. Also, Art. 1 of GEO no. 68/2007, which is a special law, states that environmental liability is based on the "polluter pays" principle, both for the purpose of preventing and repairing environmental damage.*

**Keywords:** *the protection, envirommental pollution, special law, the precautionary, the consequence.*

## 1. Introductory notion

The The Romanian Constitution, adopted in 1991, included several tangential provisions regarding environmental law, establishing the state's obligation to "restore and protect the environment" and the obligation to protect the environment related to the right to property[1].

On the occasion of the revision of the Constitution[2], the fundamental right of man to a healthy environment[3] has been established, consecrating the legal framework for the exercise of this right, correlated with the obligation of natural and legal persons to protect and improve the environment[4]. We agree with the view that[5], in the content of human right to a healthy environment, its right to correct information on the possibility of ecological damage, an uncertain possibility, but which may cause possible dangers, must also be included.

We emphasize that other countries have been and are concerned about the protection of the environment, enshrining principles in fundamental laws[6].

By GEO no. 195/2006 on environmental protection[7] and by GEO no. 68/2007 on environmental liability with regard to the prevention and remedying of environmental damage[8], the legislator has established

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[1] Lacrima Rodica Boilă, *Răspunderea civilă delictuală obiectivă,* ediția a 2-a, Ed. C.H. Beck, București, 2014, p. 503.

[2] Law on the Revision of the Romanian Constitution of 18 September 2003 (Official Monitor No. 669 of September 22, 2003)

[3] Art. 35 of Romanian Constitution.

[4] Ion Dogaru, Pompiliu Drăghici, *Drept civil. Teoria generală a obligațiilor în reglementarea Noului Cod civil,* Edition 2, CH Beck, București, 2014, p. 480.

[5] Lacrima Rodica Boilă, *op. cit*., p. 504.

[6] Article 66 of the Constitution of Portugal establishes rules to ensure effective protection of the environment and quality of life by establishing the right of everyone to a healthy and balanced human life environment, correlated with the appropriate duty to defend it; The Framework Law of 8 July 1986 in Italy sets out the rules on environmental damage and provides in Art. 18-1, obligation to repair, provided it is prescribed by law as an offense. In Switzerland, the Nature Protection Act of 1.07.1996, obliges the perpetrator of an unlawful cause of damage in natural areas and protected biotopes to pay the cost of repairing it; The Indonesian law of March 11, 1982, on environmental management, establishes in art. 20, liability of the environmental polluter; The Spanish Constitution of 1978, in art. 45, enshrines the general principle according to which every person has the right to enjoy a healthy environment in order to develop his/her personality and the obligation to preserve it.

[7] O.M. no. 1196 of 30 December 2005, subsequently amended and supplemented by several normative acts, the last amendment being brought by Law no. 226/2013 (O.M. No. 438 of July 18, 2013).

[8] O.M. no. 446 of 29 June 2017 being amended and completed by GEO no. 15/2009 (Ordinance of the President of the Republic of Moldova No. 149 of 10 March 2009), GEO no. 64/2011 (Official Monitor, No. 461 of June 30, 2011); Law no. 249/2013 (O.M. No. 456 of 24 July 2013); Law no. 187/2012 (Official Monitor, No. 757 of November 12, 2012).

the legal framework regarding environmental protection in Romania.

## 2. Civil Liability in Environmental Law

Therefore, Tort law civil liability, according to some authors, must be considered in terms of its foundation, as follows: liability based on fault, liability of the commissioners for the deed of their offenders, faultless liability for the deed of work and special objective liability which includes the legal regime established by the Protection Law environmental liability, liability for nuclear damage, objective liability of the aircraft operator, liability for damage to persons and goods not on board during take-off, flight or landing[9].

In this area, liability can be subjective, based on the proven fault of the person who committed the act of damage or objective, for the deed of work, under the conditions established by the Civil Code or under the special provisions regarding the regime of this liability.[10]

As far as we are concerned, we consider that civil liability for environmental damage is determined by the existence/non-existence of fault[11], namely:

- subjective liability, based on fault;
- objective liability, which may be governed by the Civil Code or special laws[12].

Government Emergency Ordinance no. 195/2005 regulates the protection of the environment in our country. As a result of the efforts to take into account the Acquis Communautaire in the field, in art. 95 of GEO no. 195/2005 provides:

1. Liability for environmental damage shall be objective, independent of fault; in the case of the plurality of authors, the liability is jointly and severally.
2. Exceptionally, liability may be subjective for damage caused to protected species and natural habitats, according to specific regulations.
3. Prevention and repair of environmental damage shall be carried out in accordance with the procedures of this Governmental Emergency Ordinance and the specific regulations.

As stated in the doctrine, GEO no. 195/2005 established a regime of liability for environmental damage, close to the one established in Community law[13].

With the accession to the European Union in 2007, it was necessary to transpose the Council Directive and the European Parliament no. 2004/35/EC of 21 April 2004 on environmental liability, with particular reference to the prevention and remedying of environmental damage[14].

Thus, Romania transposed the Directive through GEO no. 68/2007, with the same title[15].

Taking into account the GEO no. 195/2005 and GEO no. 68/2007, in order to highlight the particularities of civil liability for environmental damage, it is imperative to analyse the notions of injury (which we have developed in the previous report) or the environmental damage, the responsible person and the persons who can demand the repair of the environmental damage, preventive and reparatory measures or actions, as well as the powers of the public authorities, the basis of liability and the legal nature of such liability[16].

Therefore, both categories of damage, pure environmental damage and ricochet damage are and must be repaired. As such, the repair of pure[17] ecological damage takes place according to provisions no. 95 of GEO no. 195/2005 and the special provisions of GEO no. 68/2007. On the contrary, reparation of damages caused by ricochet, caused to natural persons and private legal entities as a consequence of the damage to the environment, will be done under the conditions and according to the rules of the common law (Article 3 paragraph 4 of GEO 69/2007).

The State's obligation to guarantee the right to compensation for the damage suffered is regulated in Art. 5 let. E, from Law 256/2006, and the basis of liability for environmental damage is enshrined in art. 95 of Law 256/2006. [18]

Therefore, the objective basis of liability is the risk of dangerous activities for the environment or for people's lives, from which we conclude that the liability of the polluter will be committed only if there

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[9] Lacrima Rodica Boilă, *op. cit.*, p. 518.

[10] M.E. Pătrăuș, *Răspunderea civilă pentru dauna ecologică, Teză de doctorat,* coordinator L. Pop, Facultatea de Drept Cluj-Napoca, 2004, pp. 113.

[11] M. Uliescu, *Dreptul mediuluiinconjurator,* Fundatia „Romania de Maine", Bucuresti, 1998, p.44.

[12] For example, the liability determined by the neighbourhood relations.

[13] Mircea Duțu, „Prevenirea și repararea pagubelor de mediu potrivit Ordonanței de urgență a Guvernului nr. 68/2007", in *Dreptul* no. 11/2007, p. 11.

[14] Published in *Journal Officiel des Communautés Européennes,* no. L 143 of 30 April, 2004.

[15] Published in O.M. no. 446 of 29 June 2007, modified and amended by GEO no. 15/2009, published in O.M. no. 149 of 10 March 2009 and by GEO no. 64/2011.

[16] Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Tratat elementar de drept civil. Obligațiile conform noului Cod civil,* Universul Juridic, București, 2012, p. 540.

[17] Damage that causes the natural environment.

[18] 1. Liability for damage shall be objective, independent of fault. In the case of plurality of authors, the liability is jointly and severally.

2. Exceptionally, liability may also be subjective for damage caused to protected species and natural habitats, in accordance with specific regulations.

3. Prevention and repair of environmental damage shall be carried out in accordance with the provisions of this Emergency Ordinance and the specific regulations.

is evidence of a causal link between his activity and the environmental damage that has occurred.[19]

Objective liability is based on the idea of the risk of activity for environmental damage[20], aiming to ensure greater protection of victims of environmental damage.

Objective responsibility is based on the idea of the activity risk for environmental damage, aiming to ensure greater protection of victims of environmental damage in the future.[21]

Civil liability concerns the culpability of the responsible person who is assessed in terms of the normality of his preventative conduct, the sanction intervening for lack of precaution.[22]

As regards the responsible person, the person who may request the prevention or repair of environmental damage, it is necessary to consider, first of all, the general provision of art. 94 par. 1 let. I, and from GEO no. 195/2005, which establishes the "polluter pays" principle. Also, Art. 1 of GEO no. 68/2007, which is a special law, states that environmental liability is based on the "polluter pays" principle, both for the purpose of preventing and repairing environmental damage.

Under these circumstances, liability is both reparatory and preventive.[23]

Any natural or legal person may have the status of polluter, however, according to art. 2, art. 10-15 and art. 26 and following of GEO no. 68/2007, the polluter is designated the operator of professional activities. Thus, according to art. 2 point 10 of GEO no. 68/2007, an operator means any natural or legal person governed by public or private law who carries out or controls a professional activity or who has been entrusted with decisive economic power over the technical functioning of such an activity, including the holder of a regulatory act for such an activity or the person who registers or notifies such an activity[24].

Professional activity[25] is any activity carried out in a business or enterprise, irrespective of its private or public character, profit or non-profit.

As regards the sphere of persons entitled to demand the prevention or repair of environmental damage, it is necessary to consider the provisions of Art. 5 letter d) of GEO no. 195/2005, which is in conformity with Community rules and provides that the State recognizes, by virtue of the right to a healthy environment, the right to address, directly or indirectly (through environmental organizations), to the competent authorities in environmental matters, irrespective of whether or not an injury has occurred.

Article 20 para. 6 of GEO no. 195/2005 provides that non-governmental organizations have the right to legal action in environmental matters, having an active procedural capacity in such litigation.[26]

In art. 20-25 of GEO no. 68/2007 regulates the right of any natural or legal person to address to the competent public authorities, in the case of environmental damage, which has affected this person, solving the complaint/request following the steps of the established administrative procedure[27].

Against the decisions taken by these authorities, dissatisfied persons can act in administrative litigation. We emphasize that this right also belongs to non-governmental organizations that have the mission of protecting the environment.

Concerning preventive and reparatory measures, GEO no. 68/2007 clearly establishes that polluters are required to take all measures to prevent and repair damage to the environment[28], while setting out how to bear the costs of these actions.

As such, any operator is obliged to prevent imminent damage and to inform the competent authorities (the county environmental protection agency and the County Environmental Guard)[29] within the time limit set by law.

Also, the necessary preventive measures must be proportionate to the imminent threat and lead to the avoidance of injury, taking into account the precautionary principle in making decisions[30]. All these activities are an expression of preventive liability for such damages.

According to the law, the county environmental protection agency may at any time request the operator to take the necessary preventive measures, as well as the possibility to take and carry out the necessary preventive measures itself. [31]

According to art. 2 point 10 of GEO no. 68/2007, reparation measures are any action including injury mitigation or interim measures aimed at restoring, rehabilitating, replacing damaged natural resources or providing an equivalent alternative to those resources or services.

According to art. 14 par. 1 lit. a of GEO no. 68/2007, polluters have the obligation to act immediately to control, isolate, eliminate the negative

[19] Lacrima Rodica Boilă, *op. cit.*, p. 506.
[20] Major risk generating activities are those in the field of nuclear energy, explosive materials and materials, hazardous toxic waste, radioactive emissions, etc.
[21] *Ibidem*, p. 144.
[22] *Ibidem*.
[23] According to art. 2 para. 1 pt. 2 of GEO no. 68/2007.
[24] Liviu Pop a.o., *op. cit.*, p. 542.
[25] According to art. 2 pt 1 of GEO no. 68/2007.
[26] L. Pop and others, *op. cit.*, p. 542.
[27] The administrative procedure and the competent bodies in the matter are stipulated in art. 20-25 of GEO no. 68/2007.
[28] L. Pop and others, *op. cit.*, p. 543.
[29] Art. 2 pt. 9 of GEO no. 68/2007.
[30] Art. 10 para. 3 of GEO no. 68/2007.
[31] Concerning the competences of public authorities in the matter, see Art. 10-12 of GEO no. 68/2007.

effects on human health or worsening the deterioration of services.

Also, the operator is obliged to take the necessary reparation measures established according to the law by the county environmental protection agency under the conditions and according to the procedures.[32]

We emphasize that remedies must be proportionate to the damage caused, also taking into account the precautionary principle in making decisions.[33]

Repair of damage according to Annex 2 to GEO no. 68/2007 may be of three kinds:

a) Primary repair (reduction of natural resources and services affected at the initial[34] state or close to it); b) complementary repair (the remedial action to be taken in relation to natural resources to compensate for the fact that the primary repair did not lead to full recovery); c) compensatory reparation (compensation for the loss of natural resources that took place between the date of the damage and the moment when the primary repair takes its full effect).

The costs of preventive and reparatory actions are borne by the operator who caused the damage.[35]

If these costs were borne by the county environmental protection agency, they will be recovered, except in the cases provided by the law, from the polluter operator[36].

In order to guarantee the recovery of these costs, a legal mortgage of the agency is set up on the operator's real estate and an insurance indemnity, according to the law. The registration of the mortgage in the land register and the establishment of the seizure shall be made on the basis of the order of the head of the county environmental protection agency which has established the preventive and reparatory measures that it has carried out.[37]

Operators' liability is jointly owned if two or more operators are concerned.[38]

There are also exceptional situations when the operator is not obliged to bear the costs of the preventive and repairs measures that have been taken.[39]

To attract objective liability, hazardous activities must be found in Annex 3 of GEO no. 68/2007.

From the provisions of art. 95 para. 2 of GEO no. 195/2005 that the legislature did not completely distance itself from subjective liability based on fault, since it held that "*exceptionally, liability may also be subjective for damage caused to protected species and natural habitats, in accordance with specific regulations*".

As it follows from the above, for the liability of an operator, the following conditions[40] are necessary: the existence of the damage[41], the unlawful act and the causal relationship between the damage and the unlawful deed.

## 3. Conclusions

Thus,

Finally, we consider that the right to compensation is based on the legal basis not on the behaviour of the author of environmental damage, but on the right of everyone not to be deprived of the value of a good or an advantageous situation in the normal state of the environment in which he lives.

The burden of proof, relating to the existence of elements of tort or delict, lies with the person who is acting in court, usually the victim of environmental damage.

As regards proof of legal action (stricto senso), any evidence is admissible, including witness evidence.

Difficulties are seen in proving guilt because it is a psychic, internal element. Because of the subjective nature of this element, its direct proof is virtually impossible. What can be proved are only the external elements of behaviour, the author's deed and the illicit character of the deed, the eventual circumstances of place and time, the personal ones of the author. At the same time, the injured party has the right to do the opposite, on the facts and circumstances that may remove his guilt.

Expertise may also be available to determine the environmental damage and the causality ratio between the deed and the damage and to determine the amount of damages.[42]

Civil liability lies in environmental law as a last resort, with techniques and tools, especially those of an economic and fiscal nature being given priority.

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[32] Conform. art. 15-19 din OUG nr. 68/2007.

[33] Conform art. 14 alin. 2 din OUG nr. 68/2007.

[34] Art. 2 pct. 22 din OUG nr. 68/2007 definește starea inițială ca fiind starea resurselor naturale și serviciilor la momentul producerii prejudiciului, care ar fi existat dacă prejudiciul asupra mediului nu s-ar fi produs, estimată pe baza celor mai bune informații disponibile. Article 2 point 22 of GEO no. 68/2007 defines the initial state as the state of natural resources and services at the time of the damage that would have existed if environmental damage had not occurred, estimated on the basis of the best available information.

[35] Conform art. 26 din OUG nr. 68/2007.

[36] Conform art. 29 alin. 1 din OUG nr. 68/2007.

[37] Art. 29 din OUG nr. 68/2007.

[38] Art. 31 din OUG nr. 68/2007.

[39] Art. 27-28 of GEO no. 68/2007; M. Duțu, op. cit., pp. 15-17 (force majeure, the state of necessity, valid consent given by the victim, the serious fault of the victim who acted wrongly or failed to act).

[40] Art. 2 pt. 11 din OUG no. 68/2007.

[41] According to art. 2 pt. 12 and $13^2$ and art. 3 of GEO no. 68/2007.

[42] Gh. Ducan, *Drept civil. Teoria generală a obligațiilor.* Dimitrie Cantemir, Târgu-Mureș, 2000, pp. 65-66.

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# PERSONAL DATA PROTECTION ISSUE REFLECTED IN THE CASE-LAW OF THE CONSTITUTIONAL COURT OF ROMANIA

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**Abstract**

*Over the past few years, data privacy became more and more an issue that stirred on European level lots of debates and determined the adoption of a new set of rules, imposed with the compulsory force of a European regulation. Thus, the EU General Data Protection Regulation (GDPR) replaced the Data Protection Directive 95/46/EC and reshaped the way the data are managed in various fields of activity. In Romania, the Constitutional Court had to bring light over important areas that involved the use of personal data and developed a relevant case-law regarding the concordance with the essential standards implied by the protection of private life enshrined both in the Romanian Basic Law and in the European Convention on Human Rights. The paper intends to depict the main challenges that faced the constitutional review and the measure that the Romanian vision over this problem is consistent with the European landmarks set in this field.*

**Keywords:** *right to privacy, personal data, European regulation, constitutional review, constitutional case-law.*

## 1. Introduction

The digital age that reigns nowadays has changed not only the way people interact, but also the way the states themselves position their legislation towards the technological progress. Day by day, due to the constant increase of accessibility of various kind of electronic devices, more efficient and attractive the electronic communications become and more complex and diverse are the tasks and activities that ordinary people can be involved in. Consequently, the higher becomes the risk of privacy breaches. The so-called 'datacraty' imposed its authority over the quasi-entirety of the social life[1]. In order to avoid the negative effects of exposure of the citizens' personal data, a set of rules meant to diminish this risk has been implemented at the European Union level.

The main idea that is in the core of all these rules is the protection of the right to respect for private life, also referred to the right to privacy. The right to personal data protection derives in a logical manner from the first mention right. Each state has also created a national system of protection, taking into consideration the European general framework.

This European framework also includes the Council of Europe's system, as well. In this regard, the European Convention on Human Rights (ECHR), one of the first major regulations at the European level, provides, in Article 8, that everyone has the right to respect for his or her private and family life, home and correspondence. Interference with this right by a public authority is prohibited, except where the interference is in accordance with the law, pursues important and legitimate public interests and is necessary in a democratic society. An iconic judgement of the European Court on Human Rights recognised in 2017 that Article 8 of the ECHR, that grants the right to respect for private life also "provides for the right to a form of informational self-determination" (ECtHR, Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, No. 931/13, 27 June 2017, para. 137).

Romania has embraced the European normative spirit. The legal provisions adopted to this end have made the object of the constitutional review performed by the Constitutional Court. It played an important role in correcting the deviations from the principles of the Romanian Basic Law which grants the right to private life, also keeping in mind the European philosophy in this field. The present paper will focus on the case-law of the Romanian Constitutional Court in the area of protection of personal data, trying to offer a comprehensive view on this topic. The paper will integrate the overview on the fore-said case-law with the case-law of Court of Justice of the European Union and other constitutional courts in Europe.

## 2. Content

### 2.1. Legal framework at the European level

A clear view over this topic requires a brief presentation of the legislative acts that regulates over the time and some of them still regulate the mechanism of personal data protection.

At the European level, the basic provisions in this field are represented by **Article 16 of the Treaty on the Functioning of the European Union** that recognize to everyone the right to the protection of personal data concerning them.

This right is further provided by **Charter of Fundamental Rights of the European Union** (the

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[1] Relevant in this direction is, for instance, the fact that the famous review "Pouvoir" has dedicated a whole number to this topic. See Pouvoir, La datacratie, no.164/2018.

Charter), **Article 8** (right to protection of personal data). It details its content, stressing, in the second paragraph, that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. It also grants to everyone the right of access to data which has been collected concerning him or her, and the right to have it rectified.

For quite a long period of time, **Directive 95/46/EC** on the protection of individuals with regard to the processing of personal data and on the free movement of such data[2] (Data Protection Directive) has been the source of inspiration for all the member states in what concerns this issue. It has been in effect until May 2018, when the new General Data Protection Regulation entered into force.

Of great importance was also the **Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006** on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.

The fore-said directives co-existed with the **Council Framework Decision 2008/977/ JHA** on the protection of personal data processed in the context of police and judicial cooperation in criminal matters[3], which was in effect until May 2018.

The overwhelming development of electronic communications raise the need of a more complex and more safeguarding set of rules. Thus appeared the **Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016** on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the so-called General Data Protection Regulation (GDPR)[4]. It regulates the processing by an individual, a company or an organization of personal data relating to individuals in the European Union. It means that EU data protection rules apply also to organizations and other entities that are not established in the EU, if they process personal data and offer goods and services to data subjects in the Union or monitor the behavior of such data subjects.

To complete the European legal framework a last directive has been adopted: **Directive (EU) 2016/680** on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data.

All these European normative acts have shaped the member states of the EU have re-configured their national regulations in this field. Accordingly, Romanian Parliament has adopted several laws that took over the provisions of the cited directives.

**2.2. CJEU's relevant case-law regarding the personal data protection issue:**

The introduction in the European Union's normative acts wouldn't be complete if we do not mention the European Court's of Justice judgement that declared void the main directive dedicated to the protection of personal data.

Thus, Directive 2006/24/EC was declared invalid through ***the Judgment of Court of Justice of the European Union of 8 April 2014, pronounced in the joint cases C-293/12 — Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and others — and C-594/12 — Kärntner Landesregierung and others***. Through the above-mentioned judgment, the European court found that the analyzed directive violated the provisions of Article 7, Article 8 and Article 52 (1) of the Charter of Fundamental Rights of the European Union**.**

The Court of Justice of the European Union concluded that the measures stipulated by Directive 2006/24/EC, although they are able to achieve the pursued objective, represent an interference with the rights guaranteed by Articles 7 and 8 of the Charter, which does not comply with the principle of proportionality between the taken measures and the protected public interest.

The Court noted in this regard that the data which made the object of the invalidated directive's regulation led to very precise conclusions on the private life of the persons whose data have been retained, conclusions that may relate to the habits of everyday life, the places of permanent or temporary residence, the daily movements or other movements, the activities, the social relations of these persons and the social environments frequented by them (paragraph 27) and that, in these conditions, even if it is prohibited to retain the content of the communications and pieces of information consulted by using an electronic communications network, those data retention can affect the use by subscribers or by registered users of the communication means stipulated by this directive and, therefore, their freedom of expression, guaranteed by Article 11 of the Charter (paragraph 28)**).**

The Court of Justice of the European Union also indicated that the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, caused by the provisions of Directive 2006/24/EC, was wide-ranging and must be considered as being particularly serious, and the circumstance that data retention and their subsequent use were performed without the subscriber or registered user being informed about this was likely to generate in the minds of the persons concerned the feeling that their private life makes the object of a constant supervision (paragraph 37)**.**

It was also alleged that Directive 2006/24/EC did not stipulate objective criteria to limit to the absolute

[2] Official Journal of EU, 1995, L 281.
[3] Official Journal of EU, 2008, L 350.
[4] Official Journal of EU, 2016, L 119.

minimum the number of persons who have access and can subsequently use the retained data, that the access of national authorities to stored data is not conditioned by the prior control performed by a court or by an independent administrative entity, limiting this access and their use to the absolute minimum for the achievement of the pursued objective and that the obligations of Member States to establish such limitations is not stipulated (paragraph 62).

**2.3. The Constitutional Court's of Romania case-law regarding the personal data protection**

**2.3.1.** One of the most worthy details to be mentioned when approaching this issue is the fact that prior to the fore-cited judgment of the CJUE, the Constitutional Court of Romania had rendered a decision, **Decision no. 1.258 of 8 October 2009[5],** by which it stated that the Law no. 298/2008 on the retention of data generated or processed by the providers of publicly available electronic communications services or of communications networks, which was the first transposition in the national legislation of the Directive 2006/24/EC, was inconsistent with the provisions of the Romanian Basic Law.

We notice the clairvoyant attitude of the Romanian Constitutional Court that has foreseen the radical solution adopted by the CJUE five years later. We also underline that on the 2nd of March 2010, soon after the Romanian Constitutional Court, Federal Constitutional Court of Germany has also rejected the German legislation requiring electronic communications traffic data retention that implemented the similar EU Directive[6].

By Decision no. 1.258 of 8 October 2009, the Court held that Article 1 (2) of Law no. 298/2008 also included in the category of traffic and location data for individuals and legal entities *"the related data necessary for the identification of the subscriber or registered user"*, without expressly defining what is meant by the phrase *"related data"*. It was indicated that the absence of precise legal rules that would determine the exact scope of those data needed to identify the user - individuals or legal entities, left room for abuse in the work of retention, processing and use of data stored by providers of publicly available electronic communications services or of public communications networks and that the restriction on the exercise of the right to intimate life, secrecy of correspondence and freedom of expression must also occur in a clear, predictable and unequivocal manner, as to be removed, if possible, the occurrence of arbitrariness or abuse of authorities in this area.

Likewise, the Constitutional Court noted the same ambiguous wording, not compliant with the rules of legislative technique, also as concerns the provisions of Article 20 of Law no. 298/2008, reading as follows, *"In order to prevent and counteract threats to national security, State bodies with responsibilities in this area, in the terms set forth by the laws governing the activity of protection of national security, can have access to data retained by service providers and public electronic communications networks"*. The legislature does not define what is meant by *"threats to national security"*, so that in the absence of precise criteria of delimitation, various actions, information, or normal activities, of routine, of natural and legal persons can be considered, arbitrarily and abusively, as having the nature of such threats. Recipients of the law may be included in the category of suspects without knowing it and without being able to prevent, by their conduct, the consequences that their actions may entail and that the use of the expression *"can have"* also leads to the idea that the data covered by Law no. 298/2008 are not retained solely for the use thereof only by State bodies with specific powers to protect national security and public order, but also by other persons or entities, since they *"can have"*, and not just *"have"*, access to such data, according to the law.

By the same decision, the Constitutional Court has found that Law no. 298/2008, as a whole, established a rule regarding the continuous retention of personal data, for a period of 6 months as from the time of their interception. Or, in the matter of personal rights, such as the right to personal life and the freedom of expression, as well as of processing of personal data, the widely recognized rule is to ensure and guarantee their observance, respectively of confidentiality, the State having, in this respect, mostly negative obligations, of abstention, by which should be avoided, insofar possible, its interference in the exercise of such right or freedom. It was underlined that exceptions are restrictively allowed, in the terms expressly provided by the Constitution and the applicable international legal instruments in the field, and Law no. 298/2008 represents such an exception, as it results from the title itself.

The Court has also found that the obligation to retain data covered by Law no. 298/2008, as an exception or derogation from the principle of protecting personal data and confidentiality thereof, by its nature, extent and scope, deprived this principle of content, as it was guaranteed by Law no. 677/2001 for the protection of individuals concerning the processing of personal data and free circulation of such data and Law no. 506/2004 on the personal data processing and protection of private life in the electronic communications sector. Or, it is widely recognized in the caselaw of the European Court of Human Rights, for example, by Judgment of 12 July 2001, rendered in *the case of Prince Hans-Adam II de Lichtenstein v. Germany*, paragraph 45, that the Contracting States under the Convention on Human Rights and Fundamental Freedoms have assumed such obligations to ensure that the rights guaranteed by the Convention are practical and effective not theoretical and illusory,

[5] Published in the Official Gazette of Romania, Part I, no. 798 of 23 November 2009.
[6] http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg10-011.

the legislative measures adopted following the effective protection of rights. But the legal obligation that requires the continuous retention of personal data makes the exception to the principle of effective protection of the right to personal life and freedom of expression, absolute as a rule. The right appears to be regulated in a negative fashion, its positive side losing its predominant character.

Therefore, the regulation of a positive obligation on a continual limitation on the exerciser of the right to a private life and secrecy of correspondence cancels the very essence of the right by removing the guarantees applying to its exercise. Natural and legal persons, mass users of publicly available electronic communications services or of public communications networks are continually subject to the interference in the exercise of their personal rights to private correspondence and free expression, without any possibility of a free, uncensored manifestation, only under the form of direct communication, to the exclusion of the main means of communication currently used.

Likewise, through Decision no. 1.258 of 8 October 2009, the Court held that in a natural logic of this analysis the examination in this case of the principle of proportionality was also necessary, which represents another mandatory requirement needed to be respected in cases of limitation on the exercise of the rights and freedom strictly provided for by Article 53 (2) of the Constitution. This principle states that the extent of restriction must be in line with the situation that led to its implementation and also that it must cease once that cause determining it disappeared. Law no. 298/2008 requires retention of data continuously from the time of entry into force, respectively of its application (i.e. 20 January 2009, respectively 15 March 2009 as concerns traffic data of location corresponding to the services of access to Internet, email and Internet telephony), without considering the need to terminate the restriction once the cause that has led to this measure has disappeared.

The Court held that, although Law no. 298/2008 referred to data of a predominantly technical nature, the same were retained in order to provide information and the person and his private life. Even though according to Article 1 (3) of the law, it shall not apply also to the content of communication or information accessed while using an electronic communications network, the other data stored, aimed at identifying the caller and the called party, namely the user and recipient of information communicated electronically, of the source, destination, date, hour and duration of a communication, type of communication, the communication equipment or devices used by the user, the location of mobile communication equipment, as well as of other "related data" — undefined in the law —, were likely to prejudice, to interfere with free expression of the right of communication or expression.

It was indicated that the legal guarantees for use in particular cases of data retained — concerning the exclusion of content of the communication or information consulted, as object of data storage, by the prior and reasoned authorization of the president of the court entitled to judge the offence for which criminal proceedings have been initiated, as provided by Article 16 of Law no. 298/2008 and implementing penalties covered by Articles 18 and 19 of the same — were not sufficient and adequate as to remove the fear that personal rights, of private type, are not violated, so that their occurrence would take place in an acceptable manner.

Thus, the Constitutional Court did not deny the purpose in itself considered by the legislature in adopting the Law no. 298/2008, in that it is an urgent need to ensure adequate and effective legal means, consistent with the continuous process of modernization and technologization of the media, so that crime can be controlled and prevented. This is the reason for which individual rights cannot be exercised *in absurdum*, but can be subject to restrictions that are justified by the aim pursued. Limiting the exercise of certain personal rights in consideration of collective rights and public interests, aimed at national security, public order or prevention of crime, was always a sensitive operation in terms of regulation, so as to maintain a fair balance between the interests and rights of the individual, on the one hand, and those of the society, on the other. It isn't less true, as noted by the European Court of Human Rights in the Judgment of 6 September 1978 rendered in *the case of Klass and others v. Germany*, paragraph 49, that taking surveillance measures, without adequate and sufficient guarantees, can lead to "destruction of democracy on the ground of defending it".

**2.3.2.** Another decision that had a very strong echo in the society was the **Decision no. 440 of the 8th of July 2014** on the exception of unconstitutionality of the provisions of Law no. 82/2012 on the retention of data generated or processed by providers of public electronic communications networks and by providers of publicly available electronic communications services, as well as for the amendment and supplementing of Law no. 506/2004 on personal data processing and protection of private life in the sector of electronic communications[7].

The Court noted that the Law no. 82/2012 represented the second transposition into national legislation of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006. In its analisis, the Court considered necessary for a precise understanding of the retention of the data mechanism, to distinguish between two different stages. Noting that the data in question relate mainly to traffic and location data of persons and data necessary to identify a subscriber or registered user, the mechanism covered involves two stages, the first being that of the retention

[7] Published in the Official Gazette of Romania, Part I, no. 653 of 4 September 2014.

and storage of data and the second, that of access to the data and their use.

The retention and storage of data, which is the first operation from the chronological point of view, is in the responsibility of providers of public communications networks and publicly available electronic communications services. This operation is a technical one and it is conducted automatically on the basis of software as long as the law obliges providers designated by law to retain those data. Whereas both under Directive 2006/24/EC and under Law no. 82/2012, the purpose of the retention and storage is a general one and thereby ensuring national security, defense, prevention, investigation, detection and prosecution of serious crime, retention and storage not being linked and determined by a particular case, it appears as obvious the continuing nature of the obligation of providers of public electronic communications network and service providers to retain data on the entire period expressly provided for by the legislative framework in force, namely for a period of 6 months, under Law nor.82/2012. At this stage, as only the retention and storage of a mass of information are concerned, identification or location of those who are subjects of electronic communications are not actually carried out, this will take place only in the second stage, after being granted access to the data and their use.

The Court stated that given the nature and specificities of the first stage, since the legislature considers necessary the retention and storage of data this operation by itself is not contrary to the right to personal, family and private life, or to the secrecy of correspondence. Neither the Constitution nor the Constitutional Court case-law prohibit preventive storage of traffic and location data, but on condition that access to the data and their use be accompanied by guarantees and be made in compliance with the principle of proportionality.

Consequently, the Court considered that only in relation to the second stage, that of access and use of such data, it arises the question of compliance of legal regulations with the constitutional provisions. Examining the provisions of Law no. 82/2012, concerning the access of the judiciary and other State bodies with tasks in the field of national security to data stored, the Court found that the law did not give the necessary guarantees for protection of the right to personal, family and private life, secret correspondence and freedom of expression of individuals whose stored data are accessed.

As it was stated earlier, under Article 1 of Law no. 82/2012, prosecution bodies, courts and State bodies with tasks in the field of national security have access to data retained under this law. However, according to the provisions of Article 18 of Law no. 82/2012, only the prosecution bodies are obliged to comply with the provisions of Article 152 of the Code of Criminal Procedure, as this requirement does not cover also the State bodies with tasks in the field of national security, which can access these data in accordance with "special laws", as provided by Article 16 (1) of Law no. 82/2012. Therefore, only the request by the prosecution bodies to the providers of public communications networks and providers of publicly available electronic communications services for the transmission of retained data is subject to the prior authorization of the judge of freedoms and rights.

Requests for access to data retained for use for a purpose designated by law made by State bodies with tasks in the field of national security are not subject to authorization or approval of the court, thereby lacking the guarantee of effective protection of the data retained against the risk of abuse and against any unlawful access and use of such data. That situation is liable to constitute an interference with the fundamental rights to personal, family and private life and secrecy of correspondence and thus contravene the constitutional provisions which enshrine and protect these rights.

Having examined the "special laws in the matter", mentioned in Article 16 (1) of Law no. 82/2012, the Court found that State bodies with tasks in the field of national security can access and use data stored without the need for court authorization. Thus, Law no. 51/1991 on the national security of Romania establishes, in Article 8, the State bodies with tasks in the field of national security, i.e. the Romanian Intelligence Service, the Foreign Intelligence Service and the Protection and Guard Service and in Article 9 it states that the Ministry of National Defense, the Ministry of the Interior and the Ministry of Justice organize own intelligence structures with specific tasks in their respective areas of activity. The Court also noted that, according to Article 13, let. e) of the law, the bodies responsible for national security, while there is a threat to national security of Romania, as defined in Article 3 of Law no. 51/1991, may request the obtaining of data generated or processed by providers of public electronic communications networks or providers of publicly available electronic communications services, other than their content, and retained by them according to the law, and neither this Article nor Article 14 of the law provides that such a request must be authorized by a judge.

The Court noted, moreover, that according to Article 9 of Law no. 14/1992 on the organization and functioning of the Romanian Intelligence Service *"in order to determine the existence of threats to national security provided for in Article 3 of Law no. 51/1991 on national security of Romania, as amended, intelligence services may carry out checks in compliance with the law, by: [...] e) obtaining data generated or processed by providers of public communications networks and providers of publicly available electronic communications services other than their content, and retained by them in accordance with the law".* But, like the provisions of Law no. 82/2012 and of Law no. 51/1991, the provisions of Law no. 14/1992 do not impose the obligation of such

intelligence service to obtain the authorization of the judge to have access to data stored.

At the same time, the Court noted that Law nor.1/1998 on the organization and operation of the Foreign Intelligence Service, provides in Article 10 (1) that *"the Foreign Intelligence Service is allowed to use undercover legal persons established in accordance with the law, to use specific methods, to establish and maintain appropriate means for obtaining, verification, assessment, protection, recovery and storage of data and information relating to national security"*, and, according to paragraph (3) of the same Article, *"use of the means of obtaining, verification and recovery of data and information must not adversely affect any rights or fundamental freedoms of citizens, private life, honor or reputation or to make them subject to unlawful restrictions"*. Furthermore, according to Article 11 of Law no. 1/1998, *"the Foreign Intelligence Service shall be entitled, under the conditions laid down by law, to request and obtain from the Romanian public authorities, economic agents, other legal persons and natural persons the information, data and documents necessary for the performance of its tasks"*. The Court therefore found that Law no. 1/1998 does not regulate in a distinct manner the access of the Foreign Intelligence Service to data retained by providers of public communications networks and providers of publicly available electronic communications services, this access is however covered by Article 13 of Law no. 51/1991, unencumbered therefore by the prior authorization of a court.

However, the lack of such authorization has been criticized, inter alia, by the Court of Justice of the European Union by the Judgement of 8 April 2014, i.e. such lack is equivalent to the insufficiency of procedural safeguards necessary to protect privacy and other rights enshrined in Article7 of the Charter of fundamental rights and freedoms and the fundamental right to the protection of personal data, enshrined in Article 8 of the Charter (par. 62). III. For all of those reasons, the Court upheld the exception of unconstitutionality and noted that the provisions of Law no. 82/2012 on the retention of data generated or processed by providers of public electronic communications networks and by providers of publicly available electronic communications services and amending and supplementing Law no. 506/2004 concerning the processing of personal data and the protection of privacy in the electronic communications sector are unconstitutional.

In what concerns the effect of this decision, the Constitutional Court itself has stressed (paragraph 78 and 79) that at the publication in the Official Gazette of Romania, Part I, of this decision, becoming lacked of legal basis from the point of view of the European law, as well as of the national law, the activity of retention and use of data generated or processed regarding the supply of publicly available electronic communications services or of public communications networks. Specifically, it means that since the publication of the decision of the Constitutional Court of Romania, the providers of public electronic communications networks and of publicly available electronic communications services *do not have the obligation anymore, nor the legal possibility to retain certain data* generated or processed within their activity *and to put them at the disposal of judicial bodies* and of those with powers to protect national security. By exception, these providers can only retain the data necessary for invoicing or payments for interconnection or other data processed for marketing purposes only with the prior consent of the individual whose data are processed, as stipulated by Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 on the processing of personal data and protection of confidentiality in the sector of public communications (Directive on confidentiality and electronic communications), in force.

Accordingly, until the adoption by the Parliament of a new law on data retention, to comply with constitutional provisions and exigencies, as they were highlighted in this decision, the judicial bodies and State bodies with powers to protect national security do not have access anymore to data that have been already retained and stored pursuant to Directive 2006/24/EC and to Law no. 82/2012 in view of their use within the activities defined by Article 1 (1) of Law no. 82/2012. Likewise, the judicial bodies and those with powers to protect national security lack a legal and constitutional basis for the access and use of data retained by the providers for invoicing, payments for interconnection or for other commercial purposes, to be used within the activities for the prevention, research, discovery and criminal prosecution of serious crimes or for the settlement of cases with disappeared persons or for the execution of an arrest warrant or a penalty enforcement warrant, precisely because the character, nature and different purpose thereof, as stipulated by Directive 2002/58/EC. Moreover, even Law no. 82/2012 establishes at Article 11 that these latter retained data are exempted from the legal provisions, having another legal regime, being submitted to the provisions of Law no. 506/2004 on the processing of personal data and the protection of private life in the sector of electronic communications.

**2.3.3.** Another important decision is **Decision no. 461 of 16 September 2014** on the objection of unconstitutionality of the provisions of the Law amending and supplementing Government Emergency Ordinance no. 111/2011 on electronic communications[8].

The Emergency Ordinance implements a number of directives regulating the authorization of electronic communications networks and services. It essentially regulates the rights and obligations of providers of electronic communications networks and services, the

[8] Published in the Official Gazette of Romania, Part I, no. 775 of 24 October 2014.

regime of limited resources, the rights of end-users, the universal service, the obligations of providers of electronic communications services and networks with significant market power.

The changes envisaged by the new regulation are aimed at the registration of users of prepaid cards, the identification of users connected to Internet access points provided by legal persons, the collection and storage of data concerning the users of communications services, the conditions for specific technical operations and corresponding responsibilities incumbent upon providers of electronic communications services, the personal data retention period and the imposition of penalties for breaches of legal obligations. The legislative initiative was motivated by the need to adopt measures to facilitate criminal investigation activities or those aimed at identifying, preventing and countering risks or threats to national security.

By the impugned rule, the legislature has expressly regulated the data necessary to identify a subscriber or user, by providing, in addition to the name and telephone number or communications service identifier, the personal identification code, the series and number of the identity document and the issuing country with regard to individuals, respectively the tax identification code, with regard to legal persons. It should be stressed that Law no. 82/2012 did not provide the obligation to retain the personal identification code, the series and number of the identity document, respectively the tax identification code needed to identify a subscriber or a user, and the database set up according to the provisions of Article 4 of this law refers, both for fixed line and mobile telephone networks and for Internet access services, electronic mail and voice over Internet Protocol, only to the telephone number, as well as to the subscriber or registered user's name and address. Therefore, in the light of the reasons held by the Court in Decision no. 1.258 of 8 October 2009, the challenges on the accuracy and foreseeability of rule no longer subsist as the new rule precisely determines the area of the data necessary for the identification, but, by taking into account the supplementing of data required to the subscriber or to the user, as well as their strictly personal nature, the amending legal provisions should have been properly supplemented by provisions ensuring high standards in terms of their protection and security throughout the entire process of retention, storage and use, precisely so as to minimize the risk of infringement of the right to personal, family and private life, the secrecy of correspondence, as well as the citizens' freedom of expression. However, the Court noted that the Law amending and supplementing Government Emergency Ordinance no. 111/2011 does not make any change regarding the protection of these rights, therefore the reasons on which the decision of unconstitutionality of Law no. 82/2012 was based, are all the more justified in this case.

The amending rule widens the category of persons who must identify the users of electronic communications services, by expressly providing the obligation of legal persons providing Internet access points to public to retain the users' identification data: the telephone number or the identifier of the communications service with advance and subsequent payment; the surname, forename and personal identification code, the series and number of the identity document, respectively the issuing country – for foreign persons; the identification data obtained through bank card payment; any other identification procedure which, directly or indirectly, ensures that the user's identity is known. The retention obligation is doubled by the obligation to store the data for a period of 6 months as from the time of their retention.

The Court noted that currently, legal persons providing public Internet access points are private legal entities, especially in commercial and recreational facilities, cafeterias, restaurants, hotels, airports etc., or legal persons governed by public law – public institutions that give citizens direct and rapid access to information of public interest (including those distributed on their own webpages), like town halls, educational institutions, health clinics, public libraries, theatres, etc. The imposition of the obligation incumbent upon such persons to retain and store personal data requires, correlatively, the specific regulation of adequate, firm and unequivocal measures, ensuring citizens' trust that the manifestly personal data that they make available are recorded and kept confidential. In this respect, the law merely establishes the measures of retention and storage of data, without amending or supplementing the legal provisions with regard to the guarantees that the State must provide in the exercise of its citizens' fundamental rights.

However, the regulatory framework in such a sensitive field must be clear, predictable and devoid of confusion, so as to remove, as much as possible, the possibility of abuse or arbitrariness in relation to those called upon to apply the legal provisions.

The Court mentioned that the provision that identification is achieved through "any other identification procedure" ensuring, directly or indirectly, that the user's identity is known, represents an imprecise regulation likely to create the prerequisites for certain abuses committed in the process of retention and storage of data by the legal persons covered by this rule.

Data retention and storage clearly constitutes a limitation of the right to the protection of personal data, respectively of the constitutionally protected basic rights relating to personal, family and private life, secrecy of correspondence and freedom of expression. Such a limitation may operate solely in accordance with Article 53 of the Constitution, which foresees the possibility of restricting the exercise of certain rights or freedoms only by law and only if necessary, as the case may be, to protect national security, public order, public health or morals, citizens' rights and freedoms,

for conducting a criminal investigation, preventing the consequences of a natural disaster or an extremely severe catastrophe. The restriction measure can be ordered only if necessary in a democratic society, it should be proportional to the situation having caused it and applied without discrimination and without infringing upon the existence of such right or freedom.

However, given that the measures adopted by the law subject to constitutional review are not accurate and foreseeable, that the interference of the State in the exercise of the abovementioned rights, although laid down by law, is not clearly, rigorously and exhaustively formulated so as to offer confidence to citizens, that its strictly necessary nature required in a democratic society is not fully justified, and that the proportionality of the measure is not ensured through the regulation of appropriate guarantees, the Court ascertained that the provisions of the Law amending and supplementing Government Emergency Ordinance no.111/2011 on electronic communications violate the provisions of Article 1(5), Articles 26, 28, 30 and 53 of the Constitution. Therefore, the limitation of the exercise of such personal rights by considering certain collective rights and public interests related to national security, public order or criminal prevention, breaks the right balance which should exist between the individual interests and rights, on the one hand, and those of the society, on the other hand, as the impugned law cannot regulate sufficient guarantees to ensure the efficient protection of data against the risks of abuse and any unlawful access or use of personal data.

### 2.4. Relevant decisions rendered by foreign constitutional jurisdictions in the matter of personal data protection

This sesitive issue concerned many other constitutional courts which performed a consistent constitutional review of the respective legislation. In this regard, are considered particularly relevant the decisions of the Federal Constitutional Court of Germany, of the Czech Constitutional Court and of the Supreme Administrative Court of Bulgaria.

By the **Judgment of 2 March 2010, the Federal Constitutional Court of Germany** declared unconstitutional the provisions of Articles 113a and 113b of Law on the new regulation of the telecommunications surveillance of 21 December 2007, and of Article 100g of the Criminal Procedure Code of Germany, indicating that they violate Article 10 (1) of the Constitution of Germany on the secrecy of telecommunications.

As for the unconstitutionality of the provisions of Articles 113a and 113b of the Law on the new regulation of the telecommunications surveillance of 21 December 2007 it was indicated that the storage without a special occasion of traffic data in telecommunications does not make the object of the strict prohibition of preventive storage of data according to the case-law of the Federal Constitutional Court and that, if attention is paid to this intervention and it is adequately realized, the proportionality requirements can be met.

It was underlined the importance of the storage of traffic data of the telecommunications sector for preventive purposes, but also the necessity of certain regulations sufficiently strict and clear on the security of data and the limitation of their use, in order to ensure transparency and legal protection. It was emphasized however that such storage represents a wide-ranging interference even while the content of the communications does not make the object of storage, as the retained data make possible a detailed knowledge of the intimate sphere of the individual, especially as concerns the social or political affiliation, preferences, inclinations and weaknesses of individuals, allowing the preparation of some relevant profiles and creating the risk of submitting some citizens, who give no reason to be submitted to investigations, to be exposed to such actions.

It was found that the provisions of Articles 113a and 113b of the Law on the new regulation of the telecommunications surveillance of 21 December 2007 violates the principle of proportionality, not being accomplished the constitutional requirements referring to data security and the transparency of their use, nor those on the protection of individuals. To this effect, it was hold that the impugned legal provisions refer only to the necessary diligence, generally, in the field of telecommunications, but relativize the security requirements, leaving them at the choice of the telecommunications operators, who are not required to comply with sufficient high standards in ensure the security level and for which higher penalties are established for breach of the storage obligation than for the violation of the security data.

It was also held that the provisions of Article 100g of the Criminal Procedure Code also allow the access to data in other cases than the individual ones, without the judge's agreement and without the person concerned being informed, for which reason they are unconstitutional.

Similarly, the **Constitutional Court of the Czech Republic, through Decision of 22 March 2011**, found the unconstitutionality of the provisions of section 97 paragraphs 3 and 4 of the Act no. 127/2005 on the electronic communications and amendments referring to related normative acts (Act on electronic communications) of the Decree no. 485/2005 on data retention regarding the traffic, location, date and duration of communications, as well as the form and method of delivery of these ones to authorized authorities.

In the content of this decision the Court held that the impugned texts do not offer to citizens sufficient guarantees regarding the risk of abusive use of stored data and arbitrary. It was found that the examined normative acts do not define at all or insufficiently and ambiguously define the rules on the compliance with the requirements on the security of data retention and restriction of third parties' access to retained data. On

this occasion is was underlined the importance in the context of the current level of development of the society of traffic data retention in the field of communications, but also the need to maintain a balance between public and individual interests. By the same decision it was also found the lack of definition of the means that should be put at the disposal of the affected persons in order to benefit of an efficient protection against arbitrary and abusive use of stored data.

Finally, **the Supreme Administrative Court of Bulgaria**, through **Decision no. 13.627 of 11 December 2008**, has annulled an Article of the national law on data retention that allowed the Ministry of Internal Affairs the access to retain data in the computers' ter qa3minals and, also, the supply of access to such data to security services and to other law enforcement institutions, without the authorization of a judicial body, motivating that the annulled legal provisions did not provide any guarantee for the protection of the right to private life and that no mechanism was established in order to guarantee this protection against illegal interferences, so as to avoid the breach of honor, dignity or reputation of an individual.

## 3. Conclusions

The emergence of the massive computer use and the huge variety of activities based on the internet services brought unexpected risks to the right to respect for private life. Consequently, the need to protect it has led to the new set of rules meant to focus on the collection, storage and use of personal data.

The new General Data Protection Regulation (GDPR), acronym that already entered into the linguistique patrimony of all member states of the European Union[9], is the most recent and also modern instrument meant to provide a set of guarantees in what concerns the privacy of the individuals when it comes to processing and storage of their personal data.

The role of constitutional jurisdiction is crucial in improving and strengthening of all the safeguards attached to the right to the private life, intimacy and, last but not least, freedom of consciousness. Their statements bring light over the legal provisions and benefit to the quality of legislation. Accordingly, the Constitutional Court of Romania has already proved its important role in high-lightening the values of democracy, in respect of fundamental human rights. Considering the outstanding process of technical development, the chances of further requests of reviewing the constitutionality of subsequent normative acts are significant. The Court will have to keep in mind both the European compulsory regulation and also the national Basic Law's provisions granting the full exercise of fundamental human rights.

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[9] Augustin Fuerea, Aplicarea Regulamentului General privind Protecția Datelor, în Dreptul nr.7/2018, p.101.

# CONSIDERATIONS ON PROFESSIONAL DIGNITY

**Izabela BRATILOVEANU**[*]

**Abstract**

*Dignity is a polysemantic notion. According to the Dictionary of Neologisms, in a first sense, dignity means position, function, situation or high rank in a State, in a large organization. This approach refers to the concept of "dignitas" which in ancient Rome was associated with a public function and defined the duties of the one who occupies that function. Third parties have a general obligation to comply with that office or high rank in the State or ecclesiastical hierarchy, which is legally sanctioned. Our study analyses the legal provisions sanctioning attitudes and behaviours affecting the dignity of certain professions, such as lawyers and magistrates, referring also to the recent case law of the High Court of Cassation and Justice, Five judges Panels and the Constitutional Court.*

**Keywords:** *professional dignity; dignitas; disciplinary deviations; magistrates; jurisprudence*

## 1. Introduction

Dignity is a polysemantic concept.

In the Anthological and synonyms dictionary of Romanian language of 1978, for the noun dignity we find the following meanings: dignity, honour, prestige, authority, prominence, good presence; seriousness, sobriety, reliability. Recognition, reputation, (good) name, fame, celebrity; glory, pride, greatness, praise. Value, price, merit. Significance, importance. Respect, respectability, compliance, esteem, honour, fairness, honorability (rare), appreciation, consideration, deference, condescendence. Pride, self-esteem.

According to the Dictionary of Neologisms[1], edited in 1986, the term dignity has the following meanings: 1) the quality of being dignified; prestige; seriousness, greatness; *2) position, function, situation or high degree in a State, in a large organization.*

In the New Explanatory Dictionary of the Romanian Language [2], edited in 2002, the term dignity has the following meanings: *1)* dignified character; competence; *2)* dignified attitude; *3)* dignified behaviour; *high rank in a State*.

In a first acceptation, dignity is associated with a position or high office in the State or in a large organization. This approach of dignity is considered in the specialty literature as representing the "*traditional approach*" because it refers to the concept of *dignitas* which in ancient Rome was associated with a public function, directly bearing certain particular obligations incumbent upon the person occupying that position related to the fact it represents the law, the public interest etc.[3] On the other part, dignity implies a general obligation of respect on the part of third parties to this rank or function - a legally sanctioned obligation[4]. Encountered in administrative contentious, violation of dignity in this first meaning in terms of chronology means the prejudice brought to the image of a function [5].

This first meaning of the notion of dignity is different from the modern meaning, the equal dignity of all human beings, regardless of any particular additional status and exclusively related to the human nature of the individual. Art. 305 of the Law of National Education no. 1/2011 makes the distinction between the human and professional dignity of teachers: "The teaching staff and the students are protected in the academia by the authorities responsible with the public order.

They are protected against the person or the group of persons who affect the *human and professional dignity of the teaching staff* or who prevent the exercise of its rights and obligations. The protection is requested by the person authorized according to the University charter (s.n.)".

## 2. Professional dignity of the lawyer

Some examples in this respect: Art. 16 par. (2) of the Constitution mentions "public offices and dignities"; Law no. 161/2003 refers to public dignity offices; Art. 64 letter f) of Law no. 47/1992 provides that judges of the Constitutional Court shall be under an obligation to abstain from any activity or manifestation contrary to the independence or dignity of their office; art. 21 par. (2) letter f) of Law no.

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[1] Florin Marcu and Constant Maneca, *Dicţionar de neologisme* (Bucharest: Academia, 1986),124.

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[3] Girard, Charlotte and Hennette-Vauchez, Stéphanie. "Introduction", in *La dignité de la personne humaine*, ed. Charlotte Girard, Stéphanie Hennette-Vauchez, 24, Paris: PUF, 2008. For the evolution of the meaning of the notion, see Michel Pauliat, "De la Dignitas à la Dignité" in *Justice, éthique et dignité de la personne*, edited by Simone Gaboriau, Hélène Pauliat, 29-35, Limoges: Pulim, 2006.

[4] Girard and Hennette-Vauchez, "Introduction", 24.

[5] Saint-James, Virginie. "La dignité en droit public français", in *La dignité de la personne humaine*, ed. Charlotte Girard, Stéphanie Hennette-Vauchez, 161, Paris: PUF, 2008.

155/2010 stipulates that the local police officer is forbidden to carry out activities likely to damage the honour and dignity of the local police officer or of the institution which he is a member of; the Code of Ethics of the bailiff provides certain standards for the bailiff's conduct as to be in line with the honour and dignity of his profession.

Non-compliance with the particular obligations incumbent on the persons occupying these positions shall entail their disciplinary liability in a range of professions, such as lawyers or magistrates. In this case, the sanction is aimed at that particular person whose conduct brings a prejudice to the dignity of the position he/she holds. In this respect, dignity protects the office, not the person occupying it.

The Code of Ethics of the Romanian lawyer presents 10 fundamental principles guiding the lawyer's morality: freedom and independence; legality and respect for the rule of law; respect for professional secrecy; preventing conflicts of interest; dignity, honour and probity; professionalism and loyalty towards the client; professional competence; respect for their colleagues and all the persons with whom the lawyer engages in professional relationships; autonomy and self-regulation of the profession of lawyer; loyalty to the profession. In line with Art. 8 par. (1) of the Code of Ethics, these principles are the values which the lawyer relies on and that he defends (in the exercise of his profession and in the social life) and in connection to which all the deontological norms and his/her conduct shall be interpreted. The principle of dignity, honour and probity requires the lawyer to comply with the highest standards of moral integrity. Whenever, through his/her conduct in the exercise of the profession or beyond it, he/she does not live up to these standards, the lawyer harms not only his/her reputation, but also that of his/her profession which may affect public confidence in the profession of lawyer. In line with Art. 13 par. (4) of the Code of Ethics, the lawyer shall abstain from formulating denunciations for the purpose of gaining legal advantages. Therefore, the lawyer's dignity means the adequacy of his/her personal qualities, image and conduct to the requirements of his/her profession.

In the exercise of the profession, the lawyer shall have to comply with the solemnity of the court hearing, not to use words or expressions likely to harm the dignity of the magistrates, his/her colleagues lawyers or the representatives of the parties involved in the trial, the non-compliance with these provisions being considered a serious disciplinary offense.

Can become a member of a bar in Romania, the person who cumulatively meets the conditions provided for by Art. 12 par. (1) of the Law no. 51/1995, namely: has the exercise of civil and political rights; is a graduate of a faculty of law; is medically fit for the exercise of the profession; is not found in any of the cases of lack of dignity provided for by art. 14 of the law.

Art.14 of Law no. 51/1995 provides 4 cases of unworthy attitude: a) the person finally convicted by a court order to imprisonment for committing an intentional offense, such as to prejudice the prestige of the profession; b) the person who committed abuses which violated the human rights and fundamental freedoms, established by court decision, or has committed serious disciplinary offenses punishable by the exclusion from the profession as a disciplinary sanction; c) the person who was punished by the prohibition to practice the profession, during the period established by a court or by disciplinary decision and d) the person in charge of whom was found, on the basis of a final court decision or acts of the lawyers' profession, the act of having practiced or supported, in any form whatsoever, the unlawful practice by a person of the profession of lawyer.

Furthermore, Art. 15 of the Law no. 51/1995 provides for the incompatibility with the occupations damaging the dignity and independence of the lawyer's profession.

The status of the lawyer's profession, as adopted by Decision no. 64 of December 3, 2011 of U.N.B.R. (National Association of Romanian Bars) Council, dedicates subsection 3 of Chapter II, Section 1, to the dignity of the lawyer's profession. The aforementioned cases of lack of dignity shall be verified by the Bar Council upon admission to the profession of lawyer, on the occasion of re-enrolment in the list of lawyers with the right to practice the profession and throughout the practice thereof.

The Constitutional Court ruled in its case law in the matter, Decision no. 629 of 27 October 2016[6], that "the regulation in the matter of the lawyer's unworthy attitude is a normal one, giving the assurance that the persons practising this honourable profession have an impeccable moral profile, and it is inconceivable that persons with (serious) criminal convictions take part in the act of justice. The legislator understood to place under the incidence of this maximum sanction - exclusion from the profession - only the commission of intentional offenses, thus excluding the involuntary offenses, considering that, if there is no intention on the part of the lawyer, it cannot be said that his/her probity and fairness are affected". In the recitals of the same decision, the constitutional contentious court holds that the disciplinary sanction of exclusion from the profession of lawyer reflects the principle of the dignity and honour of the lawyer's profession, thus representing a guarantee of the morality and probity of the members of the lawyers' bar association. Thus, the legislation in the matter is governed by certain principles and rules that ensure a good, normal and lawful conduct of the lawyer's activity, the latter having the obligation to abstain from committing acts that would cast a negative light on him/her.

[6] Published in the Official Gazette no. 36 of January 12, 2017.

The Constitutional Court, by Decision no. 225 of April 4, 2017[7], found that the phrase "likely to prejudice the prestige of the profession" of lawyer in Art. 14 letter a) of Law no. 51/1995 is unconstitutional and violates Art.1 par. (5) of the Constitution because its drafting lacks clarity and accuracy, by not clearly defining intentional offenses that may prejudice the prestige of the profession of lawyer. The Constitutional Court held that "the express non-circumstantiality of offenses committed which are likely to prejudice the prestige of the lawyer's profession leaves some room for arbitrariness, making thus possible to apply the sanction of exclusion from the profession in a differentiate manner, depending on the subjective consideration of the structures of the profession of lawyer able to reflect on the case of lack of dignity". The lack of clarity, accuracy and predictability of the aforementioned phrase created prerequisites for being applied in a different, discriminatory manner as a result of arbitrary judgments. Or, the predictability of law also implies the precise drafting of normative texts[8]. According to the Constitutional Court, Decision no. 1 of January 10, 2014, any normative act shall comply with certain qualitative conditions, including predictability, which implies that the normative act must be sufficiently clear and accurate in order to be applied, the formulation with sufficient precision of the normative act allowing those interested, who may call upon the advice of a specialist, if necessary, to provide, in the reasonable extent, the circumstances of the case, the consequences which may result from a given action.

## 3. The professional dignity of the judge and the prosecutor

It was rightfully stated that "the dignity of justice in the singular is first and foremost an image, an appearance, in the eyes of those who observe it. But, as it can only be observed through the eyes of the persons serving it, the dignity of justice is confused with that of the magistrates themselves. In other words, the consideration, the esteem, the respect that citizens have towards justice are precisely those of the magistrates themselves"[9]. Magistrates must be respected not only for the office they occupy, but also for their competence and irreproachable conduct, therefore they have to show self-control in public situations. As stated, judges and prosecutors have to comply with high standards, both in their private and public life, because their conduct affects the entire judicial system. Consequently, the standards of conduct for the employees in the judicial system (judges and prosecutors) are much higher than those required of an ordinary citizen.

The Code of Ethics of Judges and Prosecutors[10] contains their conduct standards in accordance with the honour and dignity of the profession and is structured in seven chapters with regard to the independence of justice, the promotion of supremacy of law, the impartiality of judges and prosecutors, the exercise of professional duties, dignity and honour of the profession of judge and prosecutor and activities incompatible with the judge or prosecutor position. The Code includes a special chapter, Chapter VI, generically entitled "The Dignity and Honour of the profession of Judge or Prosecutor" (Articles 17-20) which has to be understood in connection with Art. 90 par. (1) of the Law no. 303/2004[11] which states that "Judges and prosecutors are obliged to refrain from any actions or deeds likely to compromise their dignity in their profession and in society". With regard to the conduct of judges and prosecutors within the judicial system in general and in courts, respectively the prosecutor's offices where they operate, Art.18 par. (1) of the Code provides that "the relations of judges and prosecutors within the collective community where they carry out their duties must be fair, based on respect and good faith, regardless their seniority in the profession and their position." If the conduct of a judge or prosecutor towards his/her colleagues is inappropriate, this will also give rise to a doubt as regards his/her attitude towards his/her own profession. According to the following paragraph the judges and prosecutors cannot state their opinion on the moral and professional probity of their colleagues. Furthermore, Art. 19 of the Code states that judges and prosecutors can publicly express their opinion in exercising the right to reply, if defamatory assertions addressed to them were published in mass media. Finally, Art. 20 of the Code stipulates that judges and prosecutors cannot perform actions that, by their nature, financing origin or execution, could, in any way, infringe upon the fulfilment of their professional duties, with impartiality, honesty and within legal terms. With reference to Chapter VI, the "*Practical Guide of Professional Ethics for Judges and Prosecutors"*[12] which explains the regulations in the Code shows that judges and prosecutors are permanently in the public eye, therefore they must accept in their personal lives certain limitations that may be considered as burdensome for ordinary citizens and they must do so freely and with good will. In other words, the judge and the prosecutor must behave in accordance with the dignity of their profession.

[7] Published in the Official Gazette no. 36 of 12 January 2017.
[8] In this respect, Dan Claudiu Dănişor, Constituţia României comentată. Title I. General Principles (Bucharest: Universul Juridic, 2009), 40.
[9] Louvel, Bertrand. "Dignité et Dignités", in *Justice, éthique et dignité,* edited by Simone Gaboriau, Hélène Pauliat, 37, Limoges: Pulim: Limoges, 2006.
[10] Decision no. 328 of 24 August 2005 of the Superior Council of Magistracy published in the Official Gazette no. 815 of 8 September 2005.
[11] Law no. 303/2004 on the statute of judges and prosecutors (L.S.J.P.) as republished in the Official Gazette no. 806 of 13 September 2005.
[12] Approved by the Plenum of the Superior Council of Magistracy (C.S.M.) in session of November 22, 2016.

Judges and prosecutors respond from a disciplinary point of view for deviations from professional duties as well as for actions that affect the prestige of justice, disciplinary deviations being expressly provided for by art. 99 let. a) - t) of Law no. 303/2004. In the sense of Art. 44 par. (1) of the Law no. 317/2004[13], the Superior Council of Magistracy fulfils, through its sections, the role of a court in the field of disciplinary liability of judges and prosecutors. According to art. 44 par. (2) of the same normative act, the section for judges also acts as a disciplinary court for the assistant magistrates of the High Court of Cassation and Justice. Against the decisions of the sections of the Superior Council of Magistracy for settling the disciplinary action, an appeal may be lodged within 15 days of the notification by the sanctioned judge or prosecutor or, as the case may be, by the judicial inspection, and the competence to settle the appeal belongs to the 5 Judges Panel of the High Court of Cassation and Justice, according to the provisions of art. 51 par. (3) of Law no. 317/2004.

It is of interest for this study the disciplinary offense provided for by art. 99 letter a) of Law no. 303/2004 which consists of "manifestations which affect the honour or professional probity or the prestige of justice, committed in the exercise or outside of the exercise of the professional duties". The content of this deviation is represented by the standards of conduct imposed on magistrates by the provisions of: Art. 90 of Law no. 303/2004, Art. 17, 18 and 20 of the Code of Ethics for judges and prosecutors, as well as Art. 104 of the Law no.161/2003[14] which stipulates: "Magistrates are forbidden any manifestation contrary to the dignity of their position or which may affect its impartiality or prestige."[15]. These provisions are corroborated with the provisions of Art. 4 paragraph (1) of Law no. 303/2004, which states: "Judges and prosecutors are obliged, through their entire activity, to ensure the supremacy of law, to respect the rights and freedoms of individuals as well as their equality before the law and to ensure non-discriminatory legal treatment to all participants in judicial proceedings, regardless of their quality, to comply with the Code of Ethics of Judges and Prosecutors and to participate in continuing professional training". Furthermore, Bangalore Principles on Judicial Conduct (2002), with respect to value no. 3 entitled "Integrity", state that the judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer, thus reaffirming the people's faith in the integrity of the judiciary. Furthermore, as regards value no. 4, the term "goodwill" states that the judge will avoid violating the rules of goodwill or the appearance of its lack in all his/her activities, and his/her conduct must be in accordance with the dignity of the magistrate position. Last but not least, the Declaration on Judicial Ethics[16] adopted by the General Assembly of the European Network of Legal Councils, within the meeting in London in 2010 stipulates the obligation of probity of the magistrate and the obligation to a worthy attitude and honour.

It should be outlined that in order to be considered a disciplinary offense, an action must be illicit in nature and meet the following constitutive elements: the object, the objective side, the subject and the subjective side.

The legal object of the disciplinary deviation as provided for by Art. 99 let. a) of Law no. 303/2004 is represented by the professional obligations or the norms of conduct established by laws, decisions or regulations, which all judges and prosecutors have to observe, in the consideration of their profession, and which are prejudiced by the unlawful deed[17].

With regard to the material element of the objective side, it consists of the manifestations of the active subject which prejudice the honour or professional probity or the prestige of justice. In the New Explanatory Dictionary of the Romanian Language[18] (2002), for the term honour we find the following meanings: 1. Moral dignity, which characterizes conduct; honesty. 2. Moral authority that someone enjoys. 3. Self-esteem. 4. Distinctive sign that is given to someone for acknowledged merits; honesty. Honour is not only about interiority, but it has a social character; to lose one's honour, is to lose the consideration of his/her peers, thus resulting the connection between honour and reputation[19]. The Declaration on Judicial Ethics states in point 2.2 that professional honour implies the fact that the judge must ensure that through his/her professional practice and his/her person does not jeopardize the public image of the judge, the court or the system of justice. According to point 2.1 of the same international document, professional probity requires the judge to refrain from any tactless or indelicate behaviour, and not just the behaviour which is contrary to law. Last but not least, the doctrine defines the prestige of justice as being the positive public appreciation of the judicial system as a whole. As it has been shown, this global assessment is made in relation to the magistrates' professional honour

[13] Law no. 317/2004 regarding the Superior Council of Magistracy as published in the Official Gazette no. 628 of September 1, 2012.

[14] See, Tamara Manea, Despre abaterea disciplinară a magistraţilor privind manifestările care aduc atingere onoarei sau probităţii profesionale sau prestigiului justiţiei www.juridice.ro.

[15] Law no.161/2003 regarding certain measures for ensuring transparency of public dignitaries, public positions and within the business environment, corruption prevention and its sanction published in the Official Gazette no. 279 of 21 April 2003.

[16] Available on https://www.juridice.ro/wp-content/uploads/2010/12/etica-judiciara-Londra.doc.

[17] Ioan Gârbuleț, *Abaterile disciplinare ale magistraților* (Bucharest: Universul Juridic, 2016), 112.

[18] https://dexonline.ro/definitie/onoare.

[19] Andreas Bucher, *Personnes physiques et protection de la personnalité* (Basel: Helbing§Lichtenhahn, 2009), 129.

and probity as a result of their individual public assessments[20].

With regard to incrimination as a disciplinary deviation of the conduct of judges and prosecutors consisting in manifestations that may prejudice the honour or professional probity or the prestige of justice, Art. 99 letter a) of Law no. 303/2004 enshrines, in fact, the obligation of reserve incumbent upon them. This obligation expresses a practical synthesis of the general principles of professional deontology consisting of independence, impartiality, integrity and involves a certain moderation and restraint in professional, social and private life. The obligation of reserve must also be looked into in the light of the need for the magistrate to comply his/her conduct in accordance with the moral and ethical principles as recognized by society and to act in all circumstances in good faith, with fairness and decency.

The variety of situations that may arise in practice made the legislator not to be able to draw up an exhaustive list of manifestations of the kind to prejudice honour, professional probity or the prestige of justice.

In the case law, based on the evidence presented, the discipline court inferred the existence of the objective side of the deviation as provided for under Art. 99 letter a) of Law no. 303/2004 as republished, with subsequent amendments and supplements, being thus demonstrated beyond any doubt the inappropriate attitude and improper behaviour which the defendant public prosecutor has manifested in the public place, within a restaurant, materialized in the use of threatening expressions addressed to a waiter, in the unjustified presentation of the prosecutor's card, followed by contacting by phone a police officer to whom he requested assistance in order to "organize an operation for catching in the act (...) for the offense of abuse of service", as he had previously left the restaurateur without paying the entire price of the products ordered[21].

In one case, it was noted that the objective side of the disciplinary deviation we refer to is outlined by several elements, namely: i) the defendant proceeded to hearing his colleague prosecutor as a witness in a tactless, distinct, singular manner, given the fact that the hearing was made in the presence of an ex officio lawyer who was not requested as a witness and a chief police commissioner, as an assistant witness; ii) the ex officio lawyer who attended the hearing mentioned in the witness statement given in this disciplinary proceedings that Mrs. Prosecutor D was clearly affected by this situation; iii) Mrs prosecutor, heard as a witness, qualified the questions raised by the defendant prosecutor as having a teasing character and were likely to prejudice his authority before the two persons who assisted in making the statement, as she was asked questions about the start date of her activity in the prosecutor's office and about the position she occupied in the department where she carries out her activity, unimportant aspects from the perspective of the subject of evidence or the credibility of the witness; iv) the presence at the hearing, as a subscribing witness, of a police officer is likely to affect the report of authority specific to the supervision relationship of the criminal investigation carried out by the criminal prosecution authorities, and v) the defendant proceeded to the hearing of his colleague using the institution of the subscribing witness, which was provided by the old Code of Criminal Procedure, but which is no longer regulated by the current Code, an institution which in practice was used by the criminal prosecution bodies to hear as witnesses uneducated persons who could not write or read[22].

In another case, it was noted that a magistrate, like any other person, cannot be deprived of the freedom of expression, but this right is not an absolute right as the State can legally intervene in order to limit it, according to the conditions provided for by Art.10 par. 2 of the European Convention on Human Rights. Furthermore, it has been shown that although the status of magistrate does not deprive the judge of the protection provided for by Art. 10 of the text of the Convention, the responsibility for maintaining the image and status of the position requires caution and moderation in expression. In the present case, the manner of expression the defendant judge chose to express his opinions regarding the activity of the judicial system, through the statements made on his personal blog, thus explicitly formulating certain suspicions and fears about the alleged criminal offenses committed by the two dignitaries, about the alleged influences on public institutions, thus suggesting the existence of a potential social danger as a result of their release, constitutes a violation of the obligation of reserve, given the fact that the defendant's statements exceeded the limits of the freedom of expression stipulated by par. (2) of Art. 10 of the text of the Convention[23].

Under this disciplinary deviation, the immediate consequence is affecting the public image not only the image of the judge or prosecutor concerned, but also of justice as a public system and service.

Relating to the aspect of the subjective side, the disciplinary deviation provided for by Art. 99 letter a) of Law no. 303/2004 may be committed intentionally or unintentionally. The guilt of the judge or of the prosecutor shall be assessed in relation to the standards of conduct set out in the aforementioned normative provisions and in relation to the requirements of the

[20] In this reagrd, Tamara Manea, Despre abaterea disciplinară a magistraţilor privind manifestările care aduc atingere onoarei sau probităţii profesionale sau prestigiului justiţiei or the prestige of justice) on www.juridice.ro.

[21] Decision no. 9P of 5 July 2017, Section for prosecutors of Superior Council of Magistracy, made final by the decision no. 41 of 12 March 2018 of the High Court of Cassation and Justice, 5 judges Panel.

[22] Decision no. 11P of September 20, 2017, Section for prosecutors of Superior Council of Magistracy, made final by the decision no.133 of June 25, 2018 of the High Court of Cassation and Justice, 5 judges Panel.

[23] Decision no. 69 of April 2, 2018 of the High Court of Cassation and Justice, 5 judges Panel.

society embodied in complying with certain values that are unanimously accepted.

According to Art. 99 letter c) of Law no. 303/2004, disciplinary deviation is represented by "attitudes that are not worthy in the exercise of their duties towards their colleagues, the other personnel of the court or the prosecutor's office, judicial inspectors, lawyers, experts, witnesses, the persons subject to trial in a court of law, or the representatives of other institutions".

In the case of this disciplinary deviation, the material object is identified with the passive subject (the judge's or the prosecutor's colleagues, the other staff of the court or the prosecutor's office, judicial inspectors, lawyers, experts, witnesses, the persons subject to trial in a court of law or the representatives of other institutions).

In the doctrine, the phrase "unworthy attitudes" takes two meanings:

- *lato sensu*, it designates any manifestation of a judge or prosecutor that is contrary to the standards of conduct required by the laws, the decisions and the regulations governing their activity, and
- in a narrow sense, it designates the gestures, words, attitudes, expressions, etc. out of the civilized and decent behaviour that should govern social relations [24].

In this context, we should mention that in Decision no. 708 of November 15, 2018 regarding the exception of unconstitutionality of the provisions of art. 90 par. (1) and Art. 99 letter c) of Law no. 303/2004 on the status of judges and prosecutors and Art. 51 par. (3) of Law no. 317/2004 regarding the Superior Council of Magistracy, the Constitutional Court found that the legislator did not violate the requirements of clarity and predictability of the law by using the phrases "actions or deeds likely to compromise the professional dignity" and "unworthy attitudes" because the significance of the two phrases can reasonably be understood by magistrates acting as recipients of the rules. As correctly retained by the Constitutional Court, the legislator could not provide an exhaustive list of actions and deeds likely to prejudice the dignity of magistrates in their profession and in society, just as it could not draw up an exhaustive list of unworthy attitudes while exercising their professional duties. Thus, adapting the conduct of the magistrates to the prescriptions of the norm shall be analysed in relation to the concrete circumstances, characteristic to each factual situation.

For the existence of the disciplinary deviation provided for by art. 99 letter c) of Law no. 303/2004, in terms of the material element, two conditions have to be met cumulatively:

1. the unworthy attitude of the judge or the prosecutor to be achieved by an action or lack of action towards one of the passive subjects;
2. the unworthy attitude of the judge or the prosecutor shall be achieved during the exercise of his/her professional duties.

In the case of law, it was considered to be included in the disciplinary deviation under analysis, the attitude of defendant Judge A, who, given a tense atmosphere, during the deliberations following the session of March 16, 2016, addressed using a raised voice and throwing a file to judge C who attended the deliberations. In the present case, the veracity of the defendant's improper conduct was confirmed by corroborating the evidence administered in the case, namely the statements of Judge C, the statements of Judges E and F, and the content of the mobile phone recording made by Judge C, from which it results that the defendant judge implicitly acknowledges her unworthy attitude[25].

In one case, it was noted that the manner in which the defendant judge acted in the court sessions of November 2, 2015, April 4, 2016, June 6, 2016, September 12, 2016, October 24, 2016, by using inappropriate expressions, by initiating dialogues without any legal relevance, by expressing criticism towards her fellow magistrates and the solutions delivered by the judicial control court fulfils the legal premise of the unworthy attitude[26].

In another case, it was held the objective aspect of the disciplinary offence stipulated by art. 99 letter c) of Law no. 303/2004 as it was demonstrated beyond any doubt that during the settlement of file no. x/212/2014, the defendant judge had inappropriate behaviour towards the injured parties and their lawyers, making inappropriate judgments and thus understanding to impose her point of view by initiating a dialogue without any legal relevance, perceived as a genuine interrogation with each of the present civil parties, insisting on bringing the minor children before the court, without showing any concern or respect towards their feelings, which was likely to incite doubts about the magistrate's concern to ensure respect for the interests of the minors in terms of hearing which does not affect them emotionally[27].

The immediate consequence of this disciplinary offence is the deterioration of confidence and respect for the magistrate's function, with the consequence of affecting the image and prestige of justice as a public system and service.

Regarding the subjective side, the disciplinary offence stipulated by art. 99 letter c) of Law no.

[24] In this regard, see Gârbuleț, Abaterile disciplinare ale magistraților, 175-76.

[25] Decision no. 8J April 6, 2017, Section for judges of the Superior Council of Magistracy, made final by the decision no.5 of January 29, 2018 of the High Court of Cassation and Justice, 5 Judges Panel.

[26] Decision no. 25J of June 28, 2017, Section for judges of the Superior Council of Magistracy, made final by decision no. 176 of October 8, 2018 of the High Court of Cassation and Justice, 5 Judges Panel.

[27] Decision no. 6J of March 28, 2017, Section for judges of the Superior Council of Magistracy, final by decision no. 333 of December 11, 2017 of the High Court of Cassation and Justice, 5 Judges Panel.

303/2004 may be committed with a direct or indirect intent.

For the purposes of Art. 99 letter s) of Law no. 303/2004, shall constitute a disciplinary offence "the use of inappropriate expressions in court judgments or judicial acts of the prosecutor, or the obvious reasoning contrary to the legal reasoning, such as to affect the prestige of justice or the dignity of the magistrate function".

It should be emphasized that the regulation of the disciplinary offence stipulated by art. 99 letter s) of Law no. 303/2004 does not concern the establishment of control over court judgments, but it shall sanction the judge for a certain conduct; court decisions are subject to legal remedies under the law.

The disciplinary offence under analysis has no material object.

The passive subject is the State, directly interested in complying with the normative provisions on the content of court judgments or judicial acts of the prosecutor.

The disciplinary offense provided for by Art. 99 letter s) of Law no. 303/2004 can be implemented in two ways, namely:

- the use of inappropriate expressions in court judgments or judicial acts of the prosecutor, likely to affect the prestige of justice or the dignity of the magistrate function;
- the statement of reasons clearly contradicts the legal reasoning of court decisions or judicial acts of the prosecutor, such as to affect the prestige of justice or the dignity of the magistrate function.

Therefore, in one case, it was noted that the expressions used in the judgments, in which the magistrate edited explicit criticisms regarding decisions delivered by the court of judicial control, recorded as rhetorical questions, in relation to their own professional experience, reveals a subjective, biased attitude and constitute elements contrary to an impartial judgment, so that they can be considered inadequate both from the perspective of the judge's reserve obligation and the content of the considerations of the court judgments, as regulated by Art. 425 par. (1) letter b) of the Civil Procedure Code. According to the 5 Judges Panel of the High Court of Cassation and Justice, the content of the personal assessments thus expressed, which essentially puts into question the professionalism and impartiality of judges from the judicial control court, is likely to cause a negative public judgment regarding the judicial system as a whole[28].

We also agree with the opinions expressed in the literature that the immediate consequence is conditional for the existence of the disciplinary deviation stipulated in Art. 99 letter s) of Law no. 303/2004, because the use of inappropriate expressions in court judgments or judicial acts of the prosecutor or the reasoning obviously contrary to the legal reasoning of court judgments or judicial acts of the prosecutor will constitute disciplinary deviation only if the prestige justice or dignity of the magistrate function[29] is affected.

The disciplinary offense under analysis may be committed with direct or indirect intent.

## 4. Conclusions

In this sense, dignity implies particular obligations incumbent upon those who occupy a position. Magistrates are required to refrain from any acts or deeds that might compromise their dignity in office and in society.

With regard to the duty of respect incumbent upon third parties, we can exemplify it by the offense of violating the solemnity of the hearing (Art. 278 of the Criminal Code) , which incriminates offensive or obscene manifestations during a court proceedings for the purpose to protect the solemnity of the court hearing and the respect due to the judicial authority and the incrimination of the offense of contempt of the court (Art. 279 of the Criminal Code). As stated in the Explanatory Memorandum of the Criminal Code, the justification of the incrimination of the offense for contempt of the court consists in the fact that "by the will of the law, the judge, the prosecutor or the lawyer have the most important judicial powers, and the manner in which they are performed decisively depends the good conduct of a trial and its outcome, so that providing increased protection against any form of violence exerted on them is, from this perspective, justified". Furthermore, the irreverent manifestations of the parties, witnesses, experts, interpreters or of any other person towards the judge or the prosecutor shall constitute a legal offense according to Art. 283 par. (4) letter i) of the Criminal Procedure Code. For the purposes of Art. 188 par. (1) of the Civil Procedure Code it shall constitute a legal offence the non-observance by either party or by other persons of the measures taken by the court to ensure the order and the solemnity of the court hearing. This first meaning of the notion of dignity is different from the modern meaning, the equal dignity of all human beings, regardless of any particular additional status and exclusively related to the human nature of the individual, which we will address in a next study.

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[28] Decision no. 25J of June 28, 2017, Judges Section of SCM, final by decision no. 176 of October 8 2018 of the HCCJ, 5 Judges Panel.
[29] Gârbuleț, *Abaterile disciplinare ale magistraților,* 458.

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# AUTONOMOUS CONCEPTS OF THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN MATTERS OF DISCIPLINARY, ADMINISTRATIVE, FINANCIAL AND CRIMINAL LIABILITY

**Gheorghe BOCSAN**[*]

**Abstract**

*Often, the delimitation between criminal law per se and other branches of public law involving the application of sanctions by the authorities of the Member States or by the institutions, bodies, offices and agencies of the European Union is difficult to operate.*

*From the point of view of the guarantees of the fair trial, as they are regulated by art. 47 of the Charter of Fundamental Rights of the European Union and art. 6 of the Council of Europe Convention for the Protection of Fundamental Rights and Freedoms, both the ECJ and the ECHR have developed, through continuous and elaborated jurisprudence, autonomous concepts on the basic notions by which aforementioned guarantees operate: "criminal charges", "criminal proceedings "," criminal sanction "," court "," court with jurisdiction in criminal matters "etc.*

*The present study analyses the mechanisms of the influence exercised by the autonomous concepts developed in the ECHR case-law on the mentioned legal topic on the legal acts of the Union, but also the uniform meanings resulting from the corroboration of these autonomous concepts with those of the ECJ jurisprudence in the same field.*

*Starting from some basic concepts of ECHR jurisprudence on the notion of criminal offence, synthesized in the Engel Criteria and many subsequent cases, such as Bendenoun v. France, Jussila v. Finland, Ezeh and Commons v. United Kingdom, the issue of the delimitation we have referred to above acquires contours in the case-law of ECJ in relevant cases such as Bonda, Baláž or Hans Åkerberg Fransson.*

**Keywords:** *Criminal liability, disciplinary liability, administrative liability, financial liability, the right to a fair trial, autonomous concepts in ECHR jurisprudence and ECJ case-law, court, criminal charge, criminal offence, criminal sanction, Engel Criteria, criminal court.*

## 1. Preliminary considerations

The various forms of legal liability, characteristic of public law branches, involve the commission of unlawful acts and the application of sanctions, which are often difficult to distinguish from their raw typology: criminal liability and punishment as a typical criminal sanction.

The basic criterion of the distinction, which is easy to see at first glance, is the gravity of the unlawful act that generates the liability and the legal nature of the applicable sanction, namely its preventive / repressive character (in the case of criminal liability) and the absence of such a character of liability specific to other branches of public law).

The importance of fair interpretation of the legal nature of liability is particularly important in the context of respecting the right to fair trial and other fundamental rights and freedoms in procedural context. Thus, the Convention for the Protection of Human Rights and Fundamental Freedoms, concluded in Rome in 1950, establishes binding minimum guarantees for the conduct of a fair trial, which are distinct according to the criminal or civil nature of the matter submitted to litigation, under Article 6 of the Convention. Paragraphs 2 and 3 of the Article apply only where the safeguards of the fair trial relate to criminal proceedings while paragraph 1 applies to any type of trial.

Regarding the importance of establishing procedural boundaries depending on the criminal or non-criminal nature of the legal matter submitted to trial from the perspective of the same Convention, Additional Protocol no. 7, done at Strasbourg in 1984, by art. 4, entitled "*The right not to be tried or punished twice*" refers exclusively to criminal proceedings. In this context, paragraph 1 of the above article states that "*No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of the State*". The principle is known in the European Union as well as in the world, in its Latin formula: "*ne bis in idem*".

For the Member States of the European Union, as well as for the institutions (in particular the Court of Justice), the Union's bodies, offices and agencies, when applying directly European Union law, the fair trial guarantees and the *ne bis in idem* principle are governed by the provisions of the Charter of fundamental rights of the European Union.

In this context, there is the issue of coordination

fundamental freedoms regulated by the Charter and the same safeguards, as regulated by the

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Convention for the Protection of Human Rights and Fundamental Freedoms. The issue seems very simple in the view of the Treaty on European Union (abbreviated as TEU), whose art. 6 par. (2) sentence I states that "*the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms*".

Notwithstanding this provision as part of the Union's constitutional basis for the protection of fundamental rights, the opinions[1] drawn up by the Commission for the accession of the Union to the Convention have been rejected by the Court of Justice. The doctrine raised pertinent and essential questions about the Court of Justice's two refusals to endorse the Commission's proposals for the conclusion of an agreement on the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms: "*Is there political and legal will to continue the process for the European Union to become party to the European Convention on Human Rights? Are we facing a permanent blockade or only a crisis that will naturally be overcome by profound reflections, reflections that will at one point materialize in a positive legal text accepted by the parties? This question intervenes in the conditions in which we refer, to the provisions of art. 218 TFEU, according to which a Member State, the European Parliament, the Council or the Commission can obtain the opinion of the Court of Justice on the compatibility of an envisaged agreement with the provisions of the Treaties. In the event of a negative opinion from the Court, that agreement may enter into force only after its amendment or revision of the Treaties*"[2]

However, until the accession of the Union to the aforementioned Convention (which would greatly simplify the situation), the provisions of the fundamental treaties of the Union, those of the Charter and those of the Convention must be interpreted in a coherent and unitary manner, supported by case-law of the Court of Justice of the European Union and the European Court of Human Rights (abbreviated as the ECHR), in order to build a fair, solid legal interface between the Charter's protection system and that of the Convention.

As stated above, the main fundamental rights to which we refer in this study are: the right to a fair trial and the right not to be prosecuted or punished twice for the same offence (*ne bis in idem*). In the Charter of Fundamental Rights of the Union, Art. 47 establishes the right to an effective remedy and to a fair trial, and art. 50, the right not to be tried or convicted twice for the same offense. The provisions of the Charter apply, in accordance with Art. 51 par. (1), to Union institutions, bodies, offices and agencies, in compliance with the principle of subsidiarity, and to Member States only if they implement Union law. On the other hand, the Charter does not extend the scope of Union law beyond its powers (Article 51 (2) of the Charter).

There are, of course, many situations in which the application of the Charter's provisions fall within the scope of art. 51 thereof; to illustrate our approach in the present study, we point out: the application of administrative sanctions under Art. 5 of Regulation No 2988/95 on the protection of the financial interests of the European Communities[3] by the authorities of the Member States or by OLAF under Council Regulation 883/2013 on OLAF's investigations[4], the application of measures and penalties provided for the implementation of the common agricultural policy or other Union sectoral areas in which aid is granted, the administrative or penal sanctions applied by the Member States under national transposing legislation of Council Directive 2006/112 / EC of 28 November 2006 on the common system of value added tax[5] and of the Implementing Regulation of Directive 2006/112 / EC on the common system of value added tax[6].

Also, regarding the legal interface between the Charter and the Convention, the provisions of art. 52 par. (3) of the Charter, which states that in so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

By virtue of this provision of the Charter, when it is necessary to determine the extent of the right to a fair trial or that of *ne bis in idem* principle, the interpretation of art. 47 and 50 respectively of the Charter must be made in the light of Art. 6 of the Convention and Art. 4 of the Additional Protocol no. 7 to the Convention. The

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[1] Opinion of the Court (Full Court) of 18 December 2014, Opinion delivered on the basis of Article 218 (11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - with EU and EU Treaties, ECLI: EU: C: 2014: 2454.

Opinion No 2/94 of the Court of 28 March 1996 "*Accession of the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms*", ECLI: EU: C: 2014: 2475.

[2] A. Fuerea, *Considerentele pe care se întemeiază avizul negativ al Curții de Justiție de la Luxemburg referitor la Acordul privind aderarea Uniunii Europene la Convenția pentru apărarea Drepturilor Omului și a Libertăților fundamentale*, Revista de Drept Public nr. 2/2015, anul XX (47), Editura Universul Juridic, p. 91-92.

[3] Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ L 312 from 23.12.1995.

[4] Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 201 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, OJ L 248 from 18.9.2013.

[5] Published in OJ L 347 from 11.12.2006.

[6] Council Implementation Regulation (EU) No 282/2011 of 15 March 2011laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (recast), published in OJ L 77 from 23.03.2011.

interpretation of the latter legal texts was done over decades by the ECHR case-law and of the first by the jurisprudence of the Court of Justice of the European Union. In the case of that Court, the interpretation was undergone in the light of some fundamental principles of interpretation established by the ECHR, of which the most important is the "*criminal charge*".

## 2. The autonomous concept of the "*criminal charge*" in the context of the interpretation of the right to a fair trial, set out by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms

The principle of equity has totally circumvented purely national logic in the interpretation of art. Article 6 of the Convention, which acquires a transnational and supranational legal vocation: "*it leaves the Member States a fairly limited freedom: Article 6, unlike others, such as Articles 8 to 12, does not allow national data to be taken into account at all. That is why we are talking about the rigidity of Article 6* "[7].

The first important case of the ECHR, where the issue of the distinction between disciplinary and criminal liability in the matter of the right to a fair trial, as provided by Article 6 of the Convention was *Engel and others against the Netherlands*[8]. The ECHR's decision in this regard was to consecrate both the autonomous concept of "*criminal charge*" and the criteria for determining it, which remained in the judicial history under the name of "*Engel Criteria*". Some prestigious academics, looking at the case-law of the Court of Justice of the European Union, have carefully observed how these criteria form the basis of the demarcation between criminal law and other branches of law in European Union[9], consolidating the autonomous concept of "*criminal nature of the accusation*". Thus, although they are formally distinct, the "*criminal charge*" and the "*criminal nature of the accusation*" complement each other when the criminal matter has to be distinguished from the civil nature of an accusation, procedure or sanction.

Nominally, the autonomous concept of "*criminal charge*" was stated in the ECHR decision in *Deweer v. Belgium* (1980)[10], §. 42 para. 2 and the conclusion on the definition of this autonomous concept was that the criminal charge is the official notification of an individual made by the competent authority about the allegation that he had committed an offence. The formula is a synthesis of the previous jurisprudence (§. 42 para. 3 of the judgment's motivation), where, in connection with the application of the reasonable time principle of the criminal trial, it was established that the starting point of the trial is, as the case may be: the one in which a person has been arrested, the one in which he/she has been formally notified about being prosecuted before o court of law or when the person has been notified that pre-trial investigations have begun.

Coming back to Engel case, the state of affairs concerns three military servicemen of the Dutch Army committing deviations from military discipline, on the basis of which they have been subject to disciplinary sanctions. The essential question to which the Strasbourg Court had to answer was whether the right to a fair trial under Art. 6 of the Convention applies to those disciplinary proceedings in its criminal dimension[11]. The choice of the state to criminalize conduct is discretionary, but necessarily implies the enforcement of the safeguards of the fair trial in criminal matters[12]. The omission by the unique will of the national states to apply the rules of the fair criminal trial is not acceptable[13]. A partial conclusion of the ECHR, expressed in §. (81) the last paragraph is that *"«the autonomy» of the concept of «criminal» operates only in one sense*."

From § (82) to § (85) of the Decision, the Court sets out the so-called "*Engel Criteria*" as follows:

a) the provision of illicit deed in the law as a criminal offense[14];

[7] J. Pradel, *La notion de procès équitable en droit pénal européen*, Revue générale de droit, volume 27, numéro 4, décembre 1996, p. 508

[8] Case Engel and Others v. The Netherlands, Judgment, Strasbourg, 8 June 1976, series A, no. 22.

[9] A. Klip, *European Criminal Law. An Integrative Approach*., 3rd edition, Ius Communitatis Series, Volume 2, Intersentia, Cambridge-Antwerp-Portland, 2016, p. 190-194.

[10] ECHR, Case of Deweer v. Belgium, Application no. 6903/75, Judgment, Strasbourg, 27 February 1980, ECLI: CE: ECHR: 1980:0227JUD000690375.

[11] Engel Decision, §. 79 second paragraph: "*Led thus to examine the applicability of Article 6 in the present case, the Court will first investigate whether the said proceedings concerned "any criminal charge" within the meaning of this text; for, although disciplinary according to Netherlands law, they had the aim of repressing through penalties offences alleged against the applicants, an objective analogous to the general goal of the criminal law*".

[12] §. (81) paragraph 4 Engel Decision: *"The Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not (...) constituting the normal exercise of one of the rights that it protects. This is made especially clear by Article 7. Such a choice, which has the effect of rendering applicable Articles 6 and 7, in principle escapes supervision by the Court".*

[13] §. (81) paragraph 5 Engel Judgment: *"The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 and even without reference to Articles 17 and 18, to satisfy itself that the disciplinary does not improperly encroach upon the criminal".*

[14] §. (82) paragraphs 1 and 2: *"Hence, the Court must specify, limiting itself to the sphere of military service, how it will determine whether a given "charge" vested by the State in question - as in the present case - with a disciplinary character nonetheless counts as "criminal" within*

b) the nature of the offence[15];
c) the severity of the sanction[16].

By the jurisprudence which followed the decision in *Engel and others v. the Netherlands*, the accusation that failed to fulfil any of the "*Engel Criteria*" does not automatically lead to the disqualification of a "*criminal charge*" in the sense of the autonomous concept established. On the other hand, the qualification as a "*criminal charge*" has often been recognized by the ECHR only by verifying a single "*Engel criterion*" (less the first, considered formal).

Most cases of accepting the qualification of a "*criminal charge*" on the basis of the verification of one of the criteria set out above referred to the criterion of the nature of the offence, assessed in terms of the punitive and deterrent nature of the sanction provided by the law for the illicit deed subject of the charge.

A first example of this is the ECtHR's decision on *Öztürk v. Germany*[17]. By a decision of an administrative authority, the applicant Öztürk, a Turkish citizen resident in Germany who did not speak German well enough, was fined for a road traffic offense. Just a few years ago, the same illicit deed was foreseen as a crime, but later it was decriminalized due to the need to simplify its sanctioning procedure, being considered minor, and imposing sanctions in approximately 5 million cases annually at Germany's level. The applicant challenged the sanction before the competent court but, in the course of the proceedings, dropped the appeal. By the judgment in question, the applicant was ordered to bear the costs of the proceedings, including the fees of the interpreter used by him during the proceedings. The applicant filed an appeal against the first-instance judgment, challenging his obligation to pay the court costs; the court dismissed the appeal.

In his complaint to the Human Rights Commission, the complainant alleged the violation by the German State of the provisions of Art. 6 par. (3) lit. (e) of the Convention, according to which any person charged within criminal proceedings has minimum rights, including the right to free assistance of an interpreter if he/she does not understand or speak the language used in court.

The fundamental legal issue in this case was also to decide whether the charge to the plaintiff, on the basis of which a fine was imposed, was a "*criminal charge*" in the sense of the autonomous concept developed by the ECHR in interpreting the terms of the guarantee the fair trial set out by art. 6 of the Convention. Given that the interpreter was not made available free of charge by the court to the applicant Öztürk, but only if payed, his complaint concerning the violation by Germany of Art. 6 par. (3) lit. (e) of the Convention should have been admissible only if the ECHR considered that the charge originally filed with the applicant was a "*criminal charge"* (which, moreover, was the case).

The ECHR found that the offense was not set out at the time of its commission by the criminal law, but until recently (reported at the time of the sanctioning) was a formal criminal offense. The reason for the decriminalization was the need to simplify the sanction procedure (§ 47 of the decision).

Paragraph 48 of the Decision recalls the criteria set out in the judgment *Engel and others v. the Netherlands*, and §. 50 of the decision reaffirms the autonomy of the concept of "*criminal*" in the context of art. 6 of the Convention.

Although the fact that the illicit act committed by the applicant is not a criminal offense but a violation of the substantive German law, the ECHR noted that procedural law provisions of the Code of Criminal Procedure apply to the sanctioning of this infringement by analogy, by continuity with the previous legal nature, established by law until 1975, that of a criminal offense (§ 51 of the decision).

The second "*Engel criterion*," the nature of the offence, was analysed by the ECHR in terms of the legal nature of the sanction prescribed by law for the perpetration of the offence. Thus, within §. 52 of the Decision, the Court sees a number of substantive and procedural differences in the nature of the sanction: German law distinguishes between the fine as an administrative sanction and the fine as a criminal penalty, and the prison sentence was not provided for contraventions, but only for criminal offenses. Also, the contravention sanctions are not retained in the criminal

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*the meaning of Article 6 (art. 6). In this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States*".

[15] §. (82) paragraph 3: *"The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law. In this respect, the Court expresses its agreement with the Government".*

[16] §. (85) of the Decision. The ECHR further examines the maximum penalties that could be applied by the Supreme Military Court to plaintiffs. For Engel, the sentence taken into account by the Court was two days *'strict arrest'*, which is, in the ECHR's view, a penalty too soft to be considered a criminal punishment. Into the §. (85) par. 4 of the Decision, the Court considers that the sanctions applied to the applicants by Witt, Dona and Schul were indeed based on "*criminal charges*" because their purpose was to impose serious sentences involving deprivation of liberty.

In the end of §. (85) of the Decision, the ECtHR states that, although in the present case the Supreme Military Court unequivocally condemned the applicant de Witt to only 12 days of *'aggravated arrest'*, in other words, a sentence not involving deprivation of liberty (§. 62), the final outcome of the appeal could not diminish the severity of the sanction initially taken into consideration.

The paragraph close with: "*The Convention certainly did not compel the competent authorities to prosecute Mr. de Wit, Mr. Dona and Mr. Schul under the Military Penal Code before a court martial (paragraph 14 above), a solution which could have proved less advantageous for the applicants. The Convention did however oblige the authorities to afford them the guarantees of Article 6* ".

[17] ECHR, Court (Plenary), Case of *Öztürk v. Germany* (Application no. 8544/79), Judgment, Strasbourg, 21 February 1984.

record. These arguments tend to plead for a legal nature of administrative sanctions in that case different of the criminal one.

However, the Court notes in §. 53 of the decision that the sanction consisting of the fine imposed on the applicant for a contravention was punitive, which is the "*distinctive feature of the criminal sanction*". Also, in the same paragraph of the decision, the Court points out that the system of tripartite division of offenses according to their gravity, in crimes, felonies and misdemeanours still persists in many contemporary states, suggesting that the latter do not really have a legal nature fundamentally distinct from that of crimes and felonies, as criminal acts of greater or less seriousness. We consider that this perspective is particularly interesting because it addresses in a historical manner and subject to the necessity of the judiciary to dispose of an enormous burden of causes without significance, the need to transfer the decision of sanctioning from the judicial system to the administrative one. This pragmatic solution does not interfere with the legal nature of the accusation: it stays criminal.

By the judgment in *Öztürk v. Germany*, the ECHR supports the idea that the legal nature of the sanction applicable to an unlawful act should not be assessed in a quantitative way, but in a qualitative one, by assessing the punitive nature of the sanction versus a purely preventive nature. Taking the clear signs of the influence of classical doctrine of criminal law, the ECHR does not seem to assume a positivist view of the nature of the punishment: it is still regarded as repression, and not simply as prevention or removal of the danger.

Also, in the effort to assess the nature of the offence, according to the second "*Engel criterion*", the Court examines the addressability of the legal rule violated by the illicit deed, starting from another dogma of the classical doctrine of criminal law, according to which the norms that protect those social values that form the object of criminal offenses have general addressability. They are not designed for determined groups of people nor for individuals seen alone. From this point of view, the ECHR addresses the issue from the perspective that the rules in the present case, imposing the social value of road traffic safety, must be respected by everyone in the society as user of public roads.

This latter criterion, of the general addressability of the legal norm infringed by the illicit act, should be considered as circumscribed to the second "*Engel criterion*" (the nature of the act) because it relates to the nature of the criminal act through the legal object, namely the social value protected. However, in the jurisprudence of the ECHR that would follow the Öztürk case, it would become a true fourth criterion of the Engel type.

Thus, in the ECHR judgment in *Bendenoun v. France*[18], in which the applicant Michel Bendenoun was involved in three parallel proceedings, all based on the same legal context: the first a customs procedure, the second a fiscal one and the third an undoubted criminal one, the Court, in §47, refers to the "*four factors*" to be analysed "*in the light of the case law and in particular the Öztürk case"*.

The first criterion assessed in § 47 of the decision is precisely the general addressability of the rules that protect the legal object of the illicit deed, the Court considering that the provisions of the General Code of Taxes relating to the offences in the case "*concern all citizens, in their capacity as taxpayers, and not a particular group with a special status* ".

In the continuation of legal syllogism, the Court examines the nature of the unlawful deeds, from the point of view of the nature of the sanction provided for by the law for the offence, considering that the tax increases are not intended as a compensation for damage but "*essentially as a punishment to deter reoffending*". In conclusion, the Court stated that those sanctions are preventive and repressive.

According to the third "*Engel Criterion*", the seriousness of the sanction stipulated by the law for committing such offences, in §. 47 par. 5 of the decision, the Court considers that these penalties, consisting of fines of FF 422 534 for the applicant and FF 570 398 for his company (therefore very important), cumulated with the possibility of transforming the first fine into days of imprisonment in case of non-payment in due course, outlines the seriousness of the sanction.

In concluding the evaluation of the "*Engel Criteria*", the last paragraph of §. 47 notes: *"Having weighed the various aspects of the case, the Court notes the predominance of those which have a criminal connotation. None of them is decisive on its own, but taken together and cumulatively they made the "charge" in issue a "criminal" one within the meaning of Article 6 para. 1, which was therefore applicable"*.

What is specific to this ECHR decision is that, for the first time, for the purposes of determining the criminal nature of a charge as an autonomous concept, it considers a combination of criteria already established by the case-law of the Court which, does not characterize the accusation as criminal, but only partially and conjugated, leads to such a conclusion.

In *Ferrazzini v. Italy*[19], following a transfer of immovable property to a company founded by the applicant for the purposes of agritourism, he requested the Italian tax authority to apply reductions to three taxes to be paid, of which the former was VAT. With regard to VAT, the tax authorities found from the tax declarations of the applicant that the property transferred to the company was undervalued, for which reason the applicant was liable to pay the tax corresponding to the real value of the property plus

[18] ECHR, Court (Chamber), Case of Bendenoun v. France, Application no. 12547/86, Judgment, Strasbourg, 24 February 1997, series A, no. 287.

[19] ECHR, Case of Ferrazzini v. Italy, Application no. 44759/98, Judgment, Strasbourg, 12 July 2001.

penalties. Following the administrative appeal of the sanction applied, the tax authorities waived the case as a result of accepting the applicant's tax relief requests.

Regarding the situation of the other taxes and duties owed, the fiscal authority informed the applicant that his claims for reduction of payment amounts were rejected and that he would be required to pay administrative penalties equal to 20% of the amount of the sums due if he did not pay them within 60 days of the date of communication. The complainant challenged the decisions before the tax commission (administrative body), which subsequently rejected them. In October 2000, the applicant appealed before the regional tax commission and then applied to the ECHR invoking the breach of the reasonable time rule, guaranteed by Art. 6 par. (1) of the Convention, in the context in which the first procedure lasted for more than 10 years and the second procedure for more than 12 years.

The position of the Government was that the provisions of Art. 6 par. (1) of the Convention do not apply to tax proceedings, and in the present case they did not concern a "*criminal charge*". Moreover, the Government argued that, in Italy, the procedure for the enforcement of a tax provision is carried out in accordance with the procedure laid down by law for civil liability. The complainant expressed a similar position, considering the nature of the proceedings as civil and not criminal.

At §. 20 of the Judgment, the Court held that: " *The parties having agreed that a "criminal charge" was not in issue and the Court, for its part, not perceiving any "criminal connotation" in the instant case (see, a contrario, Bendenoun v. France, judgment of 24 February 1994, Series A no. 284, p. 20, § 47), it remains to be examined whether the proceedings in question did or did not concern the "determination of civil rights and obligations*".

Analysing the belonging to the public or the private law of the fiscal legal matters, §. 29, third sentence, of the Judgment states: " *The Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant*". Hence the conclusion expressed in the last sentence of the paragraph mentioned: "*It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer*".

The Court concludes in the sense of that inapplicability of the provisions of Art. 6 par. (1) of the Convention.

A complete and systematic analysis of the criteria for determining the incidence of the provisions of Article 6 (1) of the Convention is implemented by the ECHR in the *Jussila v. Finland* Judgment[20].

The complainant, manager of a car repair company, has filed tax returns in 1998 on VAT. By detecting a number of inaccuracies, particularly of an accounting nature, in those statements, the fiscal authority made an estimate of the turnover of the company, which was higher than that declared by the company, which led to the increase in the amount owed as VAT. The tax authorities communicated to the applicant a decision on the basis of which he had to pay an increase equal to 10% of the amount of the rights he was ultimately considered to be debtor (308.8 Euro). Subsequently, the applicant challenged the tax decision by administrative means, and then in court. In the appeal proceedings, before an administrative tribunal, the applicant requested the hearing in court of himself, of the tax inspector who handled the file and an *ex parte* expert. However, the court was pleased with the submission by the tax inspector of written observations and the submission of an *ex parte expert* report. The Administrative Court rejected the applicant's request to be heard in the proceedings before the court and the request for the fiscal inspector and the *ex parte* expert to be heard, considering that all the parties involved were aware of their claims and the hearings in those circumstances became useless. In the applicant's appeal, the Supreme Administrative Court also rejected the complainant's request for hearings.

In the reasoning developed by the ECHR to determine whether Art. 6 par. (1) of the Convention is applicable in this case, the following steps were taken:

a) excluding the application of art. 6 of the Convention in its civil aspect - the case-law - explained in the Ferrazzini decision against Italy;
b) analysis of the *Engel Criteria* as follows:

- the provision in law of the criminal nature of the act - the Court notes that both the *Engel v. the Netherlands Judgment* and that of *Ezeh and Connors v. the United Kingdom*[21] do not attach any particular importance to the verification of this criterion, which is purely formal, but the accent goes instead to the nature of the offence and the severity of the sanction[22];
- the lack of seriousness of the sanction provided by law is not such as to remove the criminal nature of the act[23];
- the admissibility of both a partial analysis of each criterion and the possibility of a cumulative assessment as a whole in order to draw the conclusion that the

[20] ECHR, Court (Grand Chamber), Case of Jussila v. Finland, Application no. 73053/01, Judgment, Strasbourg, 23 November 2006, ECLI: CE: ECHR:2006:1123JUD007305301.

[21] ECHR, Court (Grand Chamber), *Case of Ezeh and Connors v. United Kingdom*, Applications nos. 39665/98 and 40086/98, Judgment, Strasbourg, 9.10.2003, ECLI: CE: ECHR:2003:1009JUD003966598.

[22] The Judgment in *Ezeh and Connors v. The United Kingdom*, cited above, §. 82, which refers to the text §. 82 of the Engel and Others v. Netherlands judgment, cited above, note 14.

[23] Judgment in Jussila v. Finland §. 31, with reference to the Judgment in Öztürk v. Germany §. 54, the second sentence: "*The relative lack of severity of the sanction to be enforced (...) cannot deprive an offense of its inherent criminal nature*."

accusation is criminal[24];

- the criterion of the seriousness of the sanction, which the Court did not consider particularly important in the *cases Öztürk v. Germany* and *Bendenoun v. France*, however, gains significant value in its judgment in *Morel v. France*[25];

c) the conclusion was based solely on the second "*Engel criterion*", namely the nature of the act, deduced from the "*preventive and repressive*" purpose of the sanction[26], and thus the incidence of art. 6 of the Convention, but without any breach of the fundamental guarantee of the fair trial by the fact that the courts rejected the requests for hearings in question, while respecting the contradictory nature of the written procedure[27].

The partially dissenting opinion shared by the judges Costa, Cabral Barreto and Mularoni, to which Judge Calfish has also rallied, expresses the view that, among the criteria considered to establish the applicability of Art. 6 par. (1) of the Convention, the criminal aspect, only two are satisfied in *Jussila v. Finland*: the general applicability of the rules on tax obligations and the punitive / preventive nature of the sanction, while the act is not provided for by the criminal law and the value of the sanction is modest. Applying the Bendenoun cumulative assessment, the supporters of the opinion consider that the conditions of the autonomous concept of "*criminal charge*" are not fulfilled and, on the other hand, following the decision of *Ferranzzini v. Italy*, there cannot be either the civil respect of the right to a fair trial.

In the partially dissenting opinion of Judge Loucaides, to which the judges Zupančič and Spielman have also stated they adhere, it was expressed the view that the rules of the fair trial require the national courts to hear the plaintiff and to have a genuine public debate as a requirement of the right to a trial fair. The partially dissenting opinion insists on the fact that the small amount of the sanction applied is insignificant compared to the sanction itself, which implies *ipso facto* an infamous character, a social stigma for the applicant. In this equation, the state does not appear as a subject of law, but as a holder of the power to enforce the law.

In support of this last dissenting opinion, we also bring the following arguments:

- interpersonal communication, manifested in court by orality and the unmediated reach of the evidence by the judge, is a value *eo ipso*;
- the perception of the defendant who is denied the right to speak in his or her own trial is that of the contempt and arrogance of the judges, who probably see in his/her hearing only a waste of time;
- the right to question witnesses and experts as part of the right of defence is fundamental; most of the time, from this newly created relationship results precious cognitive elements;
- the public procedure guarantees observance of the process of administration of justice by society; it is a way of verifying compliance with the principle of the rule of law, since no one can simply be obliged to believe in the rule of law without evidence in this respect and without personal experience;
- the mere fact of the public and oral procedure does not impede the effectiveness and speed of the procedure;
- the ideas of the defence and prosecution are developed successively during the court hearing, feeding each other on the way of the orality and spontaneity it induces.

The same reasoning on the use of the "*Engel Criteria*" to outline the concept of "*criminal charge*" and "*criminal trial*" respectively was also used in many other ECHR cases, including some more recent ones, such as *Zolotukhin v. Russia*[28] and *Grande Stevens v. Italy*[29].

In the decision in *Grande Stevens v. Italy*, the applicants were administratively sanctioned by CONSOB[30] for "*manipulation of the market*"[31] with fines ranging from 3,000,000 to 5,000,000 Euros. On appeal, the Court of Appeal in Torino reduced the amount of the fines to some of the claimants, reaching

[24] Judgment in Jussila v. Finland §. 31 sentence II and §. 32, last sentence, with references to the decision in Bendenoun v. France, §. 47 last paragraph: " *These factors may be regarded however in context as relevant in assessing the application of the second and third Engel criteria to the facts of the case, there being no indication that the Court was intending to deviate from previous case-law or to establish separate principles in the tax sphere. It must further be emphasised that the Court in Bendenoun did not consider any of the four elements as being in themselves decisive and took a cumulative approach in finding Article 6 applicable under its criminal head*".

[25] ECHR, Décision finale sur la recevabilité de la requête 54559/00, présentée par Jean Morel contre la France (translated from French by the author of the stydy)- the applicant was sanctioned because he did not file a VAT return even though his turnover exceeded the level for which the declaration was mandatory, pursuant to certain provisions of the Fiscal Code. He was required to pay a 10% increase of the payment amount, 4450 FF, ie 678 Euros. The amount of the tax penalty was considered "*of minor importance*" by the Court (paragraph 10 of the motivation). However, the ECHR based its decision not to consider that the provisions of Art. 6 par. (1) of the Convention are applicable in that case on the whole assessment of the "*Engel criteria*".

[26] Judgment in Jussila v. Finland §. 38.

[27] Idem, §. 48.

[28] ECHR, Court (Grand Chamber), Case of Sergey Zolotukhin v. Russia, Application no. 14939/03, Judgment, Strasbourg 10 February 2009, ECLI: CE: ECHR:2009:0210JUD001493903.

[29] ECHR, Court (Second Section), Case of Grande Stevens v. Italy, Application no. 18640/10, Judgment, Strasbourg, 4 March 2014, final 07.07.2014, ECLI: CE: ECHR:2014:0304JUD001864010.

[30] CONSOB = Commissione Nazionale per la Società e la Borsa = National Commission for Society and Stock Exchange (Italy), an independent administrative body with the role of ensuring investor protection, transparency and the development of stock exchanges.

[31] Offences set out by art. 187 ter, § 1 of Legislative Decree no. 58 of 24 February 1998: "*Without prejudice to criminal penalties when the offense constitutes a crime, any person who, through the media, including the Internet or any other means, disseminates false or misleading information, news or rumours' liable to generate false indications or misleading on financial instruments will be administratively sanctioned with a fine between € 200,000 and € 5,000,000.* ".

between € 600,000 and € 1,200,000. Marrone and Grande Stevens have remained with CONSOB's initial sanction of 5 and 3 million respectively.

The Court of Appeal also noted that, besides the application of administrative sanctions by CONSOB, this authority informed the Prosecutor's Office that the same persons committed the offense set out and punished by art. 185 §. 1 of the same Legislative Decree no. 58 of 24 February 1998[32].

By the indictment of 7 November 2008, the applicants were brought to trial before the Turin Tribunal for the aforementioned offense, with the same content as the offense for which they were administratively sanctioned. Before the court, the applicants alleged breach of the *ne bis in idem* principle. The Prosecutor's Office opposed that defence by stating that the Italian legal texts in question were merely transpositions of the provisions of Directive 2003/6 / EC of 28 January 2003[33], which did not prohibit the cumulation of administrative and criminal penalties. In this regard, the court ruled that the two sanctions would not have been applied "*for the same deed*" because only the text of criminalization required the intention to be an element of the subjective side of the offense, while the administrative text also accepted the guilt; on the other hand, only the text of criminalization provided the requirement that the behaviour be capable of causing a significant change in the value of financial instruments. Moreover, the court also noted the incidence of the provisions of art. 14 of Directive 2003/6 / EC, which provide for the possibility of imposing penalties as well as administrative sanctions for violations of its provisions.

By the judgment of 28 February 2013, the Torino Court of Appeal convicted the plaintiffs Gabetti and Grande Stevens for the offense withheld against them by indictment (the other defendants being acquitted on various grounds of fact and law). In so doing, the Court of Appeal held that there had been no violation of the *ne bis in idem* principle.

Before the ECHR, the applicants invoked the violation of the right to a fair trial in the proceedings before CONSOB and the breach of *ne bis in idem* principle, stipulated in art. 4 of the Additional Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

As regards the applicability of the provisions of Art. 6 par. (1) of the Convention, the Court again referred to the *'Engel Criteria'*, pointing out that they were alternative rather than cumulative, by making the usual point-by-point analysis from the previous case-law[34]. Thus, the Court held that the acts which gave rise to the sanction applied by CONSOB were not provided for by the criminal law, but by their nature the legal provisions infringed by the applicants were designed to guarantee the integrity of the financial markets and the confidence in the security of transactions. The Court "*considers that the fines applied were essentially designed to punish, in order to prevent a repeat of the violation*." The sanctions were not applied to repair the financial damage, and their basis was the seriousness of the facts and not the damage suffered by the investors. The fines applied were, however, not transformable into prison days in the case of their default (as was the case in *Anghel v. Romania*) [35]. Finally, the Court notes the severity of the sanctions provided by law and even applied by CONSOB for violation of the provisions of the Legislative Decree: fines of up to EUR 5,000,000, pointing to §. 99 decision that those sanctions "*were criminal, as nature*". The logical consequence of this reasoning was that of determining the applicability of art. 6 par. (1) of the Convention.

## 3. The link between the autonomous concepts of "*criminal charge*" / "*criminal matter*" and the "*same facts*" in the context of the European Convention for the Protection of Human Rights and Fundamental Freedoms

The autonomous concepts of "*criminal charge*"/"*criminal matter*" are particularly relevant to determining the incidence in a particular criminal case of the *ne bis in idem* principle. Thus, often, the question is to establish the existence of a violation of this principle when, for the same facts, a person is sanctioned administratively, fiscally or disciplinary, and later or even simultaneously, the person is investigated, prosecuted and sometimes even convicted.

The *ne bis in idem* principle is a fundamental guarantee in the domestic law of the national states[36], being in principle provided by numerous constitutions of the EU Member States[37], by art. 4 of the Additional Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Art. 50 of the Charter of Fundamental

[32] "*Anyone who disseminates false information, performs simulated transactions or uses other fraudulent acts that are objectively apt to generate a significant change in the value of financial instruments will be punished by imprisonment between 1 and 6 years and a fine from 20,000 to 5,000 .000 Euro* ".

[33] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), published in *OJ L 96, 12.4.2003*

[34] ECHR, Judgment *Grande Stevens v. Italy*, §. 94-99.

[35] Ibid., §. 95, 96.

[36] Known in American law and generally in the adversarial system as "*double jeopardy*".

[37] See to that effect art. 103 (3) of the Grundgesetz (Fundamental Law of the Federal Republic of Germany), Article 40 (5) Constitution of the Republic of Estonia, Art. 23 (3) Constitution of the Republic of Lithuania, art. 39 (9) Constitution of Malta, art. 29 (5) Constitution of the Portuguese Republic, Art. 50 (5) Constitution of the Slovak Republic, Art. 31 Constitution of the Republic of Slovenia, etc. Outside the European Union, it is worth mentioning Amendment V to the United States Constitution (Double Jeopardy Clause). For details see G. Coffey, *The Constitutional Status of the Double Jeopardy Principle*, Dublin University Law Journal. 30 (2008), Thomson Reuters, pp. 138-165.

Rights of the European Union, as well as in numerous international conventions[38].

The *ne bis in idem* principle, from the perspective of art. 4 paragraph 1 of Additional Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, reads as follows: *"No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State*".

It is noted that the wording of Additional Protocol no. 7 to the European Convention on *ne bis in idem* principle refers only to the situation where the element "*idem*", namely the prosecution or conviction, occurs in the same state where the person has been acquitted or convicted. There is no transnational perspective of this principle.

Nothing in the text of art. 4 para. 1 of Additional Protocol no. Article 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms does not preclude a person being convicted or acquitted in a particular member of the Council of Europe and then prosecuted or convicted for the same facts in another Member State[39]. This will no longer apply in the context of the autonomous concept consisting of the *ne bis in idem* principle of European Union law (the Charter or the Convention Implementing the Schengen Agreement), where this principle becomes transnational and supranational.

From the point of view of a supranational jurisdiction, such as the ECHR, in relation to a legal text of the kind previously cited, almost all concepts with which that rule operates are accepted as defined in the domestic law of the State concerned, less the concept of "*the same fact*", which must have a common meaning for the interpretation of the rule, which is why it was defined as an autonomous concept in ECHR jurisprudence.

An act that cannot be classified as object of a "*criminal charge*" from the point of view of this autonomous concept, cannot attract a punishment and therefore cannot constitute a "*same fact*" as an autonomous concept that removes the possibility of a new investigation, prosecution or new punishment.

We do not intend in this study to carry out a thorough study of the *ne bis in idem* principle, but only to highlight the deep and intimate relationship established between the two aforementioned autonomous concepts.

To that end, we note that many ECHR decisions aim to establish the right to a fair trial in criminal matters (Article 6 § 1 of the Convention) as a first step before addressing the issue of the incidence of the *ne bis in idem* principle.

For the purpose of illustrating this mechanism, we turn to the ECHR judgment in *Grande Stevens v. Italy*, as we have referred to above, in terms of applying the "*Engel Criteria*" to determine the incidence of the autonomous concept of "criminal matter". As we have already seen, CONSOB, having sanctioned the plaintiffs by administrative means for manipulations of the securities market, sent the evidence to the prosecutor's office, who, following a criminal investigation, prosecuted the plaintiffs for an offence qualified by law as a crime. The applicants alleged violation of the *ne bis in idem* principle, but the Italian courts rejected the defence with a motivation mainly referring to the subjective side of the offence.

In their application to the ECHR, the applicants have again invoked the violation of the same principle by the Italian national courts. As explained above, the ECHR considered that the sanction applied to the applicants was based on a *'criminal charge'*, in a *'criminal matter'* thus creating the premises for the analysis of the *ne bis in idem* principle incidence.[40]

In pursuing its legal syllogism, the ECHR examines whether there are *"same facts"* in the CONSOB decision and in the indictment of the prosecutor's office. The Court has, through this concept, understood the material identity of the facts, and not the conditions under which acts or inactions are prescribed by law as offenses[41]. The concept was also defined in previous ECHR cases in this area[42].

Following the analysis of the CONSOB sanctioned facts materiality and of those sent before the court by the Prosecutor's Office, the ECHR concluded that: "*the procedures clearly referred to the same*

[38] Article 14 (7) of the International Covenant on Civil and Political Rights, Art. 20 Rome Statute of the International Criminal Court, art. 54 Convention on the Implementation of the Schengen Agreement (CISA), art. 8 (4) Interamerican Convention on Human Rights.

[39]For further explanation, see P.P. Paulesu, *Ne bis in idem and Conflict of Jurisdiction* in R. E. Kostoris, Editor, *Handbook of European Criminal Procedure*, Springer International Publishing AG, Switzerland, 2018, pp. 398-402. The aforementioned author finds the same situation in the case of the ne bis in idem principle of the International Covenant on Civil and Political Rights (Article 14 (7)).

[40] ECHR, judgment in Grande Stevens v. Italy, §. 222: "Applying those principles to the case at hand, the Court notes, firstly, that it has just concluded, under Article 6 of the Convention, that there existed valid grounds for considering that the procedure before the CONSOB involved a "criminal charge" against the applicants (see paragraph 101 above) and also observes that the sentences imposed by the CONSOB and partly reduced by the court of appeal constituted res judicata on 23 June 2009, when the judgments of the Court of Cassation were delivered (see paragraph 38 above). From that date, the applicants ought therefore to be considered as having been "already finally convicted of an offence" for the purposes of Article 4 of Protocol No. 7".

[41] Ibid. §. 224: "It remains to be ascertained whether those new proceedings were based on facts which were substantially the same as those which had been the subject of the final conviction. In this regard, the Court notes that, contrary to what the Government seem to be asserting (see paragraph 217 above), it follows from the principles set out in the case of Sergey Zolotukhin, cited above, that the question to be answered is not whether or not the elements of the offences set out in Articles 187 ter and 185 § 1 of Legislative Decree No. 58 of 1998 are identical, but whether the offences with which the applicants were charged before the CONSOB and before the criminal courts concerned the same conduct".

[42] ECHR, Zolotukhin v. Russia, cited above, §. 82: "Accordingly, the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same".

*conduct of the same persons and on the same date*"[43] and therefore, *"this finding is sufficient to conclude that there has been a violation of Art. 4 of Protocol no. 7 "*[44].

The question of whether or not the accusation underlying one of the "*convictions*" was to be found as criminal, based on the "*Engel Criteria*", following a constant practice in the application of the *Criteria*, started to be doubted by the ECHR, in the judgment in case *A and B v. Norway*[45]. In the case, the applicants together with other persons have traded in the financial market and the proceeds from these activities were not declared at the tax authority, which discovered the facts in the course of an audit, almost four years after they were perpetrated. Total damages to the state as a result of non-payment of taxes related to undeclared income were 3.6 million Euros. The tax authority notified the prosecutor's office, who, after conducting the criminal investigation, prosecuted the plaintiffs for the offense of tax evasion. Before being convicted of imprisonment on the basis of the indictment, the applicants were sanctioned by the tax authorities forcing them to pay penalties representing 30% of the amount of the taxes owed to the income they did not declare. The applicants have raised a claim before the ECHR that a violation of the *ne bis in idem* principle occurred in the Italian justice system.

In §. 105 of the Judgment, the Court recalls its jurisprudential tradition, also expressed in the Zolotukhin case, to establish the criminal character of the charge on the basis of the "*Engel Criteria*", but at §. 107 points out that it does not appear justified to start from such an analysis in the present case, applying more precise criteria than those mentioned above. Moreover, the Court noted that there was a need for a *'calibrated approach*' as regards the way in which the *ne bis in idem* principle is applied in procedures combining administrative and criminal penalties.

Within this new "*calibrated approach*" to which the Court refers, the *"States should be able legitimately to choose complementary legal responses to socially offensive conduct (such as non-compliance with road-traffic regulations or non-payment/evasion of taxes) through different procedures forming a coherent whole so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned"*[46].

Thus, the ECHR no longer considers that an integrated approach combining administrative and criminal penalties for the same facts in their purely material sense would defeat *ne bis in idem*, especially when the two categories of sanctions would present different purposes and would be in the competence of different authorities.

In order to allow such cumulation, at §. 132 of the Judgment, the Court sets out precise rules:

- the procedures pursue complementary goals and therefore address not only abstractly but also concretely different aspects of incorrect social behaviour;
- the duality of the proceedings in question is a foreseeable consequence, both legally and practically, of the same behaviour (idem);
- inquiries should be carried out in such a way as to avoid, as much as possible, duplication of gathering and evaluation of evidence, in particular through appropriate interaction between the various competent authorities to ensure that the evidence in a procedure is acquired also for the other procedures;
- the sanction imposed in the procedures that become definitive earlier should be taken into account in those that become definitive later, ultimately preventing the person from incurring an excessive burden, the latter risk being the lowest if there is in place a mechanism which is designed to ensure the proportionality of the total amount of sanctions imposed;
- there is a certain temporary link between procedures that is sufficiently tight to protect the individual from uncertainty and prolonged delays[47].

Analysing carefully the above criteria, the ECHR concluded that, in the case, to each of the complainants, there is a sufficiently close link, both in substance and in time, between the decision on tax penalties and the subsequent criminal conviction for that they can be considered as part of an integrated system of penalties under Norwegian law for failing to provide accurate information in a tax return resulting in a faulty assessment of taxes[48].

## 4. The concept of "*criminal charge*" and the principles "*ne bis in idem*" and "*nulla poena sine culpa*" in the case-law of the Court of Justice of the European Union

Because the criminal dimension of European Union law has appeared relatively late, especially since the Amsterdam Treaty, the Court of Justice of the European Union (CJEU/ECJ) was seized with very few cases before 1997.

Such a case is Hansen & Søn[49]. In application of Regulation (EEC) No. 543/69 of the Council from 25 March 1969 on the approximation of the laws of the Member States relating to road transport, which obliges employers in this field to oblige drivers to have specific

[43] ECHR, the judgment in Grande Stevens v. Italy, cited above, §. 227.
[44] Ibid., §. 228.
[45] ECHR, Grand Chamber, Case of A and B v. Norway, Applications nos. 24130/11 and 29758/11, Judgment, Strasbourg, 15 November 2016, ECLI: CE: ECHR:2016:1115JUD002413011.
[46] Ibid., §. 121.
[47] Ibid., §. 134.
[48] Ibid. §. 153.
[49] CJEU, Judgment of the Court, 10 July 1990, C-326/88, Anklagemyndigheden and Hansen & Søn, ECLI:EU:C:1990:291.

driving and resting intervals, by means of a Danish ministerial order, it was set out the provision that the employer would be fined if the employee did not comply with the rules on rest referred to in that regulation, even if the employer had no guilt in respect of that breach of law. In such a case, Hansen & Søn was sanctioned with a fine in absence of the existence of any intention or fault on its part in connexion to the unlawful act perpetrated by an employee. In those circumstances, the Danish Court of Appeal asked the CJEU a preliminary question as to whether the regulation at issue prohibits the adoption of national provisions under which an employer whose drivers are in breach of the provisions of that regulation may be subject to criminal sanction, even if the violations are not an intentional or negligent act of the employer.

This request for a preliminary ruling raises the question of whether, in application of Community law, the adoption by the Member States of rules based upon objective criminal liability is admissible. Hansen & Søn also argued that the criminal sanctioning of employers in that context extends the scope of the Regulation and that only Denmark has chosen to apply criminal sanctions for the unlawful acts of the employees, a situation which is likely to distort fair trade competition in the economic field of road transports.

In response, the CJEU stated that the Regulation leaves the discretion of the Member States to the implementation of its provisions, and Article 18 of the Regulation allows Member States to determine the legal nature and severity of the sanctions to be imposed in the event of its breach. Moreover, the Court also refers to the provisions of Art. 5 of the EEC Treaty, which required Member States to take all necessary measures to ensure the effective application of Community law.

The preliminary ruling stated that neither that regulation nor the general principles of Community law does not preclude the application of national provisions according to which an employer whose drivers are in breach of the provisions of the Regulation on working and resting time may be the subject of a punishment decided in criminal proceedings, despite the fact that such violations cannot be attributed to an intentional unlawful act or negligence on the part of the employer, provided that the foreseeable punishment is similar to those imposed for violation of national law for acts of similar nature and importance and proportionate with the severity of the violation committed.

In so doing, the Court insisted on the principles of Community law generally applicable in such cases: the effective and dissuasive nature of the sanction, the principle of proportionality and assimilation, referring to the case-law on the "*Greek maize case*"[50], taking note of the fact that in Denmark, the protection of the working environment is ensured mainly by the application of criminal penalties, as well as by assessing the proportionality of the sanction against the seriousness of the facts.

By the aforementioned decision, the Court implicitly accepts criminal liability which is not based on guilt (objective) but only under condition that national law allows it. Such a position violates a fundamental principle of law, concomitantly seen as a fundamental rights guarantee: *nulla poena sine culpa*. We can validly deduce the importance of this principle in guaranteeing the defence rights in criminal proceedings, *per a contrario*, by applying the presumption of innocence principle (set out in Article 48 of the Charter of Fundamental Rights of the European Union and Article 6 (2) of the European Convention on Human Rights and Fundamental Freedoms)[51].

However, in §. 47 of the CJEU's judgment in *Käserei Champignon Hofmeister*, the Court notes: "*in other areas, the Court has accepted that a system of strict criminal liability penalising breach of a Community regulation is not in itself incompatible with Community law*". The quote refers to §. 19 of the Hansen & Søn judgment.

The preliminary ruling in *Käserei Champignon Hofmeister* appears confusing because in *Hansen & Søn*, the Court was not questioned whether the objective criminal liability is contrary to Community law but rather whether the existence of such a liability in the national law of a Member State legitimates its existence also in Community law. However, it must be made clear that at the time of the judgment in *Hansen & Søn* (1990) there were no provisions in the fundamental treaties of the Communities on human rights or on the issue of criminal justice in the Community context and the Charter was not yet adopted.

The Court's ruling in *Käserei Champignon Hofmeister* (abridged KCH) has brought to light, as a response to *Hansen & Søn*, the autonomous concept of the CJEU on the principle *nulla poena sine culpa*, but also the autonomous concept of "*criminal charge*" and "*criminal matter*". The latter was approached,

[50] CJEU, Judgment of the Court of 21 September 1989, *Commission of the European Communities v. Hellenic Republic*, C - 68/88, ECLI:EU:C:1989:339.

[51] CJEU, Judgment of the Court (Fifth Chamber) of 11 July 2002, case Käserei Champignon Hofmeister GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas, C-210/00, ECLI:EU:C:2002:440.

In §. 29 of the judgment, the Court has noted that *"KCH argues that, in the light of its importance and the fact that it does not aim merely to eradicate the consequences of an unlawful act, the penalty laid down in Article 11 of Regulation No 3665/87 is of a criminal nature. Since it allows the imposition of such a penalty even in the absence of any fault, the provision is contrary to the principle 'nulla poena sine culpa', which is part of the general principles of Community law. This is a principle recognised by Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (hereinafter 'the ECHR'), by the law of the Member States, and by Community law itself*".

More, §. 30 of the same judgment states that *nulla poena sine culpa* is also applicable to administrative sanctions.

seemingly unrelated to the ECHR jurisprudence based on the "*Engel Criteria*" check, to which we have referred above. Although the CJEU ignored such an approach in its decision, the similarities are clear. As in the case of *Hansen & Søn* judgment in 2002, when the *Käserei Champignon Hofmeister* decision was handed down, the Treaties did not refer directly to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union has not yet been written. However, as we have already shown (in footnote 51) and we will continue to do so, the CJEU's awareness of the acquis of the European Convention has progressed significantly.

The case concerns the application to the exporter KCH by the German customs authorities of financial penalties for breach of the provisions of Regulation (EEC) No. 3665/87[52], art. 11 para. (1) subparagraph (1) (a). In fact, KCH stated that it has exported a quantity of melted cheese for which it had applied for export refunds, receiving an advance of DEM 30 000 on the basis of statutory refunds, but subsequently on the occasion of a check by the customs authority, it was found that the product also contained vegetable fats, in these conditions not fulfilling the conditions to allow for any export refunds to be paid.

KCH challenged the financial penalty imposed by the customs authority in the framework of the domestic justice system, claiming that it has purchased the product subsequently exported without being aware that the supplier did not complied with the quality standards of the goods and has not had a reasonable opportunity to carry out checks to the supplier. In law, KCH argued that the principle of *nulla poena sine culpa* had been violated and, in the alternative, that there was a case of force majeure consisting of the impossibility of carrying out prior checks at the supplier's premises.

As regards the *nulla poena sine culpa* principle, the interpretation of which was to be given by way of the preliminary ruling, the Court held that this principle applies only where the charge is of a criminal nature and hence the Court's first task within the legal syllogism constructed is to determine whether the sanction in question was based on a provision of a criminal nature[53].

Further to the reasoning, the Court holds that:

- the legal rules infringed are not of general application, but are addressed only to economic operators who have chosen to avail themselves of the benefits of an aid scheme in agricultural matters[54];
- the amount of the payment under the sanction provided for by the Regulation is directly proportional to the amount unreasonably levied by the economic operator before the irregularity has been discovered by the authorities[55];
- it is difficult to give accurate export declarations, that is why the sanction merely encourages exporters to carry out checks on suppliers adapted to the frequency and intensity of the concrete needs or to be sheltered by contractual clauses which provide for compensation from contractors when the goods are inadequate or to conclude insurance policies for the same purpose[56];
- the proof of a possible fraudulent intention of the exporter is so difficult to produce that the regulation constructs exporters as the last link of the export-purchase chain for exported goods that can ensure compliance of the goods with the export declaration[57];
- " *In the context of a Community aid scheme, in which the granting of the aid is necessarily subject to the condition that the beneficiary offers all guarantees of probity and trustworthiness, the penalty imposed in the event of non-compliance with those requirements constitutes a specific administrative instrument forming an integral part of the scheme of aid and intended to ensure the sound financial management of Community public funds* "[58].

The Court's conclusion was that an accusation like the one based on Art. 11 para. 1 subparagraph 1 (a) of Regulation (EEC) No. 3665/87 cannot be regarded as a criminal charge[59].

Seeing the arguments above presented, we note that the CJEU, without saying it, has only analysed the ECHR criteria for determining the autonomous concept of "*criminal charge*", with certain nuances coming from the specific regime of Community agricultural aid (general applicability of the norm, the nature of the offence and the nature of the sanction). In so doing, the Luxembourg Court has begun to construct a self-contained concept of the "*criminal charge*" or, more precisely, of the "*criminal sanction*". Between the two autonomous concepts, however, there is a strong link, based, whether it is labelled as such or not, on the "*Engel Criteria*".

Concerning the issue of the same text of the aforementioned regulation in the context of *nulla poena sine culpa* principle, the CJUE's decision in *Société d*

[52] Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products, OJ 351/1987.

Under art. 11 para. (1) subparagraph (1) of the Regulation, where it is found that, for the purposes of granting an export refund, an exporter has claimed a refund higher than that applicable, the refund due for the export in question shall consist of the refund applicable to the product actually exported, reduced by an appropriate amount:

a. half the difference between the requested refund and the one applicable to the actual export made;

b) double the difference between the requested refund and the applicable refund if the exporter deliberately provided false data.

[53] *Käserei Champignon Hofmeister Judgment* §. 35.

[54] Ibid. §. 41, first sentence.

[55] Ibid. §. 43.

[56] Ibid. §. 63.

[57] Ibid. §. 61.

[58] Ibid. §. 41, last sentence.

[59] Ibid. §. 44.

*'Exportation de Produits Agricoles SA (SEPA) case*, also relying on previous rulings, noted that *"The liability on which that penalty is based is essentially objective in nature. It follows that the reduction referred to in point (a) of the first subparagraph of Article 11(1) of Regulation No 3665/87 must be applied even if the exporter has not committed any fault "*[60].

Turning to the issue of the autonomous concept of "*criminal charge*" and the "*Engel Criteria*", Advocate General Juliane Kokott, in her conclusions in Bonda, examined precisely the applicability of these criteria in order to establish the criminal or administrative nature of the sanctions in question also for observing the *ne bis in idem* principle[61]. Starting with §. 51 of the conclusions, the evaluation of the "*Engel Criteria*" is made by the Advocate General (hereinafter referred to as AG) by reference to the CJEU's decision in *Käserei Champignon Hofmeister*, referred above. AG also points out indirectly to the equivalence of the "*Engel Criteria*" with those applied by the CJEU in *Käserei Champignon Hofmeister*, even if the CJEU did not use that well-known name and made no reference to ECHR jurisprudence in the matter[62]. By analysing upon this method, AG reaches the conclusion that there was no "*criminal charge*" in the matter, so that the *ne bis in idem* principle was not violated.

In fact, Łukasz Marcin Bonda, an independent Polish farmer, submitted an application to the managing authority for agricultural aid in 2005, in which he made inaccurate declarations on the area under cultivation and on the types of agricultural crops. By finding that the declaration is inconsistent with the reality, the administrative authority rejected the farmer's application for aid and applied to him an administrative measure prohibiting entitlement to agricultural aid for three years further from that time under Article 138 of Regulation (EC) No. 1973/2004 of 29 October 2004[63]. Subsequently, Bonda was convicted in first instance for committing the offense of subsidy fraud set out by Article 297 (1) of the Polish Penal Code, to eight months' imprisonment with conditional suspension of execution, the trial period being two years and a fine of 80 days, calculated at a rate of PLN 20 per day. On appeal, the court asked the CJEU a preliminary question as to the legal nature of the sanction set out by the EU regulation and the incidence of the *ne bis in idem* principle.

In the judgment[64], the Court relied on the analysis made by AG Kokott in her approach to the autonomous concept of *'criminal proceedings'*[65], based on the *'Engel Criteria'* analysis, by reference to the previous case-law, including Käserei *Champignon Hofmeister* case, with references also to the provisions of art. 325 TFEU, on the protection of the financial interests of the European Union and to the provisions of the so-called PIF Regulation[66]. Express references to "*Engel Criteria*" were also made largely in §. 37-45 of the Judgment, concluding that they have not been accomplished.

Thus, *"the Court has previously held that penalties laid down in rules of the common agricultural policy, such as the temporary exclusion of an economic operator from the benefit of an aid scheme, are not of a criminal nature"* [67]and *"there is nothing to justify a different answer being given with respect to the measures provided for in the second and third subparagraphs of Article 138(1) of Regulation No 1973/2004"*[68].

The conclusion of the preliminary decision was that: *"the measures provided for in the second and third subparagraphs of that provision, consisting in excluding a farmer from receiving aid for the year in which he made a false declaration of the eligible area and reducing the aid he can claim within the following three calendar years by an amount corresponding to the difference between the area declared and the area determined, do not constitute criminal penalties"*.

A similar issue is also addressed in the CJEU's judgment of *Hans Åkerberg Fransson*[69]. The only notable difference is that the sanctions regarding to whom the question whether they are criminal or not related to statements inconsistent to the reality of the suspected taxpayer, which led to the undervaluation of the VAT due to the state budget and to the Union budget, through the mechanism of the VAT common system. The Court's conclusion was that the penalties imposed on the petitioner under the national legislation

[60] CJEU, Judgment of 6 December 2012 in Case C-562/11, Société d 'Exportation de Produits Agricoles SA (SEPA) v. Hauptzollamt Hamburg-Jonas, ECLI: EU: C: 2012: 779, §. 26.

[61] Opinion of Advocate General Juliane Kokott delivered on 15 December 2011 in Case C-489, Łukasz Marcin Bonda, ECLI: EU: 2011: 845, starting with §. 45.

[62] Ibid. §. 52: "*For the purposes of the second Engel criterion, the ECtHR essentially reviews the same elements which the Court of Justice also applied in its judgment in Käserei Champignon Hofmeister* ".

[63] Commission Regulation (EC) No 1973/2004 of 29 October 2004 laying down detailed rules for the application of Council Regulation (EC) No 1782/2003 as regards the support schemes provided for in Titles IV and IV a of that Regulation and the use of land set aside for the production of raw materials, OJ L 345/2004.

[64] CJEU, Judgment of the Court (Grand Chamber), 5 June 2012, case C-489/10, reference for a preliminary ruling in the criminal proceedings against Łukasz Marcin Bonda, ECLI:EU:C:2012:319.

[65] Ibidem, note 61, §. 36.

[66] Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, *OJ L 312, 23.12.1995.*

[67] Ibidem, note 61, §. 28.

[68] Ibid., §. 31.

[69] CJEU, Judgment of the Court (Grand Chamber) from 26 February 2013 in Case C-617/10, Åklagaren v. Hans Åkerberg Fransson, ECLI: EU: C: 2013: 105.

transposing Directive 2006/112 / EC[70] are not criminal in nature.

In order to do so, the Court once again verified the fulfilment of the "*Engel Criteria*" without naming them[71].

A somewhat similar legal issue is addressed in the CJEU judgment in *Menci*[72]. Thus, in the transposition of Directive 2006/112 / EC on the common system of VAT, the Italian law provided both an administrative penalty for non-payment of VAT at the prescribed time, representing a percentage share of the amount owed to the tax with that title and a criminal penalty (imprisonment from 6 months to 2 years) for the same fact. Again, the criminal nature of the administrative sanction, the *ne bis in idem* principle, and the necessary and proportionate nature of the cumulation between the two types of sanctions is being discussed, as tax returns have been made in accordance with reality and there are no indications of fraud being committed.

In that decision too, the Court applies the "*Engel Criteria*" to determine the possible criminal nature of the act sanctioned with the percentage increases in the payment amount as a tax liability[73]. However, unlike previous cases when, as a result of the analysis of the *Engel Criteria*, the finding was that the facts in question were not criminal, in the present case, with regard to the administrative sanction, the Court ruled that, by the repressive nature of the sanction and by its seriousness it has, in fact, a criminal nature (§ 33).

As regards the principle of *ne bis in idem*, the criterion of the identity of the material facts was applied or, rather, "*the existence of a set of concrete circumstances which are inextricably linked together which resulted in the final acquittal or conviction of the person concerned*" (§ 35) as well as ECHR jurisprudence. Given the criminal nature of the administrative sanction applied before the prosecution of the defendant Luca Menci for an offense with largely the same content, the Court considers that this would be acceptable from the point of view of the *ne bis in idem* principle only if seen as a restriction of a fundamental right which, according to Article 52 (1) of the Charter of Fundamental Rights of the Union must be provided for by law, respect the substance of rights and freedoms, be necessary and proportionate to the aim pursued.

Another judgment, which concerns the criminalization in Italian criminal law of the offense of non-payment of VAT, is that of *Mauro Scialdone* [74](the case has many similarities with the *Procura della Repubblica v. Luca Menci*).

Thus, Siderlaghi, having Mauro Scialdone as its manager and administrator, was found by the financial administration not to have paid the VAT for the annual declaration for 2012 in the amount of 175 272 Euros within the time limits set by law. The tax authority imposed on the company an administrative penalty consisting in the payment of penalties representing 30% of the total amount of VAT owed. The Prosecutor's Office filed an indictment against the defendant Scialdone for committing an offense having the same constitutive content as above (being a criminal offence only if a minimum threshold of 50,000 Euro was due). During the trial, a partial repeal of the incrimination rule occurred, in the sense that the fact was no longer an offense if the amount due was less than EUR 250 000 (when the debt was due to non-payment of VAT) and less than EUR 150 000 (when the debt came from the non-payment of income tax).

In those circumstances, the Tribunal of Varese referred to the CJEU a number of preliminary questions, which were subsequently restructured by the Court, having as a common denominator the idea of separating the amount due from which the act constitutes an offense according to whether the debt represents VAT or, respectively, income tax. The same tribunal also questioned whether the partial decriminalization of the offense did not violate the provisions of Art. 325 TFEU, in order to create less favourable regulatory conditions for combating fraud against the financial interests of the Union.

The Court has built its legal reasoning based on the ideas of the constitutive treaties (Article 325 TFEU) and the legal acts of the Union, according to which Member States must combat fraud and any illicit activity affecting the financial interests of the EU through measures that are effective, dissuasive, proportionate and consistent with the principle of assimilation. The scope of VAT is covered by these provisions.

The fact of failing to pay the VAT-based debt, provided that the declarations establishing that charge were made in accordance with the reality does not constitute a "*fraud*" relating to the financial interests of the Union (the frauds being expressly described in the Convention drawn up on the basis of Article K. (3) of

[70] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347/2006.

[71] Judgment in the case of Hans Åkerberg Fransson, §. 35: " *Next, three criteria are relevant for the purpose of assessing whether tax penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (Case C-489/10 Bonda [2012] ECR, paragraph 37)*".

[72] Judgment of the Court (Grand Chamber) of 20 March 2018 in Case C-524/15, preliminary ruling in criminal proceedings Procura della Repubblica v. Luca Menci, ECLI: EU: C: 2018: 197.

[73] Judgment in Menci case §. 26: " *As regards assessing whether proceedings and penalties, such as those at issue in the main proceedings, are criminal in nature, it must be noted that, according to the Court's case-law, three criteria are relevant. The first criterion is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty that the person concerned is liable to incur (see, to that effect, judgments of 5 June 2012, Bonda, C-489/10, EU:C:2012:319, paragraph 37, and of 26 February 2013, Åkerberg Fransson, C-617/10, EU:C:2013:105, paragraph 35)*".

[74] CJEU, Judgment of the Court (Grand Chamber) of 2 May 2018, preliminary ruling in Case C-574/15, Criminal proceedings concerning Mauro Scialdone, ECLI: EU: C: 2018.295.

the Treaty on European Union, on the protection of the financial interests of the European Communities, also called the PIF Convention[75])[76]. Non-payment of VAT due falls within the category of "*illegal activities*" likely to affect the financial interests of the Union within the meaning of Art. 325 para. (1) TFEU, which therefore requires effective and dissuasive sanctions[77]. In this respect, the Court's reasoning continues with the analysis of the effective, dissuasive, proportionate and respecting of the principle of assimilation character of the legislative criminalisation text. The Court's conclusion is that all of these criteria are met in relation to the partial decriminalization of the VAT non-payment in the sense that it no longer constitutes an offense under Italian law but only from a threshold of EUR 250 000.

## 5. The autonomous concept of "court having jurisdiction in particular in criminal matters"

This autonomous concept was developed by the CJEU in the case of *Marián Baláž*[78]. The legal act of the Union interpreted in the context of this judgment is Council Framework Decision 2005/214 / JHA on the application of the principle of mutual recognition to financial penalties[79] and the basic notions of that Framework Decision are "*decision*", "*court having jurisdiction in particular in criminal matters*" and "*financial penalty* ".[80]

In the present case, the Czech citizen Marián Baláž was sanctioned for a violation of a provision of the Austrian Road Code when he ignored the meaning of the indicator "*prohibiting access to motor vehicles with a mass greater than 3.5 tons* ". The sanction applied was a fine of EUR 220 or, in case of non-payment, 60 hours of imprisonment. The offender did not contest the sanction applied by the administrative authorities, although he was informed about that and the right to challenge it. Because it was not enforced in Austria and the offender was living in the Czech Republic, the Austrian authorities sent the financial sanctioning decision to the judicial authorities in the latter country for recognition and enforcement. The decision was recognized in the Czech Republic. Subsequently, the offender filed an appeal against the recognition decision, arguing in particular that the decision could not be enforced as long as it was not susceptible of being the subject of an appeal before a "*court having jurisdiction in particular in criminal matters*".

The Prague High Court therefore addressed a preliminary ruling request for the interpretation of the aforementioned concept, asking CJEU, *inter alia*, whether it is an "*autonomous concept*".

The Court has held that it is indeed an *'autonomous concept'* by applying its constant doctrine that whenever the legal act of the Union does not refer to the national law of the Member States, that notion must be understood in a unitary manner throughout Union in the context of that provision and in the light of the objective pursued by the legal act[81].

The Court deconstructs the concept in question by examining first the "court" component, taking into account criteria such as: "whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent"[82].

In order to analyse also the second structural component of the autonomous concept, namely the quality of the court to have " jurisdiction in particular in criminal matters", the Court undertakes an analysis that is in fact a parallel to the one when, in various cases, among which those referred to above, established the character of a "*criminal charge*" of facts qualified by national law as contraventions. The Court moves the debate from the periphrasis cited in the first part of this paragraph to the concept of "*criminal*

[75] Published in OJ C 316 from 27.11.1995.

[76] Scialdone case §. 39: " *Likewise, a failure to pay declared VAT does not constitute 'fraud' within the meaning of the PFI Convention. For the purposes of that convention, according to Article 1(1)(b) thereof, 'fraud' in respect of EU revenue involves 'non-disclosure of information in violation of a specific obligation' or the 'use or presentation of false, incorrect or incomplete statements or documents'. As is apparent from paragraph 37 above, such failures to comply with declaration obligations are not at issue in the present case. Moreover, while that provision also refers to the 'misapplication of a legally obtained benefit', it should be pointed out, as the German Government observes, that failure to pay declared VAT within the time limit prescribed by law does not give the taxable person such a benefit since the tax is still payable and the taxable person is acting unlawfully by failing to pay it* ".

[77] Ibid. §. 44.

[78] Judgment of the Court (Grand Chamber) of 14 November 2013 in Case C-60/12, preliminary ruling in proceedings for the enforcement of a financial penalty issued against Marián Baláž, ECLI: EU: C: 2013: 733.

[79] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ 2005 L 76, p. 16), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24)

[80] In the sense of art. 1 lit. (a) of Framework Decision 2005/214 / JHA, the concept of "decision" means "a final decision requiring a financial penalty to be paid by a natural or legal person where the decision was made by (iii) an authority of the issuing State other than a court in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters". Art. 1 (b) of the same Framework Decision defines "the financial penalty" as "the obligation to pay a sum of money on conviction of an offence imposed in a decision".

[81] Judgment Marián Baláž. §.26. The Court refers to several decisions it has made in cases concerning autonomous concepts relating to the European Arrest Warrant procedure, such as those in Mantello and Kozłowski (C-261/09 and C-66 respectively / 08).

[82] Ibid. §. 32.

*proceedings*"[83] and this is naturally related to the "*criminal charge*" because criminal proceedings applies to a criminal accusation.

The CJEU's conclusion was that an independent administrative authority such as the *Unabhängiger Vervaltungssenat* (*Independent Administrative Senate*) in Austria is a "*court having jurisdiction in particular in criminal matters*". The main reason for awarding such a qualification is that, even though it is *de facto* an administrative authority, according to Austrian law, it has the power to judge appeals against decisions on sanctioning contravention[84].

In conclusion, the Court defines the autonomous concept of "court having jurisdiction in particular in criminal matters" as "any court or tribunal which applies a procedure that satisfies the essential characteristics of criminal procedure"[85].

## 6. Conclusions

In international law and European Union law, before supranational jurisdictions, fundamental notions known by all contemporary national law systems acquire unitary meanings, otherwise it would be impossible to interpret the legal norms that these systems of law impose. This phenomenon occurs whenever supranational rules do not expressly refer to the meaning of the respective notions of the national law of each state.

An essential question of contemporary law is where the field of criminal law regulation begins and ends in its *lato sensu* meaning, both in substantive and procedural terms. In short, what are the "*criteria*" that define "*the criminal*" and delimit it from other branches of law that impose similar sanctions as the nature of the punishment. Such branches of law are administrative law and tax law, and sanctions similar to those of criminal law are administrative, disciplinary, financial and fiscal.

This study demonstrates the permanence and ubiquity of the so-called "*Engel Criteria*" in the conceptual delimitation referred to in the previous paragraph. By applying these criteria, the European Court of Human Rights and the Court of Justice of the European Union have defined "*autonomous concepts*" (unrelated with the meaning they have in the national law of the states) to allow the isolation of what we call "*criminal*". Such an epistemological separation is essential in the matter of respecting human rights and fundamental freedoms, whether it relates to the Council of Europe Convention having that object, or whether the legal instrument under consideration is the Charter of Fundamental Rights of the European Union. Between the two there are clauses that coordinate them, as we have seen in Section I of the study, laid down in the fundamental treaties of the Union but also in the Charter. As a result of these clauses, the autonomous concepts of the ECHR migrate into the legal order of the European Union, itself an autonomous legal order, where they are adapted by the Court of Justice of the European Union to the realities of the latter.

The first autonomous concept was that of the "*criminal charge*" (*Deweer case*), followed immediately by *"criminal matter"* linked directly to the "*Engel Criteria*" with particular importance in the context of the right to a fair trial and the *ne bis in idem* principle, in its turn a different concept from the point of view of its content in the context of the Convention and the Charter. Concerning the efforts to delimit the "*criminal charge*", the concepts of "*criminal penalties*", "*criminal proceedings*", "*court having jurisdiction in particular in criminal matters*" and, last but not least, the principle "*nulla poena sine culpa*" were also defined as autonomous concepts.

All these autonomous concepts together form an orderly system that allows a coherent interpretation of the national law of the Member States of the Council of Europe, the interaction of these systems of law between themselves and separately of the European Union law.

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[83] Ibid. §. 36: "*To that end, the court having jurisdiction within the meaning of Article 1(a)(iii) of the Framework Decision must apply a procedure which satisfies the essential characteristics of criminal procedure, without, however, it being necessary for that court to have jurisdiction in criminal matters alone*".

[84] Ibid. §. 39 last sentence: "*In an appeal of that kind, which has suspensory effect, the Unabhängiger Verwaltungssenat has unlimited jurisdiction and applies a criminal procedure which is subject to compliance with the procedural safeguards appropriate to criminal matters*".

[85] Ibid. §. 42.

# CONSIDERATIONS REGARDING THE LEGAL STATUS OF HERALDIC REPRESENTATIONS IN THE ROMANIAN SYSTEM OF LAW

**Claudiu Ramon D. BUTCULESCU***

**Abstract**

*Heraldry is a science that studies and governs the use and regulations of certain symbols utilized for distinguishing persons, legal entities, legal bodies etc. Sometimes heraldry is defined as an art, when it comes to the visual representations of the aforementioned symbols on flags, seals, shields etc. In the actual Romanian System of Law, heraldic representations, both ancient and modern may be considered as intellectual property rights or cultural rights or eventually as elements related to the legal status of a person, namely as identification attributes of a person. In many European countries, as well as in other civilized countries, there are legal frameworks that strictly regulate the use, display and rights over heraldic insignia. In the Romanian legal system, such a framework does not yet exist, and for that reason, this article addresses the possibility of creating such a legal framework within the Romanian System of Law and tries to answer to the following questions: 1) Is it possible for such a legal framework to be enacted and enforced in the Romanian System of Law? 2) What purpose would be served by the enactment and enforcement of such a legal framework? 3) What should be the legal nature of the rights pertaining to such a legal framework? 4) Is it possible to create within this framework an armorial which will comprise all the heraldic representations, of ancient and modern origins, belonging to moral or natural persons? 5) What kind of legal protection would be appropriate for the successful implementation of the framework? Hopefully, the contents and conclusions of this article will be able to answer at least some of these questions and perhaps will lay the first bricks in a future project that would lead to practical and tangible results concerning the protection of rights related to heraldic representations.*

**Keywords:** *cultural rights, legal status, intellectual property rights, heraldry, coat of arms, heraldic insignia, coat of arms, legal system1.Introduction*

## 1. Introduction

Heraldry represents a system in which inherited symbols, called charges are displayed on a shield, or escutcheon, for the purpose of identifying individuals of families[1].

These symbols are known as armorial bearings or coat of arms[2] and serve to identify individuals or families, even legal entities such as religious orders, public authorities, professional bodies, universities etc. Sometimes, an armorial bearing may distinctively identify an individual within a family, such as a child born from an illegitimate line or a certain line itself within a family, such as a senior line.

The graphic representations are usually displayed through various methods and conventions and the science of literally describing armorial bearings is called blazonry[3].

This article addresses the issues regarding the legal status of heraldic representations or armorial bearings as we defined them earlier, from the perspective of the Romanian System of Law. In Romanian Law, certain armorial bearings are protected, specifically the state armorials, the coat of arms of cities, municipalities and villages and also coat of arms pertaining to some public institutions. These armorial bearings are clearly within the public domain of Romanian law and should be treated as public property. The legal situation of these coats of arms is governed by the Law no. 102 of 21th September 1992, which regulates the legal status of the coat of arms and seal of Romania. The same law contains provisions regarding the coats of arms of public authorities, districts, municipalities, cities and villages[4]. The methodology for drafting and adopting coat of arms for administrative regions was enacted by the Government Decision no. 25 of 16th January 2003 concerning the establishment of the methodology of drafting, reproduction and use of coat of arms of districts, municipalities, cities and villages. There are also some Decisions edicted by various State Departments concerning the same issue, which shall be detailed in the content section of this paper. The aforementioned norms only regulate today's public symbols, although these symbols evolved from princely coat of arms of belonging to ancient rulers of medieval Romanian States. Many of these symbols which have not been incorporated in current coat of arms have no legal protection at all. Moreover, private coat of arms, both ancient and modern do not benefit from a law that directly regulate their use. The matter researched in this paper presents a significant importance, as the coats of arms of medieval times are part of the Romanian

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[1] *The Columbia Encyclopedia*, 6th ed. (Columbia University Press, 2018), s.v. "Heraldry,"

[2] https://www.britannica.com/topic/coat-of-arms

[3] *The Columbia Encyclopedia*, 6th ed. (Columbia University Press, 2018), s.v. "Blazonry,"

[4] Article 10 of Law no. 102 of 21th Septembrie 1992

Cultural Heritage and a component of the immaterial cultural patrimony of Romania. The fact that these coats of arms are no longer in use does not mean that they should not have any legal protection whatsoever.

The coat of arms belonging to private persons are also important because they can be envisioned as means of identification for persons in the past and also for living individuals or active legal private entities. The coat of arms belonging to known historical families of Romania (other than the ruling ones) are also, to a lesser extent part of the cultural national heritage and more importantly an essential part of the legacy of that family for its members. It may be possible that the legal status of the armorial bearings mentioned before (the ones not in use anymore and the private ones) may be regulated through more general legislation, concerning intellectual or industrial property. Still, in the present, no legal framework exists that could encompass the rights over all the coat of arms, whether in use or not, public or private. In order to address this issue, at least theoretically, I proposed a series of questions within the abstract of this paper, concerning the possibility of enacting such a legal framework, namely: 1) Is it possible for such a legal framework to be enacted and enforced in the Romanian System of Law? 2) What purpose would be served by the enactment and enforcement of such a legal framework? 3) What should be the legal nature of the rights pertaining to such a legal framework? 4) Is it possible to create within this framework an armorial which will comprise all the heraldic representations, of ancient and modern origins, belonging to moral or natural persons? 5) What kind of legal protection would be appropriate for the successful implementation of the framework? I intent to answer to this matter by analyzing the actual regulations, and by proposing new measures which could improve the actual legal status.

Besides the analysis of the national legislation concerning the protection of heraldic representations, analysis from a comparative point of view may also prove useful. Certainly, the comparative analysis will also yield some contrasting approaches. For example, in states where the form of government is monarchy there will likely be more numerous and specialized laws that in countries which have a republican form of government.

In the specialized literature, there are numerous works that treat heraldry[5] as a science and distinctively as an art. Also, there are bibliographical works[6] that compile most of the works published in the field of heraldry. However, there are few studies that address the legal status of heraldic representations. This study comes as a continuation of some earlier works I have written, some regarding the legal protection of coat of arms of the nobility[7] and others concerning the heraldic insignia of institutions and companies in contemporary law[8].

This paper aims to identify useful legal means by which the rights over the heraldic representation could be protected, and where no such means are identified, to propose directions which may be taken to achieve the goal of protecting these representations.

## 2. Content

At the present time, the Romanian system of law does not have a legal framework in which heraldic representations such as coat of arms, crests, insignia are regulated and protected. As shown above, only the state heraldic representations and some heraldic coat of arms belonging to public authorities are regulated and protected. All the other heraldic signs, whether new or ancient can only be protected through the civil law, although no specific regulation exist to specifically address the rights over these signs. Vaguely, the Romanian Civil code enumerates at article 1141 certain family memorabilia which could possibly include heraldic insignia, without specifically naming them. Thus, in the absence of specific legal rules, the protection of the rights arising from the creation and use of heraldic representations is difficult, the only sources of law available would be the general rules prescribed by the civil law and the general principles of law (analogia juris)[9].

Newly created heraldic representations could be governed by some provisions contained in the Law no. 8 of 1996 which regulate intellectual property rights[10]. For example, article 7 of Law no. 8 of 1996 states that graphical works of art, like sculptures, paintings, engravings are the object of intellectual property rights. However, the field of heraldry is a vast one, spanning over at least eight centuries, and even more in Western Europe and defines itself as a highly specialized field, having codified images and a specialized language used in blazonry.

None of the laws mentioned above can sufficiently protect the entire field of heraldry, so a new system of laws and regulations should be adopted for this purpose. Having established the utility of such a framework, next comes the analysis regarding the possibility of its enacting and enforcing. From a comparative point of view, there are several countries which have such a legal framework such as England, Sweden, Denmark, Netherlands, Spain etc. All of these countries are constitutional monarchies, and as such

[5] Dan Cernovodeanu, Știința și arta heraldică în România, Editura științifică și enciclopedică, București, 1977, p. 13
[6] Maria Dogaru, Bibliografia heraldicii românești, Editura Ministerului Administrației și Internelor, București, 2004, p. 7
[7] Claudiu Ramon D. Butculescu, Aspecte propedeutice privind regimul juridic actual al stemelor nobiliare, Editura Eikon, București, pp.
[8] Claudiu Ramon D. Butculescu, Prolegomena to the Study of Heraldic Insignia : from the Medieval Coat of Arms (XIV-XVI Century) to the Heraldic Insignia of Institutions and Societies in Contemporary Law. Evolution, Legal Regime, Effects, Legal Protection, Prohibitions, Diversity and Interdisciplinarity in Business Law, pp. 11-18
[9] Maria Luiza Hrestic, Operational Rules of Application of the Formal Relations, Revue Europeenne du Droit Social, pp. 160-167
[10] Bujorel Florea, Reglecții despre plagiat. Comentarii practice, Editura Hamangiu, București, 2018, p. 22

have a long tradition in maintaining and strictly regulating the use of heraldic symbols. Romania is today a semi-presidential republic, which means that for accurate comparative results, we should research if there are legal frameworks regulating heraldry symbols in countries which are not monarchies but have a republican form of government. In the Slovak Republic, for example, there is an official heraldic register[11], operated by the Ministry of the Interior in which there can be included coat of arms belonging to natural persons, moral persons and is not limited only to official or state coat of arms.

Also, in the Republic of Moldova, the use of heraldic symbols is regulated by the Law no. 86 of 28th of July 2011. Article 7 of the aforementioned law states that private symbols are: the personal coat of arms or the family coat of arms; the banner and other personal or family vexillary insignia; the family hymn and the personal or family armorial seal. All these heraldic symbols are officially recognized as public symbols and are registered din the General Armorial of the Republic of Moldova, following the request of the owner and based on the decision of the National Heraldry Committee. The decree regarding the establishment of the General Armorial Regulation of Republic of Moldova was enacted in 2014[12].

In Canada, there is a Canadian Heraldic Authority that creates coats of arms, flags and badges. The authority was created in 1988 and all the coats of arms granted, registered, approved f confirmed are included in the Public Register of Arms, Flags and Badges of Canada[13].

Some countries have laws that protect the creation and use of coat of arms but have no official bodies to register them. Still, in many of these countries there are reputed private associations which register and publish coat of arms. For example, in the French legal system, armorial bearings are considered a form of incorporeal property, having an accessory nature and being irrevocably attached to family name[14]. However, there is no state body that registers the coat of arms and the usage and protection of arms is regulated according to the French Civil Code.

Similarly, in Germany, the published personal armorial bearings are protected under article 12 of the German Civil Code, which regulates the name rights. The coat of arms is considered closely linked to the surname and as such it enjoys the same protection.

There are also countries in which there is no official body to regulate the use and protection of heraldic insignia and also the legal protection is scarce, but there are associations which draft and register newly created coat of arms, such as Poland, Russia, Portugal etc.

Having shown that there are several countries which successfully regulate the field of heraldry, concerning the drafting, use and protection of heraldic representations, it is logically to assume that such a framework is also possible to establish in Romania.

The purpose of such a framework would be to regulate the use of heraldic insignia and to protect the bearers from usurpers. The state symbols are protected, as I shown earlier, by the provisions of the Law no. 102 of 21th September 1992, however the historical heraldic symbols are not. If the use of such heraldry symbols would be placed under the Romanian copyright law, then most of them would be practically in the public domain and may be used freely. However, such symbols are part of national history and as such, should be protected by law against abusive use. The historical coat of arms, whether bore by the ancient princes or rulers of past Romanian kingdoms should be included in a newly formed patrimony of significant heraldic symbols of Romania. Also, excepting scientific or historical research, their use should be prohibited. Another exception in which their use could be permitted should concern cases where such symbols were inherited or transmitted through generations to contemporaneous holders. Similarly, historical heraldic insignia used by various nobles, individuals and even corporations, if they are not claimed by rightful users (descendants, inheritors etc.), should also be places in this patrimony, with a strict prohibition of use.

The family or personal coat of arms, whether newly created or inherited should be protected also, by strictly regulating their use, the rights of their bearers, including the prohibition of unlawful use by other persons, publicly or privately. Only by enacting a legal system that will regulate the drafting, use and protection of armorial bearing an adequate protection will be provided.

As to the nature of the rights pertaining to a legal framework regulating heraldic representations, firstly, the protection should be provided by a special law, with specific rules, and not by the Civil code or the copyright law. Although the Romanian Civil Code, which entered into force on 1st of October 2011 contains modernized[15] provisions which may apply to heraldic representations, the complexity of the heraldic system requires a specific law to regulate the rights and obligations arising from the creation and use of coats of arms. Such a law, which comes from the legislative power of the State[16], should define the heraldic representations and should classify them in heraldic representations of significant importance and heraldic

[11] http://ives.minv.sk/heraldreg/

[12] http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=354932

[13] https://www.gg.ca/en/heraldry/public-register-arms-flags-and-badges-canada

[14] Jean Silve de Ventanvon, La legitimite des lys et le Duc D'Anjou, Fernand Lanore, Paris, 1989, p. 220

[15] Denisa Barbu, Tradition and innovation in legal sciences, Logos Universality Mentality Education Novelty, vol. IV, issue 1, Lumen Publishing House, 2015, p. 6

[16] Maria Luiza Hrestic, Considerations on the Formal Sources of International Law, Journal of Law and Administrative Sciences, no. 7/2017, p. 104

representations belonging to private persons, which could be recognized if they abide by the strict rules of heraldry. The nature of the rights should follow the nature of the heraldic representations themselves: for heraldic representations of significant importance, the rights should pe places in the public domain of the law, while the heraldic representations of private persons should be placed in the private domain of the law.

The heraldic representations of significant importance should be inalienable whether conventionally or forced and imprescriptible. The use of such heraldic representations by private persons should be prohibited, with the exception of scientific historical research. If such symbols are inherited from legitimate holders, the rules of inheritance stated by the Romanian Civil Code should apply. When there are no inheritors, the heraldic representations should become property of the state and used only for historical researches.

In order for the legal protection to be adequately ensured, registries should be created, containing all the coat of arms, whether ancient or contemporaneous, belonging to public or private persons, natural or moral. Firstly, a national registry, called "armorial" should be established and strictly administered by a public entity. Considering that according to the Law no. 102 of 21th September 1992, within the Romanian Academy there is a national committee which certifies the coat of arms of administrative units of Romania, this national armorial could be kept and administered by this committee. Aside from the national registry, regional registries should be kept by local subsidiaries of the Romanian Academy: for example, for the Moldavian Region, a prestigious institution like the Institute for Heraldry and Genealogy "Sever Zotta" could accomplish such a task. Likewise, for Transylvanian heraldry, the Center for Transylvanian Studies could accomplish such a task. In a more detailed view, all the districts of Romania should have regional registers, but these should be kept by private associations, as bodies of research in heraldry and accredited by the Romanian Academy.

The protection given to the rights arising from the creations and use of coat of arms should be civil and penal. For minor breaches of law, the punishments should include only pecuniary measures, but for major breaches of the law and abusive use of heraldry symbols of significant importance, the penalty should consist of substantial fines and even deprivations of privileges or liberty, with the limits set by the European Union Law and the European Court of Human Rights, regarding the proportionality of the punishment, the equality of arms, an equitable trial[17] etc. Similar punishments exist in Romanian laws for the unauthorized use of distinctive signs, such as emblems, logos etc. For example, the Law no. 11 of 29th January 1991 on combating unfair competition states in article 5 that the use of an emblem which is likely to cause confusion with that legitimately used by another trade is punishable by imprisonment from 3 months to 2 years or by fine. Although the provision mentioned above concerns unfair competition, as an infringement of the freedom of trade[18], its essence could be successfully translated, mutatis mutandis, as a conceptual basis for future regulations regarding heraldic representations.

## 3. Conclusions

The main outcome resulting from this study addresses the need to design and enact a legal framework that may be able to offer protection to heraldic representations, regardless of the time they were drafted and incorporated into coats of arms, within the Romanian system of law. The arguments presented in the main contents of this paper strongly suggest the need to implement such a legal framework, which should include rules regarding the protection of existing coats of arms, the registration of new ones, the establishment and development of a national armorial to include all armorial bearings and specific rules regarding the drafting and use of such armorial bearings.

The expected impact of this study concerns the possibility of enacting legal provisions concerning the protection and use of heraldic representations. The first step in the road to achieving the goal of a heraldic legal framework will be the creation of professional, dedicated associations, which will hold registries in every district of Romania and will oversee the creation, use and protection of heraldic representations. These associations should be recognized by law and accredited by the National Heraldry Committee of the Romanian Academy. The national registry or national armorial should comprise the heraldic representations included in the district registries and also the heraldic insignia of state authorities.

This paper tackles the possibility of creating a legal framework regarding heraldic representations in the Romanian system of law and tries to set a few directions for the establishment of such a legal framework. The future studies should research the concrete ways in which such a legal framework will be successfully established, implemented and administered.

[17] Denisa Barbu, Importanța predictibilității procedurilor penale în faza de urmărire penală, in Dreptul românesc la 100 de ani de la Marea Unire. Dimensiuni și tendințe, București, 2018, p. 500

[18] Vlad Teodor Florea, Dreptul concurenței. Punerea în aplicare a regulilor de concurență, Editura Hamangiu, București, 2018, pp. 2-3

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# WORKS CONTRACT - ADMINISTRATIVE CONTRACT. THE IMPLICATIONS OF LEGISLATIVE CHANGES ON ONGOING WORKS CONTRACTS

**Doina CUCU** [*]

**Abstract**

*Law no. 98 of 19 May 2016 on public procurement has been continuously amended and submitted to additions. The Emergency Ordinance 114 of December 28, 2018, issued by the government, which stipulates that between 1 January 2019 and 31 December 2019, by way of derogation from the provisions of Art. 164 par. (1) of the Law no. 53/2003 – Labour Code, republished, with all further amendments and additions, "in the building sector, the state guaranteed gross minimum wage is determined in cash, without any other bonuses and supplements, at the amount of 3,000 lei per month, for a normal work schedule of an average of 167,333 hours/ month, representing 17,928 lei/ hour ".*

*The increase of the minimum basic gross salary guaranteed by the state directly influences the price of the contract and in this article we will analyze the influence on the works contracts.*

**Keywords:** *administrative contract, works contract, contract price adjustment, EA 114/2018, GR 1/2018 EO (Emergency Ordinance), GR (Government Resolution).*

## 1. Introduction

As defined in the Civil Code, in Art. 1166 the contract is "a legally recognized agreement by which two or more persons have expressed their intention of creating, modifying or extinguishing a legal relationship"[1] within the limits of law, public order and good morals. Thus, the contract shall be terminated when "The Contracting Parties shall have expressed their consistent wills in line with the conditions of the fund and the form required by law, by reference to the specifics of each contract"[2] if the law does not impose a certain other formality or form. The administrative contract has its origin in the French law, being the result of the jurisprudence of the State Council.[3] In our country, this theory has emerged simultaneously with the development of legal relations between public administrations and the private entrepreneurs with the object of contracting various public works or services.[4]

A further stage of the evolution of the administrative contract's theory is the period after December 1989 "starting from the fact that the very Constitution of 1991 recognizes it without qualifying it expressly with the name of an administrative contract".[5]

## 2. Content

"The administrative contract is an agreement between a public authority in a position of legal superiority, on one hand, and other subjects of law on the other hand (individuals, legal persons or other public bodies subordinated to the superior entity, the purpose of which is to satisfy a general interest through the provision of a public service, the performance of public works or the use of a public good which is submitted to a political power regime."[6]

Concluding, we can say that a contract is an administrative contract if it fulfills at least the following criteria:

- Minimum one of the parties is a public entity;
- Its subject or object is to ensure a public facility or a public interest;
- The terms of the contract are governed by "unilateral administrative law or acts in order to protect public interests and conventional clauses negotiated by the parties".[7]

The administrative contract is also defined "to represent an agreement of will, totally or partially submitted to a regime of public power, between a public institution or another subject of the law authorised by it, on the one hand, and a private or any other public institution, on the other hand, in pursuing

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[1] Civil Code of 17 July 2009 republished and updated. Law no. 287/2009 was published in the Of. Journal of Romania, Part I, no. 511 of July 24, 2009, was amended by Law no. 71/2011 and rectified in Of. Journal of Romania, Part I, no. 427 of 17 June 2011 and in the Of. Journal of Romania, Part I, no. 489 of 8 July 201 with subsequent amendments and additions.

[2] T. Prescure, A. Ciurea, Civil Contracts, ed. and 2 a, rev., ed. Hamangiu, 2007, p. 2

[3] Vedinaș, Verginia (2017). Administrative law. The X[th] Edition was revised and updated. Bucharest: Universul Juridic, p. 372

[4] Iorgovan, Antonie (2005). Administrative Law Treaty, vol. II, Edition 4, Ed. Bucharest: All Beck, p. 101

[5] Vedinas, Verginia (2017). Administrative law. The X[th] Edition was revised and updated. Bucharest: Universul Juridic, p. 373

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[7] Săraru, Cătălin-Silviu, (2014) CLAUSES OF PUBLIC LAW IN ADMINISTRATIVE CONTRACTS, Transylvanian Administrative Sciences Review 1 (34) / 2014, p. 99

the satisfaction of a general interest, through the provision of a public service, the execution of public works.

Putting the value of a good of public property into the legal relationship of public office."[8]

Thus, we can deduce the following features of the administrative contract:[9]

a) it is a multiparty agreement of will or settlement;
b) one of the parties is a determined subject, namely a body acting in the exercise of public power, an administrative body or another subject of law authorized by a body of administrative law;[10]
c) different from civil contracts where there is a position of legal equality for the parties concerned, as when talking about the administrative contract, the parties involved are not in a position of legal equality, but one of them, namely the public authority, has a superior position towards the other subject of the administrative contract;
d) the object of the administrative contract is determined, in pursuing to satisfy a general public interest and thus obtaining one of the following characteristics: obtaining a public service, capitalizing on a public good, performing public works;
e) the setting, by law and conventionally, of the clauses of the administrative contract;
f) due to the superiority of the public authority, it may determine the possibility of unilaterally modifying or terminating the administrative contract, if the public interest so requires;
g) "governed by a regime of public power, unlike civil contracts, which are governed by common law";[11]
h) "the written form of the administrative contract, which, like the administrative act, cannot be of a consensual character, involving an authority acting on behalf of the public authority";[12]
i) in order to solve potential litigations arising from the execution of an administrative contract, the competence to resolve them is the Administrative Contentious Courts.

The principles underlying the awarding of public procurement contracts and the organization of solutions competitions are: non-discrimination, equal treatment, mutual recognition, transparency, proportionality, accountability.

In Romanian legislation, we distinguish several types of administrative contracts. Among the types of administrative contracts, public procurement contracts are distinguished by the large number of contracts concluded by public authorities.

According to Law no. 98[13] of 19 May 2016 on Public Procurement, Cap. I, art. 3(b) public procurement is "the acquisition of works, products or services by means of a public procurement contract by one or more contracting authorities from economic operators designated by them, whether the works, products or services are intended to ensure a public interest or not. "

Under the same law, Cap. I, art. 3(l) the contract of public procurement is "the contract for onerous interest, assimilated by law to the administrative act, concluded in writing between one or more economic operators and one or more contracting authorities, which has as its object the execution of works, the supply of products or provision of services".

Public procurement contracts are distinguished by the large number of public works contracts.

"Public works contract - public procurement contract having as its object either: exclusively the execution, or both the design and the execution of works in connection with one of the activities listed in Annex no. 1; either solely the execution, or both the design and construction of a building; or the construction by any means of a building which meets the requirements set by the contracting authority exercising decisive influence over the type or design of the construction)".[14]

Conclusion of public works contracts

As with any other contract, the first rule to be observed in the conclusion of public works contracts is the parties' agreement. Specifically, "in the case of an administrative contract, the administration is the one

[8] Sararu, Cătălin-Silviu, (2010). Capacity of public authorities / institutions to conclude administrative contracts, in "Law", no. 1, p. 109
[9] Vedinaș, Verginia (2017). Administrative law. The X$^{th}$ Edition was revised and updated. Bucharest: Universul Juridic, p. 374
[10] Vedinaș, Verginia (2017). Administrative law. The X$^{th}$ Edition was revised and updated. Bucharest: Universul Juridic, p. 374
[11] A. Negoiță quoted by Vedinaș, Verginia (2017). Administrative law. The X$^{yh}$ Edition was revised and updated. Bucharest: Universul Juridic, p. 375
[12] A. Negoiță quoted by Vedinaș, Verginia (2017). Administrative law. The X$^{th}$ Edition was revised and updated. Bucharest: Universul Juridic, p. 375
[13] Law No 98 of 19 May 2016 on public procurement published in the Official Journal, issue 390 of 23 May 2016, amended and supplemented by: Emergency Ordinance No 80 of 16 November 2016 laying down measures in the field of central public administration for the extension of the deadline art. 136 of the Law no. 304/2004 on judicial organization and amending and completing some normative acts, Law no. 80 of April 27, 2017 regarding the approval of Government Emergency Ordinance no. 80/2016 for the establishment of measures in the field of central public administration, for the extension of the term stipulated in art. 136 of the Law no. 304/2004 on judicial organization and amending and supplementing some normative acts and the Emergency Ordinance No. 107 of 20 December 2017 for the amendment and completion of some normative acts with impact in the field of public procurement with the subsequent additions and modifications
[14] Law No 98 of 19 May 2016 on public procurement published in the Official Journal, issue 390 of 23 May 2016, amended and supplemented by: Emergency Ordinance No 80 of 16 November 2016 laying down measures in the field of central public administration for the extension of the deadline art. 136 of the Law no. 304/2004 on judicial organization and amending and completing some normative acts, Law no. 80 of April 27, 2017 regarding the approval of Government Emergency Ordinance no. 80/2016 for the establishment of measures in the field of central public administration, for the extension of the term stipulated in art. 136 of the Law no. 304/2004 on judicial organization and amending and supplementing some normative acts and the Emergency Ordinance No. 107 of 20 December 2017 for the amendment and completion of some normative acts with impact in the field of public procurement with the subsequent additions and modifications

who invites and accepts and the applicants (candidates) are the ones who offer."[15]

The object of the contract is highlighted by the necessity report and / or the specifications drawn up at the level of the department requesting the acquisition and approved in advance by the management of the public authority.

The contract price is appreciated by the compartment making the necessity and / or specification and is made up of the price without V.A.T. to which is added V.A.T. according to the legal provisions in force at the date of the invoice issuance by the provider.

Payment methods and duration of the contract are also required by the necessity report and / or the specifications drawn up at the level of the compartment requesting the purchase. The term for the duration of the contract is imposed by the date of signing the contract by both parties.

It is the public authority that will choose among the offers received the most satisfactory tender in relation to the necessity report or the specification.

During the course of the contract the price may change in the following situations:

1. in the case where "certain conditions have occurred on the market resulting in the increase / decrease of the price indices for the constituent elements of the offer, the effect of which is reflected in the increase / decrease of the costs on which the price of the contract was based"[16].

However, in order to ensure the principle of transparency, the public authority must specify in the works contract and in the documentation on which it was based the possibility of adjusting the price. This is to be argued by the "actual price adjustment, the indices to be used, and the source of information on their evolution, such as statistical bulletins or commodity exchange quotations".[17] In the case of contracts ranging from 6 months to 24 months, the contracting authority may choose to include price adjustment / revision clauses, but for contracts that run for more than 24 months this clause is mandatory.

2. If "the legislative changes occur or were issued by local administrative acts which have as their object the establishment, modification or waiver of certain charges / local taxes, whose effect is reflected in the increase / decrease of the costs on which the price of the contract was based ".[18]

In both situations, the price of the contract can be adjusted only to the extent that the costs of substantiating the contract price are covered and this is the way in which the final result should not be different from the initial one of the award procedure.

On January 11, 2018, goes into effect the Government Resolution no. 1 of January 10, 2018 for approval of general and specific for certain categories of procurement contracts related to the investment objectives financed from public funds which considers the application of general and specific conditions and model framework agreement contract for public procurement contracts or sectorial works, on the execution of works on the one hand, and on the design and execution of works, on the other. Government resolution refers to the investment objectives financed from public funds including grants and / or reimbursable whose estimated value must be "equal to or greater than the thresholds provided by art. 7 (1.a) of Law no. 98/2016 on public procurement, as amended and supplemented ".[19]

It deals with price adjustment in Clause 48 and uses other time references when referring to the duration of the contract. Thus, if the duration of the contract is less than or equal to 365 days, it is considered that the contract prices are firm and can only be modified if the increase or decrease of the value of the contract is a consequence of the amendment of the law and this will prevent the contractor to fulfill its contractual obligations. If the duration of the contract is longer than 365 days, it is considered that the prices have been established taking into account the price and market conditions at the time of the offer and will be adjusted with the increase or decrease of the price indices.

## 4. Conclusions

The issue of the Emergency Ordinance no. 114 of December 28, 2018 regarding the establishment of measures in the field of public investments and fiscal-budgetary measures, the modification and completion of some normative acts and the extension of some deadlines in Article 71 stipulates that by way of derogation from the Law no. 53 of 24 January 2003 - Labour Code, republished, as amended and supplemented, art. 164, par. 1 the country's minimum gross salary for the construction sector between January 1, 2019 and December 31, 2019 is 3,000 lei per

[15] Sararu, Cătălin-Silviu, (2009). Administrative contracts. Regulation. Doctrine. Jurisprudence. C. Beck Publishing House, p. 131

[16] METHODOLOGICAL RULES of 2 June 2016 for the application of the provisions regarding the award of the public procurement contract / framework agreement of Law no. 98/2016 on Public Procurement, Section 4, Art. 164, par. 1, published in: Official Journal no. 423 of 6 June 2016 approved by Resolution No. 395 of June 2, 2016, with subsequent amendments and additions

[17] METHODOLOGICAL RULES of 2 June 2016 for the application of the provisions regarding the award of the public procurement contract / framework agreement of Law no. 98/2016 on Public Procurement, Section 4, Art. 164, par. 1, published in: Official Journal no. 423 of 6 June 2016 approved by Resolution No. 395 of June 2, 2016, with subsequent amendments and additions

[18] METHODOLOGICAL RULES of 2 June 2016 for the application of the provisions regarding the award of the public procurement contract / framework agreement of Law no. 98/2016 on Public Procurement, Section 4, Art. 164, par. 1, published in: Official Journal no. 423 of 6 June 2016 approved by Resolution No. 395 of June 2, 2016, with subsequent amendments and additions

[19] Government Resolution no. 1 of January 10, 2018 for the approval of general and specific conditions for certain categories of procurement contracts related to publicly funded investment objectives, published in: Official Journal no. 26 of January 11, 2018

month for an average work schedule of 167,333 hours per month. It was thus established without including bonuses and other additions.

Emergency Ordinance no. 114 of 28 December 2018 does not show how the calculation of the value of the work will be adjusted in the works contract and how it will change this total value of the works contract.

The National Agency for Public Procurement issues on 21 December 2018 Instruction no. 2[20] regarding the price adjustment of the public procurement contract wishing to support both contracting authorities and economic operators by clarifying certain legal provisions aiming at ensuring a transparent framework and avoiding non-uniform interpretation in contradiction with the principles of public procurement / sector.

Thus, art. 1, par. (2.a) provides that by price adjustment an adjustment coefficient is to be applied regardless of the occurrence of an unforeseeable situation such as: legislative changes or other administrative acts having an effect on increases or decreases in costs on which the price of the contract was based, the minimum applicable wage, the modification of the technical norms, the increase or decrease of the price of some raw materials, materials or other products, the extension of the contract award procedure over the validity period of the offer (initially established through the awarding documentation), the tenderer's obligation to change the declared supplier bid due to bankruptcy or incapacity to perform the works. Art. 1, par. (2.b) provides for a price adjustment "even if the price adjustment was not provided for in the procurement documentation / public procurement / sectorial procurement contract".

This article has given rise to many controversies. Is it fair that a contract that has the clause "the price of the contract remains firm and the contract price adjustment during the contract period is not acceptable" can be modified based on an instruction?

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[20] INSTRUCTION no. 2 of December 21, 2018 regarding the adjustment of the public procurement / sector procurement price, EMITENT: National Agency for Public Procurement, published in: Official Journal no. 32 of 11 January 2019

# THE MODIFICATIONS BROUGHT TO THE LAW OF THE CONTENTIOUS ADMINISTRATIVE: CRITICAL PERSPECTIVE

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**Abstract**

*In 2018, the lawmaker decided to amend the Law of the contentious administrative, and some of these changes can be deemed essential. However, the changes of 2018 do not reflect a knowledge of the realities of the contentious administrative. This is why, this study comes in order to criticize most of these changes. The amendments which were brought do not simplify certain situations, but make them more difficult, and we are sure that such thing will be reflected in the practice of the contentious administrative courts.*

**Keywords:** *law of the contentious administrative, legislative changes, jurisdiction of the court, prior procedure*

## 1. Introduction

*"The term of contentious administrative represents a traditional meaning of the administrative law, considered inappropriate for "the realities specific to socialist traditions" and, therefore, used in the respective period rather for the purpose of historical evocation (A. Iorgovan, op. cit., 2002, p. 451).*

*Etymologically speaking, the word contentious originates from the Latin contendere meaning to fight.*

*This is a metaphorical fight, a fight of opposing interests between two parties, one of which will be victorious (V. Vedinas, op. cit. 2002, p. 156).*

*Therefore, the term contentious expresses the conflict of interests, the contradictory nature of the interests (Al. Negoita, op. cit., 1996, p. 216)*

*In the administrative law, the term contentious started to be used in order to delimit jurisdictional remedies from ordinary administrative second appeals."*[1]

*"The contentious administrative represents the totality of the litigations between public authorities, on the one hand, and the individuals whose rights and legitimate interests were damaged, on the other hand, deduced from typical or assimilated administrative acts considered illegal, which fall under the jurisdiction of the contentious administrative divisions of the courts of law, governed by a predominantly public-law regime."*[2]

The emergence of Law no. 554[3] in 2004, the so-called *new law of the contentious administrative*, was a long-awaited moment for all law theorists and practitioners, especially for those of the administrative law.

Law no. 554/2004 repealed Law no. 29/1990, a pre-constitutional law that had to be often interpreted rather than applied in the strict meaning of the terms used. The contentious administrative (the contentious where the private sector fought against the "state"), fundamentally rethought after the Revolution of December 1989, when it had been urgently transposed into a law. Subsequently, the enforcement of the Constitution in 1991, made the law of 1990 already subject to the interpretations in the light of the fundamental constitutional notions.

Here is how 2004 represented the time when the contentious administrative was based on new and modern bases, exceptional lawyers led by the late professor Antonie Iorgovan, thus creating the premises of a performant legislation that was to respond to such great challenges caused by such a field.

Judges, lawyers, the entire legal spectrum were pleased with the idea of implementing a modern jurisdiction centered on two levels: the genuine contentious administrative, which entailed the attack against typical or assimilated administrative acts, issued by public authorities and fiscal contentious, which entailed the attack against fiscal administrative acts.

The implementation of the new law took three years, in which there were already noted deficiencies that generated contradictory situations in practice. In 2007, Law no. 554 is substantially amended by Law no. 262[4], this time a new adjustment made with the objective realities of the contentious administrative being targeted.

Until 2018, Law no. 554/2004 has undergone changes, but the substance has never been modified.

2018 is the year when certain regulations of the contentious administrative are rethought by the

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[1] See in this respect Dana Apostol Tofan, *Drept administrativ, Volume II*, All Beck Publishing House, Bucharest 2004, page 281

[2] See in this respect, Verginia Vedinas, *Drept administrativ, Edition IX revised and updated*, Universul Juridic Publishing House, Bucharest, 2015, page 172

[3] Law no. 554/2004 of the contentious administrative published in the Official Journal, Part I, no. 1154 of December 7th, 2004

[4] Law no. 262/2007 for the amendment and supplementation of Law no. 554/2004 of the contentious administrative, published in the Official Journal Part I no. 510 of July 30th, 2007

lawmaker and apparently, are placed into a new perspective, meant to improve the judiciary system. If this is true or not, if the amendments made are able to create an improvement of the system that governs the contentious administrative, here are just a few questions that the present study aims to clarify, obviously from the perspective of the author, theoretician and practitioner of the administrative law.

On a brief analysis of the old form of the Contentious administrative, as it had settled down after all the amendments, especially after the essential one of 2007, such a great need for amending the law was not revealed. Basis were laid, a construction was substantiated.

It is truth that the enforcement of the new Code of Civil Procedure entailed the adjustment of certain regulations in the field of the contentious administrative. We could no longer speak of "irrevocable decision", the second appeal should be seen as an extraordinary remedy, yet ordinary in matters of contentious administrative, could we impose the procedure for filtering second appeals before the High Court of Cassation and Justice in matters of contentious administrative? All these referring to the special nature of Law no. 554/2004, in relation to the Code of civil procedure.

All of these amendments and adjustments were indeed necessary, but in addition to these, the law also underwent other amendments, at least critical to a more sensitive analysis.

## 2. Amendments to Law no. 554/2004, analysis of the implications

In order to understand why the lawmaker justified that the amendment of Law no. 554/2004 was required in 2018, it is obvious that we have to start from the memorandum of reasons accompanying draft Law no. 212/2018[5], which is the amending law.

The first reason was the long term required for trial settlement. This aspect is reflected in the contentious administrative in two directions: the regularization procedure, on the one hand, and the procedure for filtering second appeals before the High Court of Cassation and Justice, on the other hand (we point out that in contentious administrative, the remedy against the court of first instance decision is represented by second appeal, corroborated with the regulation according to which the Court of Appeal is the court of first instance in many contentious administrative litigations, therefore second appeals were filtered before the High Court of Cassation and Justice).

The memorandum of reasons leads to the reasoning according to which the activity of the courts is dominated by the field of the contentious administrative which represents about 30% of the activity of the tribunals of the courts of appeal and almost 40% of the activity of the High Court of Cassation and Justice.

Furthermore, the memorandum of reasons revealed concrete data showing the trend of increasing the number of the cases in this field[6].

Furthermore, another reason was generated by the fact that, especially within the High Court of Cassation and Justice, an average term of 2 years has passed between the writ of summons and the date of the first hearing, this being an interference with the right of the litigant to solve the case within a reasonable time.

Furthermore, within the High Court of Cassation and Justice, an activity disproportion was created, the division of contentious administrative had to settle a double number of cases compared to the other non-criminal divisions.

The same discrepancy was noted within inferior courts (tribunal and courts of appeal).

Therefore, the lawmaker concluded that the legislative amendment having the effects below was required:

- To reduce the term of case settlement;
- To balance the activity volume between the divisions of the courts and between the courts under the fulfillment of their professional competencies;
- To create the legal premises of the fulfillment of the right of the citizens to access the court and to settle the cases in due time.

In legislative terms, the amendments were made by taking into account the following axis, thus considering that their impact would be positive:

- The modification of the jurisdiction for certain types of cases that can be settled by other sections or specialized court panels. In this respect, litigations coming from the execution and termination of administrative contracts were taken into account;
- Keeping the distribution of the cases in the field of the contentious administrative at national level, as established according to the jurisdiction to settle the cases by removing derogation procedures;
- The modification of the jurisdiction on levels of court in the field of the contentious administrative;
- The removal of procedural mechanisms which generate large delays without a procedural benefit justifying them (filtering procedure and regularization procedure in cases the scope of which is represented by urgent cases the stay of execution of the administrative act, petitions for the enforcement of administrative acts and replacement of the common law procedure for the submission of the statement of defense and of the answer to statement of defense in common law cases) by a faster procedure.

[5] Law no. 212/2018 for the amendment and supplementation of Law no. 554/2004 of the contentious administrative and of other normative acts, published in the Official Journal, Part I no. 658 of July 30th, 2018

[6] According to the report on the status of justice for 2016: In the field of the contentious administrative and fiscal, in 2016 the number of new cases was 139,407 cases, with 23713 cases more than in 2015, which represents an increase of 20.5%.

Last but not least, it was noted that the accordance of law no. 554/2004 with the decisions of the Constitutional Court was required.

Starting from these arguments, the lawmaker proceeded with the actual modification of the law, in the end, some changes were beneficial, but others were at least questionable in terms of practical impact in the settlement procedure.

A first significant amendment concerns the "*Prior administrative procedure. Therefore, the prior procedure was regulated in order to grant stakeholders the possibility to settle their complaints in a shorter term and operative manner, the notified administrative body being able to reconsider the previously issued act and to issue another one accepted by the plaintiff.*

*Some authors analyze the prior administrative procedure as a first stage of the contentious administrative procedure, prior to the actual stage, before the contentious administrative court (...).*

*The new law of the contentious administrative maintains the mandatory nature of the prior procedure, although there were proposals in the opposite direction in the doctrine and even the draft law entailed the idea of enshrining its facultative nature. [D. Apostol Tofan, Modificarile esentiale aduse institutiei contenciosului admnistrativ prin noua lege cadru in materie (I), in C. Jud. nr. 3/2005, pp. 90-103]."*[7]

*"By means of the exercise of the administrative second appeal, the applicant of the prior complaint aims the dismissal or amendment of the act deemed illegal by the issuer, and by means of the hierarchical administrative second appeal, the initiator aims to cancel the act by means of the public authority superior to its issuer or to determine the issuer of the act to dismiss or amend it, in order to avoid an action in contentious administrative."*[8]

*"By means of law no. 202/2010*[9] *regarding some measures for accelerating resolution process (Law of the small reform in justice), art. 109 of the Code of civil procedure was supplemented by a new paragraph, (3), which shall read as follows: "The failure to fulfill prior procedure can only be claimed by the defendant by statement of defense, under penalty of preclusion."*

*This provision is found with identical content in the new code of civil procedure in force as of February 15th, 2013, in art. 193 para. (2).*

*We are wondering whether this rule of procedural law also applies in contentious administrative, regulated by special organic law, which requires the administrative procedure as a prerequisite for the exercise of the right of action.*

*Art. 7 of law no. 554/2004 regulates the rule of the mandatory nature of the administrative prior complaint; the terms and conditions under which the prior procedure is exercised; cases where the prior procedure, by way of exception to the rule, is not mandatory.*

*The aforementioned law does not entail provisions on the following: the nature of the motion to dismiss on grounds of the non-fulfillment of the prior procedure; the conditions under which it can be claimed (hearing, subjects); the legal sanction entailed by the failure to fulfill the prior administrative procedure.*

*The legal nature of the prior procedure, that of exercising the right to action, enshrined in the doctrine and case law, was deducted from the provisions of art. 109 para. (2) of the Code of Civil Procedure 1865, current art. 193 para. (1) of the New Code of Civil Procedure, the general regulation the hypothesis of which aims precisely the situations in which, by special law, it is stipulated that the notification of the court is performed only after the fulfillment of the special procedure.*

*Therefore, the fact that the Law of the contentious administrative establishes the obligation of the prior procedure does not exclude the incidence of these texts of the codes of civil procedure; on the contrary, places the action in contentious administrative, in its regulation field.*

*According to the rules applicable in case of the competition between general regulation and special regulation, where special regulation <<falls silent>>, general regulation applies, with the tone introduced by art. 28 para. (1) of Law no. 554/2004, in order to determine the compatibility of the rules of civil procedure with the specifics of the contentious administrative reports."*[10]

The amendments made to the law of the contentious administrative in the field of prior procedure can be structured on the following directions:

- The obligation of the injured third party to file prior complaint *within 30 days as of the date it took knowledge, by any means, of the content of the act* (art. 7 para. 3 of Law no. 554/2004).
- Rethinking the reasons which can be detailed in the prior complaint, meaning that the grounds claimed in the petition for the annulment of the act are not limited to those claimed by means of the prior procedure (art. 8 para. 1 final thesis of Law no. 554/2004).

We will detail each and every amendment and we will point out positive and negative aspects detached from the analysis of the text.

In what concerns the obligation of the third party to file prior complaint within 30 days as of the date it

[7] See in this respect, Gabriela Bogasiu – *Legea Contenciosului Administrativ*,*Comentata si adnotata*, Universul Juridic Publishing House, Bucharest 2018, page 237

[8] See in this respect Anton Trailescu, *Drept administrativ,* edition 4, C.H. Beck Publishing House, Bucharest 2010, page 346

[9] Law no. 202/2010 regarding some measures for accelerating resolution process, published in Official Journal Part I no. 714 of October 26th, 2010

[10] See in this respect, Gabriela Bogasiu – *Legea Contenciosului Administrativ Comentata si adnotata, op. cit,* pp 239-240

took knowledge of the content of the act, the impact of the change is in two directions.

First of all, the modification occurs on the background of the Decision of the Constitutional Court no. 797/2007 published in Official Journal no. 707/2007[11], whereby art. 7 para. 7 of Law no. 554/2004 in old wording was declared unconstitutional, in the sense that the 6-month term as of the issuance of the act shall not apply to the prior complaint filed by the person injured in his / her right or in a legitimate interest, by an administrative act of individual nature, addressed to another law subject than the recipient of the act.

The effect of the Decision of the Constitutional Court has not been transposed into law within the deadline of 45 days, so that a non-unitary interpretation of the law was noticed in practice, certain courts going so far that they have ruled that the injured third party could file prior complaint within 6 months, the 30-day term not being opposable to him/her.

The amendment of 2018 and which basically establishes the 30-day deadline for both the beneficiary and the injured party is beneficial, due to the fact there is practically no reasoning that justifies a term for the recipient and another for the third party.

The second amendment undergone by art. 7 para. 3 in its new wording entails certain discussions. Therefore, the third party shall file the prior complaint within 30 days since he/she took knowledge of the content of the act.

In practice, it was noted that an individual administrative act, such as the land owner certificate is communicated only to the beneficiary and the legal effects in connection with the mandatory nature and executory nature ex officio are produced as of the moment of the communication to the beneficiary.

*The time when third parties took knowledge of the existence of an injurious administrative act is related to extrinsic elements, to acts or deeds occurred subsequently, to which the judge gives the appropriate significance in relation to circumstances of the case, by keeping a just balance between the interests of the parties to litigation."*[12]

In connection to this amendment, we are wondering if wording "*took knowledge of the existence of the act*" was not enough. It will be very difficult for the third party to effectively take knowledge of the content of the act. Therefore, will the issuance authority issue a counterpart of the act, provided that he/she is not the beneficiary? Which are the real means whereby the third party can effectively take knowledge of the content of the act?

We believe that it was sufficient for the third party to claim the existence of the act and the alleged injuries brought to him and subsequently, if the act was not revoked by the issuing authority, the court would judge the damage and eventually, cancel it.

Therefore, the phrase "content of the act" seems to be too burdensome for the third party, especially correlated with the rest of the provisions of the law, which do not seem to lead and to be interpreted in the same sense.

In conclusion, according to the new express provisions of the law, both for the recipient of the unilateral individual administrative act, and for third parties, the rule is that of exercising prior complaint within the 30-day deadline, which starts as of the communication date, for the recipient, and as of the date of the acknowledgment of the act, for third parties.

*"The 6-month deadline, which starts as of the issuance of the act, for the recipient, and as of the date of the acknowledgment of the act, for the third party, is an exceptional one, conditioned by the existence of certain substantiated grounds, consisting in circumstances likely to make impossible the administrative proceedings within the 30-day deadline."*[13]

*"The rewording of the texts by means of Law no. 212/2018 brought a high quality by means of the express regulation of the running of the deadline for third parties as being the date of the actual acknowledgment of the content of the act, and not the date they took knowledge of the issuance of the act, as provided in previous form."*

Notwithstanding, we remain with the opinion that it was sufficient to speak about the "existence of the act" and not about the content of the act.

We also refer here to the amendment undergone by art. 8 para. 1 final thesis, which allows the plaintiff to file prior complaint, in order to check the completion of the procedure, and subsequently, in court action, to state the reasons for annulment, as he/she wishes.

*"Starting from the premise that the general regulation of the administrative prior procedure, referred to in art. 7, does not establish binding content elements, foreseeing only that the injured person must request the dismissal, in full or in part, of the administrative act, art. 8 para. (1) was supplemented by Law no. 212/2018, namely that "the grounds claimed in the petition for the annulment of the act are not limited to those claimed by means of the prior complaint".*[14]

In case of this modification, the analysis must start from the terms specific to administrative law, respectively the dismissal which can be ordered by the issuance authority and the annulment, which can be ordered by the court of law.

Provided that certain grounds can be claimed in prior procedure, grounds which can be subsequently

[11] See in this respect Decision of the Constitutional Court no. 797/2007 published in the Official Journal no. 707/2007. The material can be accessed by using site: https://lege5.ro/App/Document/geydsmbzhe/rectificarea-privind-decizia-curtii-constitutionale-nr-797-2007-din-06112007

[12] See in this respect, Gabriela Bogasiu – *Legea Contenciosului Administrativ Comentata si adnotata, op. cit*, page 246

[13] See in this respect, Gabriela Bogasiu – *Legea Contenciosului Administrativ Comentata si adnotata, op. cit*, pag 260

[14] See in this respect, Gabriela Bogasiu – *Legea Contenciosului Administrativ Comentata si adnotata, op. cit*, page 282

supplemented or can even become new grounds in the action for annulment, we are naturally asking what is the role of the prior procedure?

As we showed above, the prior procedure, mandatory as a rule, it is the remedy left to the authority in order to revoke the act, when it is notified on illegalities involved.

Provided that the prior complaint becomes only a formality, the dismissal regulation lacks of substance.

Provided that new/other grounds can be claimed on the illegality of the act, which would be the point of preserving the prior procedure?

In this light, the amendment suffered by law no. 554/2004 appears to be of the essence. Although, apparently, we can say that this is a benefit granted to the litigant, who can go to the action in annulment with all grounds deemed substantiated so as to impose the annulment of the act, grounds that he/she may not have been able to discover until the filing of the action, there remains the natural question: what is the importance of the prior procedure? From this perspective, the prior procedure remains only a formality.

A major impact amendment is also the new wording of art. 8 para. 2 of the Law which establishes that "*in case of administrative contracts, the court can be vested with litigations which concern the stage preceding the conclusion of an administrative agreement, as well as any litigations in connection with the conclusion of the administrative contract, including litigations the scope of which is the annulment of an administrative contract.*

*The litigations arising from the execution of the administrative contracts fall under the jurisdiction of the common law civil courts."*[15]

There can be noted a division of the material jurisdiction of the courts in case of the administrative contracts:

- The litigations preceding the conclusion of the administrative contract, litigations in connection with the conclusion of the administrative contract and litigations the scope of which is the annulment of an administrative contract shall fall under the jurisdiction of the contentious administrative courts of law;
- Litigations arising from the execution of the administrative contracts shall fall under the jurisdiction of the common law courts of law.

From this division of the litigations the scope of which is the administrative contract, the following question occurs: to the extent that the administrative contract is defined as a species of the administrative act, is it normal for the courts of common law to rule on it, in certain situations?

We believe it would be natural that the courts of contentious administrative remain competent on all sectors and issues raised by the administrative contracts.

It is often difficult to distinguish between matters of annulment and, for example, matters of execution, and the aspects to be intertwined.

We believe that cases where courts or parties claim lack of material jurisdiction will be frequent, and the matters of jurisdiction will train the litigation more than other matters which were taken into account by the lawmaker, when he/she modified the jurisdiction, in an attempt to relieve the divisions of contentious administrative.

We consider that this change is not beneficial and all litigations having as object the administrative contracts should remain in the jurisdiction of the divisions of contentious administrative, by taking into account the specific of this field.

Another significant amendment is represented by the new wording of the text" para. (3) of art. 10, which currently includes a standard of protection in favor of private law subjects involved in disputes of contentious administrative and fiscal, thus establishing the exclusive territorial jurisdiction of the court over their domicile or registered office, when they have the capacity of plaintiff, and the jurisdiction of the court over the domicile or registered office of the defendant, when the plaintiff is public authority, public institution or assimilated to them.

*The special regulations of exclusive territorial jurisdiction introduced in Law no. 554/2004 by Law no. 212/2018 exclude the incidence, in litigations of contentious administrative and fiscal, of alternative jurisdiction established by art. 111 of the New Code of Civil Procedure (petitions filed against public law individuals), according to which the petitions filed against the state, central or local authorities institutions, as well as other public law individuals can be filed before the court with jurisdiction over the domicile or registered office of the plaintiff or before the court with jurisdiction over the defendant.*

*According to the new par. (4), introduced in art. 10 by means of Law no. 212/2018, "the territorial jurisdiction to solve the case shall be fulfilled when the action is brought on behalf of the plaintiff by any public or private law person, regardless of the capacity in the trial."*

*Equally, the situations referred to in art.1 para. (3) and (4) of Law no. 554/2004, which shall read according to below, shall fall under the typical hypothesis of this regulation:*

*"The Ombudsman, following the control performed by him/her, according to his/her organic law, if he/she considers that the illegality of the act or the refusal of the administrative authority to carry out the legal duties can only be removed by way of justice, he/she may bring the matter to the competent contentious administrative court with jurisdiction over the petitioner's domicile. The petitioner acquires de jure the capacity of plaintiff, and he shall be summoned in this capacity. If the petitioner does not assume the*

[15] See in this respect, Gabriela Bogasiu – *Legea Contenciosului Administrativ Comentata si adnotata*, *op. cit*, page 284

*action filed by the Ombudsman at the first hearing, the contentious administrative shall cancel the petition.*

*If the Public Ministry, following the exercise of the duties provided by its organic law, considers that violations of the rights, freedoms and legitimate interests of individuals are due to the existence of individual unilateral administrative acts of public authorities issued by means of abuse of power, under their prior approval, notifies the court of contentious administrative with jurisdiction over the domicile of the natural person or of the injured legal person. The petitioner acquires de jure the capacity of plaintiff, and he shall be summoned in this capacity."*

*In what concerns the territorial jurisdiction regulated by Law no. 554/2004 there are exceptions provided by special laws, such as: Competition Law no. 21/1996*[16]*, which in art. 19 para. (7) stipulates the special jurisdiction of the Court of Appeal Bucharest in what concerns the legality control of the decisions of the Competition Council; G.E.O. no. 194/2002*[17] *on the regime of foreigners in Romania, approved by Law no. 357/2003*[18]*, which provides the exclusive jurisdiction of the Court of Appeal Bucharest in responding to the refusal to grant the right of long-term residence in Romania [art. 74 para. (3)]"*[19]. All these derogations remain in force.

In what concerns the amendments undergone by "*article 13 of the Law of the contentious administrative, we note that this regulates a series of measures on the summoning of the parties and the preparation of judgment, by derogatory regulations or, as the case may be, by supplementing those referred to in the Code of civil procedure (art. 153, art. 201, art. 202, art. 203)*."[20]

In the absence of an express derogatory provision, art. 13 of Law no. 554/2004 must be interpreted and applied in connection with the provisions of art. 200 of the New Code of Civil Procedure, therefore, upon the receipt of the petition, the panel to which the case was assigned follows the procedure for verifying and adjusting the petition.

As soon as the judge notes the observance of the terms provided by the law for the sue petition, the judge orders, by resolution, its communication to the defendant, by notifying the defendant that he will be bound to file statement of defense, under the terms provided by art. 201 para. (1) of the New Code of Civil Procedure, as well as the obligations arising from the provisions of art. 13 of Law no. 554/2004.

At the same time, the correlation of art. 13 with art. 17 para. (1) of Law no. 554/2004, in its new wording, *leads to the conclusion that the filing of the answer to the statement of defense is not mandatory in contentious administrative, the first hearing being set in such a way that at least 15 days have passed since the date of the communication of the statement of defense.*

Modifications were also brought to art. 14, in terms of the court proceedings, in order to ensure the urgency of judging the suspension petition. Art. 14 has also suffered significant amendment in 2007. "*By means of the amendments brought by Law no. 262/2007, the wording of art. 14 in connection with the suspension of the execution of the act was clearer. Therefore, according to para. (1), in justified cases and for the prevention of imminent damage, after notifying (not at the same time with the notification, as provided prior to the amendment) under the terms of art. 7 of the public authority which issued the act or of the hierarchically superior authority, the injured person can request the competent court of law to order the suspension of the execution of the unilateral administrative act until the decision of the court of first instance. Furthermore, the supplementation brought by Law no. 262/2007 is also pertinent, namely, if the injured person fails to file action in annulment within 60 days, the suspension ceases de jure and without any formality*.[21] Therefore, "*the petition is urgently judged and especially, by summoning the parties, and, in order to ensure the urgent nature of the procedure, art. 14 para. (2), as amended by Law no. 212/2018, provided expressly the exception from the provisions of art. 200 and art. 201 of the New Code of Civil Procedure, the prior stages of verifying and adjusting the petition not being applicable in this field.*

*The content of the special regulation provides that as soon as the judge was assigned the suspension of execution, the judge must set the first hearing and, at the same time, to order the communication of the petition to the defendant, by making him aware of the obligation to file statement of defense, at least 3 days before the hearing.*

*The plaintiff shall acknowledge the content of the statement of defense filed with the case, but, according to the complexity of the case, in order to ensure the fulfillment of the right to a fair trial, the court can grant a new hearing in case the plaintiff requests the postponement in order to take note of the content of the statement of defense."*[22]

Art. 16 of Law no. 554/2004 has often raised discussions about the availability principle. Therefore, in case of a trial in contentious administrative, the following circumstance must be taken into account "*the administrative law is a branch of public law, therefore,*

[16] Competition Law no. 21/1996 republished in the Official Journal, Part I no. 153 of February 29th, 2016

[17] Emergency Ordinance no. 194/2002 on the regime of foreigners in Romania, republished in the Official Journal Part I no. 421 of June 5th, 2008

[18] Law no. 357/2003 for the approval of Government Emergency Ordinance no. 194/2002 on the regime of foreigners in Romania, published in the Official Journal, Part I no. 537 of July 25th, 2003

[19] See in this respect, Gabriela Bogasiu – *Legea Contenciosului Administrativ Comentata si adnotata*,*op. cit*, pp 353-354

[20] See in this respect, Gabriela Bogasiu – *Legea Contenciosului Administrativ Comentata si adnotata*, *op. cit*, page 391

[21] See in this respect Rodica Narcisa Petrescu, *Drept administrativ*, Hamangiu Publishing House, 2009, pp. 495-496

[22] See in this respect, Gabriela Bogasiu – Legea Contenciosului Administrativ Comentata si adnotata, op. cit, pp. 417-418

*on the one hand, in case of a substantial administrative law report, the right, legitimate interests and obligations of private entities are always balanced with public interest, and, on the other hand, the parties are in a position of legal inequality. This inequality should not be reflected in the procedural plan, by ignoring the "equality of arms" principle, because the essence of the contentious administrative is precisely the protection of private entities against the abuses of the administration."*[23]

*"The new content of art. 16, as amended by Law no. 212/2018, takes almost literally the corresponding provision of the Civil Procedure Code, thus having the capacity to end disputes in addressing the question of compatibility and correlation of the special rule with the general procedural and civil regulation."*[24]

In what concerns the remedy, "*in contentious administrative the court of first instance decisions cannot be appealed by means of appeal, the only possible remedy being the second appeal*.

*The special regulation referred to in Law no. 554/2004 remained applicable even after the enforcement of the Code of civil procedure, situation expressly regulated by art. 7 para. (3) of Law no. 76/2012*[25]*, according to which in the field of the contentious administrative and fiscal, including in the field of asylum, the provisions of para. (1) and (2) of the same article, quoted in section Legislation are not applicable.*

*It was decided in the unitary case law of the Division of contentious administrative and fiscal within the High Court of Cassation and Justice that in cases where the Code of civil procedure provides the appeal of judgments with appeal (e.g. presidential ordinance), in contentious administrative, the remedy that can be exercised is the second appeal, by applying art. 28 of Law no. 554/2004, which enables the specialized court to check the compatibility of the general procedural and civil regulations with the specifics of the administrative law reports."*[26]

The second appeal grounds, the other terms for the exercise of the remedy and court procedure are those regulated by the Code of civil procedure, except the solutions pronounced by the court of contentious administrative, in respect of which the law derogates partially from the rules provided by art. 497 and art. 498 of the New Code of Civil Procedure.

We have to outline that the second appeal in contentious administrative does not have the same meaning as in civil proceedings, and the court will behave completely differently.

## Conclusions:

This study aimed to reveal that the amendments undergone in 2018 by Law no. 554/2004 can be analyzed from various perspectives. There are some changes that definitely have a beneficial impact (i.e. raising the ceiling in terms of shared jurisdiction between tribunal/court of appeal for fiscal litigations to RON 3,000,000) but there are also amendments with negative impact. Certainly, the impact of these amendments cannot be yet quantified, either in what concerns the litigant, or in what concerns the courts of law. We believe, however that any amendment should be made in conjunction with the meaning of the regulations (i.e. it makes no sense to divide the jurisdiction of the courts of law in the field of the administrative contracts).

The regulation of the contentious administrative is ultimately a specialized one and, therefore, the whole issue arising from this regulation should have been left to the competence of the specialized courts.

Notwithstanding, we will see in the future how the new vision brought by the lawmaker will be reflected in the judicial practice and we will continue the analysis started by means of this study.

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[23] See in this respect, Gabriela Bogasiu – Legea Contenciosului Administrativ Comentata si adnotata, op. cit, page 451

[24] See in this respect, Gabriela Bogasiu – Legea Contenciosului Administrativ Comentata si adnotata, op. cit, page 453

[25] Law no. 76/2012 for the application of Law no. 134/2010 on the Code of civil procedure published in the Official Journal, Part I no. 365 of May 30th, 2012

[26] See in this respect, Gabriela Bogasiu – Legea Contenciosului Administrativ Comentata si adnotata, op. cit, pp 549-550

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# FAMILY - CONSTITUTIONAL, LEGAL, SOCIAL AND HUMAN PERSPECTIVE

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**Abstract**

*The idea of family represents a concept almost as old as law. The sense that we give to family is oscillating between legal definitions and social and human concepts. The year of 2018 brought to the attention of all a natural question: how can we define family from the constitutional, legal and human perspective? The organization of a referendum by the Romanian authorities in what concerns the redefinition of the family in the Constitution brought great controversies. By starting from this legal action (the referendum), we are trying to analyze, by means of it, what does this old, but at the same time new concept, mean: the family.*

**Keywords:** *family, referendum, legislative regulation, social impact, husband, wife, children*

## 1. Introduction

The family is an institution with old roots, the family existed before the state, we cannot conceive mankind without the notion of family. Therefore, we wonder why this subject is so topical?

2018 brought this institution to the attention of Romanians, in an unexpected and surprising way.

A referendum was organized on October 6th and 7th, 2018 and the question to which the voters were called to answer was: 'Do you agree with the law on revising the Constitution of Romania in the form adopted by the Parliament?' It should be mention that the decision of the Legislative aimed the revision of art. 48 of the Constitution, meaning that the family is founded on the marriage between a man and a woman and not between spouses, as currently governed by the Constitution.

The new wording of art. 48 para. 1 of the Constitution should be reformulated: 'The family is founded on the freely consented marriage of the spouses, their full equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children.'

Statistically speaking, 21.10% of the population voted in the referendum for the redefinition of the family in the Constitution, and from the total of votes, 91.56 were 'YES', 6.47% were 'NO', and the rest were null.

Out of the 18,279,011 voters, only 3,857,308 came in order to express their vote.

The referendum would have been valid if the turnout had been 30%, and 25% of the votes had been valid votes.

So, here is the real impact of this issue in Romania in 2018, according to actual data.

The scope of the referendum was that the constitutional text explicitly provided that family is the union between a man and a woman, by removing words 'between spouses', which could have led to confusions, by considering that spouses may also be persons of the same sex.

Notwithstanding, it should have not been disregarded that the Civil Code expressly provided, as we shall see below, on the definition of spouses as the man and the woman united by marriage.

However, due to the fact the Constitution is the fundamental law of the state, and Civil Code has organic law value, inferior to the Constitution as legal power, it was considered that the notions must be correlated, thus amending the constitutional text.

This is why the defenders of the traditional family opened Pandora' box.

However, the topic was not of interest for the Romanian population, which was clearly proved by the poor turnout, despite the propaganda made in religious media.

Without supporting any of the groups, the topic is worth analyzing.

We are in 2018, the year of the referendum, 21st century, when the society faces two realities that cannot be ignored: same-sex couples, whom other countries granted not only the freedom to marry, but also to have children and single-parent families, a growing phenomenon even in our country.

Faced with these realities, the following natural question arises: was the return to traditional formulas required or should we look to the future?

## 2. Family: parliamentary debates

First of all, we would like to present some of the opinions of the members of Parliament regarding the law on revising the Constitution.

Therefore, the senators had pro and con opinions in the debates on the Constitution revision initiative.

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Şerban Nicolae (PSD) argued that every child has the right to grow up in a family consisting of a mother and a father, some liberals backed the project, and USR accused PSD of campaigning.

'There is undoubtedly a religious dimension and a rational one. I have identified the religious dimension in what comes from the individuals' understanding. Procreation can only be done by a man and woman. Three billion man without a woman cannot procreate. 4 billion women without a man cannot procreate. This is a natural law. I believe there is God and he has a creative role. There is a religious dimension. I believe we have the obligation to give a vote that respects what any human being understands by family and marriage. I believe life is the result of a natural process that cannot be questioned. I would like to say a few words about the rational dimension. I believe that every child has the right to grow up in a family consisting of a mother and a father. I do not believe that the first word of every child is by accident 'mother' – the person who he feels the most attached to', Şerban Nicolae stated in the plenary of the Parliament. PSD Senator argued that current phrase of the Constitution, which stated the word 'spouses', emphasized the freely expressed consent, because marriages of post-war period were concluded of interests, by agreements, and that could not be called 'family'.

'For those who do not know, the current phrase taken from the Family Code emphasized the freely expressed consent. The freely agreed marriage, because in the post-war period, in the Romanian society, marriages were still contracted by agreements concluded between parents or in various other forms, and therefore, there was a need for a freely expressed consent, which did not mean marriage was the basis of the family. We are in the situation to discuss another aspect, now there is no question of free consent', Şerban Nicolae added. USR Senator, Vlad Alexandrescu, declared in the plenary, during the debates on the revising of the Constitution for the definition of the family, that family and traditions do not matter for senators who support this modification, but they 'are only campaigning by taking advantage of the Referendum'.

'For USR it is clear that neither the family nor the traditions matter to you, but only the idea of campaigning by taking advantage of the referendum. (...) You have postponed it so many times and decided to vote it now, in order to distract people from the justice laws, from the Criminal Codes. (...) A vote against is not a vote against family. Does PSD really want a referendum on traditional values? What if we organize a referendum on traditional values? Let's organize a referendum in order for those who are criminally convicted to stop holding public functions, for allocating 6% of the GDP for Education, for removing plagiarism. Do you have the courage to ask Romanians what do they think about this? No, you want a useless referendum', USR Senator, Vlad Alexandrescu stated in the plenary.

ALDE Senator, Daniel Zamfir, said that such a draft law cannot be imposed on the senators and that they cannot be told how to vote. 'I strongly believe that this is not a draft law that any parliamentary group should discuss, more precisely to establish how to vote it. It is a draft law on which the senators must not be told how to vote. (...) ALDE has never influenced and will not influence the vote of any member of Parliament. Personally, I can say that I will vote as my conscience tells me'. PNL Senator, Nicoleta Pauliuc, announced she would vote in favor of adopting citizens' initiative, because 'this is a vote for keeping tradition', and PNL supports the stopping of demographic decline.

'I chose to vote today for supporting citizens' initiative. My vote is for keeping tradition. PNL wants to stop demographic decline, which can be achieved by two main ways, including supporting natality. It is not necessary to politicize the desire of over three million Romanians, Pauliuc said from the tribune of the Senate plenary. The leader of the UDMR Senate group, Cseke Atilla, said that there were things that had to be clarified during the debates, the amendment marking an equal sign between the notion of family and marriage.

'If you need a simple sentence on the proposed text, this is a text which is not perfect, but it is better than the current one. The UDMR Senate group analyzed the proposed text and all UDMR Senators agree with the definition of marriage provided that it is freely consented and contracted between a man and a woman. However, there are certain shortages; In some way, the term of family and marriage are put on an equal footing, which is wrong. They tried to induce the idea that if you are not married, you do not have a family. If a couple lives together and has children, is this not a family? It was on this occasion that these situations should be regulated by simple sentences at the constitutional level. Such things could be developed by organic laws. This did not happen, therefore, UDMR Senators will vote as their conscience tell them and they will say the following: We all agree with the contracting of the marriage between a man and a woman. Some will vote for and some will refrain from voting', the leader of UDMR Senate group, Cseke Atilla declared.

Therefore, here is the political dimension of this approach. Notwithstanding, this political dimension should have taken into account the legislative regulations that we will analyze above and from the analysis of which can be concluded that, in fact, the approach remains only a political one.

## 3. Family: current legal regulation

In addition to the text of art. 48 of the Constitution, already quoted by us, the detailed regulation of the notion of family is found in the Civil Code.

Therefore, art. 258 provides as follows: 'Family. (1) The family is founded on the freely consented

marriage of the spouses, their full equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children.

(2) The family is entitled to protection granted by the society and the state.

(3) The state shall be bound to support, by economic and social measures, the conclusion of marriage, as well as the development and consolidation of family.

(4) For the purpose of this code, spouses shall mean the man and the woman united by marriage.

Family is the natural and fundamental group unit of the society. It is a form of social relations between people connected by marriage or kinship[1], a fundamental social institution found in all societies, even if its particular forms differ substantially from one place to another[2].

In legal terms, family represents the group of persons among whom there are rights and obligations that arise from marriage, kinship, and other relations assimilated to family relationships[3].

The sociological and legal notion of family usually concur, overlap, however, as we will show in this study, the phenomenon of single-parent families has increased, which has led to many approaches of the concept of 'family'.

Another example where the stricto sensu notion of family ceases occurs in case of the dissolution of marriage by divorce, when relationships between spouses, 'in sociologic terms, cease, because there is no longer a community of life and interests between them. However, certain rights and obligations, such as family relationships in a legal sense, continue to exist - for example, those relating to maintenance, right to name, common goods, unless they divided at the time of the dissolution of marriage."[4]

In a comprehensive definition, family is the social community by means of which spouses and their children build a life together, by being united by their biological, economic, psychological, spiritual relationships[5].

How can we start a family? We go back to the traditional concepts, in connection with the legal ones.

'The first principle enshrined in para. (1) is *the principle of freely consented marriage.* The principle is enshrined both internationally, in art. 16 of the Universal Declaration of Human Rights[6], art. 12 of the European Convention on Human Rights and Fundamental Freedoms[7], and nationally, not only in para. (1) of the regulation, but also in the Constitution, which, in art. 48 para. (1) provides that family is founded on the freely consented marriage of the spouses and in art. 259 para. (1) NCC, which provides that family is based on the freely consented marriage between man and woman.

*Stricto sensu*, this principle of constitutional value means that the concordant will of the future spouses is the only subjective, relevant and indispensable factor for the conclusion of the marriage. The agreement or opposition of the parties or of other persons do not have legal connotations. The freely accepted consent of marriage means that there are no privileges or discrimination of social, racial, ethnic, religious nature in the exercise of the fundamental right of any person to marry and to found a family.

The second principle enshrined by para. (1), is *the principle of equality of rights between man and woman*. Equality between man and woman is enshrined both in terms of patrimonial and personal relationships between spouses, and between parents and children.

The equality of woman with man in different activities is provided by certain international acts. Therefore, according to art. 16 para. (1) of the Universal Declaration of Human Rights "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution". Furthermore, according to art. 3 of the International Covenant on Economic, Social and Cultural Rights[8]: 'the States Parties to the present Covenant undertake to ensure the equal right of men and women to enjoyment of all economic, social and cultural rights set forth in the present Covenant'.

Once the marriage is concluded, the spouses have equal rights and duties, both in what concerns the relations between them and their relations with their minor children; together they must ensure their raising and education'[9]. In the relationship between spouses, the rights and duties of each, having the same content, are complementary and have only one purpose: the common interest[10].

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[2] R. Stark, *Sociology*, edition 3, Wadsworth Publishing Company, Belmont, California, 1989, p. 372; S.M. Cretney, *Principles of Family Law*, Sweet&Maxwell, London, 1974, p.3;

[3] I.P Filipescu, A.I. Filipescu, *Tratat de dreptul familiei*, ed. VIII revised and supplemented. Universul Juridic Publishing House, Bucharest, 2006, p.12;

[4] I.P Filipescu, A.I. Filipescu, *Tratat 2006*, p.13

[5] A. Stanoiu, M.Voinea, *Sociologia familiei*, Typography of the University of Bucharest, Bucharest, 1985, p.6; for definitions on family, see also B.D. Moloman, *Casatoria civila si religioasa in dreptul roman*, Universul Juridic Publishing House, Bucharest, 2009, p. 13-20;

[6] Adopted by the United Nations General Assembly on December 10th, 1948;

[7] Signed on November 4th, 1950, ratified by Romania by Law no. 30/1994, published in Official Journal no. 135/1994;

[8] Adopted by the United Nations General Assembly on December 16th, 1966, ratified by Romania by Decree no. 212/1974, Official Bulletin no. 146/1974;

[9] Carmen Tamara Ungureanu, Mădălina Afrăsinie and others, *Noul Cod Civil, Comentarii, doctrina si jurisprudenta Vol 1*, Hamangiu Publishing House 2012, p. 332.

[10] E. Florian, *Dreptul familiei*, Limes Publishing House, Cluj-Napoca, 2003, p. 20;

Equality between man and woman does not exclude the right of women to a protection regime, as do young people, when social reasons impose such measures[11].

The third principle enshrined by para. (2), is *the principle of family protection*. The family is protected not only by the state but also by society in general, the right to protection being constitutionally enshrined by art. 26 para. (1). Furthermore, art. 8 of the European Convention regulates the right to respect for private and family life. The respect for private and family life entails the obligation of the authorities to protect family life and, at the same time, the obligation to refrain from any arbitrary interference in it. In the light of the European Court case law, the protection of family life concerns the existent family life, formed after the conclusion of the marriage, and not the family life which is at the planning stage[12].

In connection with the right to family protection, para. (3) of the regulation establishes the obligation of the state to support the conclusion, development and consolidation of marriage. The support can be materialized by means of various economic and social measures. One example would be state allowance for family support. This is another controversial topic, are these allowances sufficient resources or at least a real point of financial support? These allowances should help children, at least in order to ensure a minimal support of the educational process, but the amounts provided are insignificant.

'Law no. 217/2003 for preventing and combating domestic violence was also adopted in order to protect and support family, to develop and strengthen family solidarity, based on friendship, affection and moral and material support of family members, which is a national interest goal.

The principle of marriage and family protection is provided by various international instruments: The Universal Declaration of Human Rights provides in art. 16 that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the state'; The International Covenant on Economic, Social and Cultural Rights provides in art. 10 para. (1) that 'the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children'; The International Covenant on Economic, Social and Cultural Rights[13] provides in art. 23 para. (1) that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'; the European Convention on Human Rights establishes in art. 8 the right to respect for private and family life.'[14]

Furthermore, for the purpose of this study, we have to take into account the provisions of **Art. 259. of the Civil Code: Marriage**. *(1) Marriage is the freely consented union between a man and a woman, concluded under the law.*

*(2) The man and the woman have the right to marry in order to found a family.*

*(3) The religious celebration of marriage can only be performed after the conclusion of the civil marriage.*

*(4) The conditions for the termination and the nullity of the marriage are set out in this Code.*

*(5) The marriage ceases by the death of one of the spouses or if the court declares the death of one of the spouses.*

*(6) Marriage can be terminated by divorce, under the terms of the law.*

'Paragraph (1) of this regulation defines marriage as the union between two persons of different sex, founded on their free consent, under the fulfillment of substantive and formal terms required by the law'[15].

The definition of the marriage reveals *its characteristics*: **a)** marriage is *the union between a man and a woman*; the union is established by the consent of the persons who join in marriage and, once achieved, it is governed by the legal regulations; **b)** marriage is freely consented, meaning that both spouses express their consent freely, based on mutual affection between them; **c)** marriage is *monogamous*, this feature naturally deriving from the foundation of marriage, namely mutual affection of spouses; the exclusive nature of love entails monogamy; a person can only be married with one person of opposite sex at a time; the legislation in force punishes bigamy; **d)** marriage is concluded under the terms of the law; we consider it has a *solemn* nature, because it is concluded in a certain place, before a state authority, at a date established in advance; **e)** marriage has a *civil* nature, its conclusion and registration being of the exclusive competence of state authority; **f)** marriage is concluded for lifetime; the relationship of marriage is meant to last a lifetime; **g)** marriage is based on full *equality between man and woman*; this equality is manifested both in the relationship between spouses and towards children; the equality between man and woman goes beyond the sphere of family relationships, thus existing in all areas of social life; **h)** marriage is concluded for the *purpose of starting a family*; marriage is the basis of the family; when we deal with a marriage completed for a purpose other than the foundation of a family, we are in the

[11] Tr. Ionascu, *Egalitatea conditiei juridice a sotilor*, in L.P. no. 10/1958, p. 105-106;

[12] ECHR., *Johnson and Others v. Ireland, December 18th, 1986*, www.echr.coe.int;

[13] Adopted by the United Nations General Assembly on December 16th, 1966, ratified by Romania by Decree no. 212/1974, Official Bulletin no. 146/1974;

[14] Carmen Tamara Ungureanu, Mădălina Afrăsinie and others, *Noul Cod Civil, Comentarii, doctrina si jurisprudenta Vol 1*, Hamangiu Publishing House 2012, p. 333

[15] Carmen Tamara Ungureanu, Mădălina Afrăsinie and others, *Noul Cod Civil, Comentarii, doctrina si jurisprudenta Vol 1*, Hamangiu Publishing House 2012, p. 334

presence of a fictitious marriage, which is null and void[16].

*'The right to marry* entails the freedom of choice between celibacy and marriage'[17].

The right to start a family includes in its content the right to have children, so to procreate (including by using artificial fertilization techniques, given the progress in the field of the medically assisted procreation) and the right to adopt children[18].

*'The scope of marriage* is stated by paragraph (2) of the analyzed wording, namely the founding of a family. Any marriage contracted for any other purpose than that of founding a family is a fictitious marriage, null and void. It does not matter if both spouses or only one of them pursue a purpose other than that of starting a family, such as, for example, getting privileges (for example, the marriage contracted by a graduate of the theological institute to obtain a parish).

Paragraph (3) establishes the obligation of civil marriage and the optional nature of religious marriage, which can only be celebrated after the conclusion of civil marriage, the wording being taken over from the provisions of art. 48 para. (2) of the Constitution.

Marriage has a *perpetual nature*, it is contracted for lifetime and can cease in case of the death of one of the spouses (either physically found or declared by the court) or the dissolution of marriage can be performed by divorce. Marriage cannot be affected by any term or condition.

The right to marry is regulated by art.16 of the Universal Declaration of Human Rights, according to which: '1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. 2. Marriage shall be entered into only with the free and full consent of the intending spouses. 3 The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. This right is also regulated by the International Covenant on Civil and Political Rights, as well as by art. 12 of the European Convention on Human Rights and Fundamental Freedoms, according to which 'men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right"[19].

Although art. 12 of the European Convention is entitled 'Right to marry', its wording seems like providing two different rights: the right to marry and the right to found a family. Such an interpretation occurred from the use of conjugation "and" in the final part of conventional regulation, which uses the phrase "exercising this right', referring to the founding of a family[20].

In terms of the law applicable to marriage in private international law relations, we distinguish between substantive and formal conditions required for the valid contracting of marriage. The *substantive conditions* are governed by the national law of each of the future spouses at the time of the marriage, according to art. 2586 NCC. Therefore, if a marriage is contracted abroad between Romanian citizens, the Romanian law shall be applicable; if a marriage is contracted in our country between foreign citizens, their national law shall be applicable; if a marriage is contracted abroad between a foreign citizen and a Romanian citizen, each of the future spouses shall be subject, in what concerns marriage, to his/her national law; if a marriage is contracted in our country between a Romanian citizen and a foreign citizen, the national law of each of the spouses shall be applicable; if the national law of the foreign citizen is aware of an impediment to marriage which, according to the Romanian law, is incompatible with the freedom to contract a marriage, this impediment shall not apply, provided that one of the spouses is a Romanian citizen and the marriage is contracted on the territory of our country; if a marriage is concluded abroad between a Romanian citizen and a stateless person (person without citizenship), the law of the country of domicile shall apply for the latter, and, in the lack of it, the law of the country of residence, while the Romanian citizen shall be subject to Romanian law; if a marriage is concluded in our country between a Romanian citizen and a stateless person, the Romanian law shall apply for the latter if he/she has domicile in Romania, and the Romanian citizen shall be subject to the Romanian law; if a marriage is concluded in our country between two stateless persons, each of them shall be subject to the law of the country of domicile or residence, and if the domicile or residence of the stateless persons is in Romania, the Romanian law shall be applicable[21]. 'The *formal conditions* shall be governed by the law of the state on the territory of which the marriage is celebrated. In case the marriage is concluded abroad by a Romanian citizen, in front of the diplomatic or consular agent of Romania in the respective state, the marriage shall be subject to the formalities provided by the Romanian law.'[22]

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[16] I.P. Filipescu, A.I. Filipescu, *Tratat*, 2006, p. 26;

[17] Carmen Tamara Ungureanu, Mădălina Afrăsinie and others, *Noul Cod Civil, Comentarii, doctrina si jurisprudenta Vol 1*, Hamangiu Publishing House 2012, p. 335

[18] C. Birsan, *Conventia europeana a drepturilor omului. Comentariu pe articole, vol. I, Drepturi si libertati,* All Beck Publishing House, Bucharest, 2005, p. 856;

[19] Carmen Tamara Ungureanu, Mădălina Afrăsinie and others, *Noul Cod Civil, Comentarii, doctrina si jurisprudenta Vol 1*, Hamangiu Publishing House 2012, p. 335-336

[20] C. Nicolescu, *Continutul dreptului la casatorie si la intemeierea unei familii reflectat in jurisprudenta Curtii Europene a Drepturilor Omulu*i, in Dreptul nr. 3/2009, p.52

[21] I.P Filipescu, A.I Filipescu, *Tratat de drept international privat*, revised and supplemented edition/, Universul Juridic Publishing House, Bucharest, 2005, p. 395;

[22] Carmen Tamara Ungureanu, Mădălina Afrăsinie and others, *Noul Cod Civil, Comentarii, doctrina si jurisprudenta Vol 1*, Hamangiu Publishing House 2012, p. 336

As a conclusion of the aforementioned, 'for the purpose of the New Civil Code, the term 'spouses' designates the man and the woman united by marriage. Therefore, only persons of different sex, married, can have the capacity of spouses, not those who cohabit together, without being united by marriage.'

According to art. 5 para. (2) of Law no. 17/2001, the provisions of the New Civil Code are also applicable to the future effects of legal situations born prior to its entry into force derived from marriage, parentage, adoption and legal obligation of maintenance, if such legal situations subsist after its entry into force.'[23]

This is why, in relation to the entire applicable legislation, we consider that the initiation of a referendum whereby terms 'man' and 'woman' explicitly appear in the Constitution, as persons entitled to found a family, was totally inappropriate.

The legislation already covers this topic, such approach being useless. Eventually, the action entailed only organizational costs, with no ending.

The population showed no interest in this topic, the approach being already imprinted in human patterns. A part of the population appreciates religious concepts and does not conceive another pattern of family than the traditional one: woman/man. In what concerns this part of the population, the approach could have meant at most a support granted to the church, the main promotor of this topic.

However, as already argued, the legislation covers more than satisfactorily the classic concept.

A second tendency that we have to consider is the European one. In many countries of the European Union, not to mention countries outside the European Union, marriage between same-sex persons is allowed.

I Romania, such an approach would entail not only the modification of the Constitution, but the modification of the entire related legislation, where family is regulated. The approach would be a great one and only at that point in time fervent discussions would occur between the groups of supporters.

Taking into account the current national mentality, we do not believe that the population is ready for such an approach. This is why, it is not included on the agenda of any political party and it is not a real subject of discussions.

The third approach should analyze single-parent families, a topic that we have already mentioned in this study.

What is single-parent family?

**Single-parent family** (*monoparental family*) is that type of family where children live only with one of the parents. This can happen as a consequence of the divorce, separation of parents, death of one of the parents, the adoption of a minor child by an adult or following the decision of a woman to give birth to a child without being married and without living with a man.

In Romania, as in many other countries of the world, in most single-parent families, the position of single-parent is held by the woman. When family becomes a single-parent one following divorce or separation of parents, the connections between the child and the parent with whom he does not live permanently tend to be interrupted in a very large number of cases.

The single-parent family is a type of family consisting of a parent and his/her child or children; group of persons in kinship relationship, resulted from direct parentage or adoption. It is often approached as a deviation from the nuclear family, made up of husband, wife, and their minor children.

Marriage is no longer the only way to legally found a family, but only the first element of a causal conglomerate: marriage followed by divorce, separation or death. The single-parent family can also be a consequence of undertaking the liability of children born outside marriage.

In this background, we should not lose sight of the share that these families start to have and the impact of such a type of family on society.

## Conclusions

This study emerged from a simple question: did the referendum organized in 2018 represent a must for the society?

By analyzing the arguments presented herein, the answer takes a clear shape. The referendum was not necessary from any point of view: in legal terms, the institution of family is extremely well regulated so that additional notes are not required. Currently, it is obvious that in Romania, family and marriage can only be concluded between a man and a woman. The constitutional wording, even if it does not define the term of 'spouses', it is construed together with the other applicable regulations, respectively articles of the Civil Code, which we have broadly commented.

From a sociological point of view, the approach appears as useless. The pattern of the notion of family is very well established in the conscience of the Romanian people, so that any change in regulating marriage between persons of the same sex would lead to extensive debates, supported only by a minority.

That is why the population showed no interest in this approach, which would have no purpose.

Therefore, after long and controversial parliamentary, political and mass-media debates, after organizing a referendum and after centralizing the results, the debated issues remain in their naturel core, as the lawmaker established them.

Despite this, certain realities which currently take shape in the society have also been debated.

Above all, family represents the love of the people towards those they choose to be together with and, later, towards their children. Perhaps this is the most important aspect that neither politicians nor the lawmaker should lose sight of.

[23] Carmen Tamara Ungureanu, Mădălina Afrăsinie and others, *Noul Cod Civil, Comentarii, doctrina si jurisprudenta Vol 1*, Hamangiu Publishing House 2012, p. 333

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# THE E-BIKE PATH: LEGAL APPROACH IN EUROPEAN UNION LAW

**Alina Mihaela CONEA***

**Abstract**

*Are there simple thinks that anyone can do and that can change our world? Some says that using bikes in our cities will make us healthy, more focused and smart, happy, living in cleaner environment, having safer roads and a lively urban life.*

*E-bikes are becoming more present in our cities and in our lives. One question is how the legal world is coping with new technologies and societal trends. A bicycle with a little e- is just a bike? According to European Union law, the answer is sometimes yes and sometimes no, since* ***the legal definition of e-bikes is not to be found, whatsoever, in the EU legal acts****. As compare to regular bicycles, electrical bicycles are within the scope of by Internal Market legislation. The present paper is concisely address the relevant legal acts applying to e-bikes, the terminology used, the rules governing the use of e-bikes and the ongoing debate related to insurance against civil liability in respect of the use of motor vehicles. E-cycling is seen as an integral part of the transport systems of the future.*

*This electrical bike legal insight can help us take a brief ride through some of the EU policies: transport, internal market, competition, health, energy and smart cities.*

**Keywords:** *e-bike, cycling, urban transport, new technologies, European policy.*

## 1. Introduction

The European cities are facing a complex set of challenges. 68% of the EU population lives in urban areas, a proportion that is growing as the urbanisation trend continues in Europe and worldwide[1]. As the European Commission points out, cities are facing ever greater social challenges in respect of the environment, transport and social cohesion[2]. One possible smart solution to this puzzle is the use of e-bikes. Studies proved that up to 51% of all logistics trips and 25% of commercial delivery trips in EU cities could be done by electric bicycles[3]. The future smart cities will bring together the demand and the supply of innovative solutions.

One question is how the legal world is coping with new technologies and societal trends. A minor illustration is the way European Union regulates this type of vehicle, the electrical bicycle.

The first aim of the paper is to identify the European Union law rules related to electrical bicycles. The paper address the relevant legal acts applying to e-bikes, the terminology used, the rules governing the use of e-bikes and the ongoing debate related to insurance against civil liability in respect of the use of motor vehicles.

The second aim is to point out the awareness of European Union institution over this topic which is apparent from diverse studies, soft law or programmatic acts.

## 2. Legislation

From the point of view of the Internal Market legislation, bicycles are non-harmonized products and are not covered by a particular EU legislation[4]. Bicycles are covered by the Mutual Recognition Regulation[5] and by the General Product Safety Directive[6]. The principle of mutual recognition states that products lawfully sold and marketed in one Member state, should also be allowed to be marketed in another Member state[7].

As compare to regular bicycles, electrical bicycles are within the scope of Internal Market legislation. The relevant legal acts applying are the Regulation on the approval and market surveillance of two- or three-wheel vehicles and quadricycles[8] and the

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[1] COM (2012) 4701 final, Brussels, 10.7.2012, Communication from the Commission Smart Cities and Communities - European Innovation Partnership.

[2] The Urban Agenda for the EU was officially established by the Pact of Amsterdam, agreed by the EU Ministers responsible for urban matters in May 2016.

[3] European Commission, Directorate-General for Mobility and Transport, The use of Environmentally Friendly Freight Vehicles, Non-binding guidance documents on urban logistics N° 5/6, December – 2017.

[4] Commission Staff Working Document Part 1: Evaluation of the Internal Market Legislation for Industrial Products /* SWD/2014/023 final, pag.207.

[5] Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC (Text with EEA relevance) OJ L 218, 13.8.2008, p. 21–29.

[6] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (Text with EEA relevance), OJ L 11, 15.1.2002, p. 4–17.

[7] Fuerea, Augustin, Dreptul Uniunii Europene. Principii, actiuni, libertati- Universul Juridic, Bucuresti, 2016.

[8] Regulation (EU) No 168/2013 of the European Parliament and of the Council of 15 January 2013 on the approval and market surveillance of two- or three-wheel vehicles and quadricycles.

directives on machinery[9], relating to electromagnetic compatibility[10], on batteries and accumulators[11], on waste electrical and electronic equipment[12] and on driving licences[13].

The Council of the EU, meeting in their Transport, Telecommunications and Energy informal configuration in October 2015 in Luxembourg, endorsed the 'Declaration on Cycling as a Climate-Friendly Transport Mode' and called upon the Commission to consider the following actions: integrate cycling into multimodal transport policy, including smart mobility, stressing the need to promote physical infrastructure and behavioural change programs and to Develop an EU level strategic document on cycling[14].

## 3. Terminology

Electric bicycle is a term, which covers two different concepts of vehicles with an auxiliary electric motor[15]: 1) cycles equipped with an auxiliary motor that cannot be exclusively propelled by that motor. Only when the cyclist pedals, does the motor assist. These vehicles are generally called, by the cycle industry, pedelecs, and 2) cycles equipped with an auxiliary electric motor that can be exclusively propelled by that motor. The cyclist is not necessarily required to pedal. These vehicles are generally called e-bikes[16].

The terms pedelecs and e-bikes are not to be found having a clear and constant meaning in the EU legislation.

The legal definition of e-bikes is not to be found, whatsoever, in the EU legal acts. It can only be implied, as admitted by the Commission in Implementing Regulation 2019/72 of 17 January 2019 imposing a definitive countervailing duty on imports of electric bicycles originating in the People's Republic of China: As bicycles are undisputedly the most common type of cycles, it is not surprising that the term e-bikes/electric bikes is generally used to refer to all types of electric cycles, in the investigation as well as in the market.[17]

A search on Eur-lex will show the use of the following indefinite terms in the legal acts of the European Union: pedelec[18], bicycles, e-bikes and pedelecs[19], powered cycles, two-wheel mopeds, powered two-wheel vehicles[20], electric power assisted cycles (or pedelecs), motor bikes[21], two- or three-wheel vehicles, fast e-bikes (speed pedelecs), electric bikes[22].

The issue is not without relevance as is obvious in the recent debates concerning the proposal for amending the Directive on insurance against civil liability in respect of the use of motor vehicles.

According to Regulation on the approval and market surveillance of two- or three-wheel vehicles and quadricycles (**Type-approval Regulation )**[23], L-category vehicles comprise powered *two-, three- and four-wheel vehicles* including powered cycles, two- and three-wheel mopeds, two and three-wheel motorcycles, motorcycles with side-cars, light and heavy on-road quads, and light and heavy quadri-mobiles.

The category *Light two-wheel powered vehicle* (L1e) cover the following two types:

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[9] Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC (recast) (Text with EEA relevance) OJ L 157, 9.6.2006, p. 24–86.

[10] Directive 2014/30/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to electromagnetic compatibility (recast) Text with EEA relevance OJ L 96, 29.3.2014, p. 79–106.

[11] Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC (Text with EEA relevance) OJ L 266, 26.9.2006, p. 1–14.

[12] Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE) Text with EEA relevance OJ L 197, 24.7.2012, p. 38–71.

[13] Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (Recast) (Text with EEA relevance) OJ L 403, 30.12.2006, p. 18–60.

[14] Informal meeting of EU ministers for Transport Luxembourg, October 7th, 2015, Declaration on Cycling as a climate friendly Transport Mode.

[15] PRESTO (Promoting Cycling for Everyone as a Daily Transport Mode) is a project of the EU's Intelligent Energy – Europe Programme granted by the Executive Agency for Competitiveness and Innovation (EACI), Give Cycling a Push, Implementation Fact Sheet, Electric Bicycles Legislation, 2012.
https://ec.europa.eu/energy/intelligent/projects/sites/iee-projects/files/projects/documents/presto_fact_sheet_legislation_en.pdf

[16] The European Cyclists' Federation, https://ecf.com/what-we-do/road-safety/electric-bicycle-pedelec-regulation.

[17] Commission Implementing Regulation (EU) 2019/72 of 17 January 2019 imposing a definitive countervailing duty on imports of electric bicycles originating in the People's Republic of China, C/2019/43, OJ L 16, 18.1.2019, p. 5–107.

[18] European Parliament resolution of 3 July 2013 on Road safety 2011-2020 — First milestones towards an injury strategy (2013/2670(RSP)), OJ C 75, 26.2.2016, p. 49–52.

[19] Prior notification of a concentration (Case M.8478 — Zukunft Ventures/Gustav Magenwirth/Brake Force One/Unicorn Energy/JV) — Candidate case for simplified procedure (Text with EEA relevance.), OJ C 393, 21.11.2017, p. 17–18.

[20] Regulation (EU) No 168/2013 of the European Parliament and of the Council of 15 January 2013 on the approval and market surveillance of two- or three-wheel vehicles and quadricycles (Text with EEA relevance)Text with EEA relevance.

[21] Council Regulation (EU) 2018/2070 of 20 December 2018 amending Regulation (EU) No 1388/2013 opening and providing for the management of autonomous tariff quotas of the Union for certain agricultural and industrial products, ST/13271/2018/INIT, OJ L 331, 28.12.2018, p. 197–209.

[22] Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/103/EC of the European Parliament and the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability, SWD/2018/247 final - 2018/0168 (COD).

[23] Regulation (EU) No 168/2013 of the European Parliament and of the Council of 15 January 2013 on the approval and market surveillance of two- or three-wheel vehicles and quadricycles.

*Powered cycle* (L1e-A vehicle) which are cycles designed to pedal equipped with an auxiliary propulsion with the primary aim to aid pedalling and output of auxiliary propulsion is cut off at a vehicle speed ≤ 25 km/h and output of auxiliary propulsion is cut off at a vehicle speed ≤ 25 km/h and a maximum continuous rated or net power ≤1000 W.

**The Type-approval Regulation does not apply to the** pedal cycles with pedal assistance which are equipped with an auxiliary electric motor having a maximum continuous rated power of less than or equal to 250 W, where the output of the motor is cut off when the cyclist stops pedalling and is otherwise progressively reduced and finally cut off before the vehicle speed reaches 25 km/h. Accordingly, this cycles will be treated as regular bicycles.

*Two-wheel moped* (L1e-B vehicle) which is any other vehicle of the L1e category that cannot be classified according to the criteria of a L1e-A vehicle , having a maximum design vehicle speed ≤ 45 km/h and maximum continuous rated or net power (1) ≤ 4 000 W.

So, to sum up, we could consider that there are **excluded to type-approval e-bike** (below 25 km/h and limited to 250 watts) and **type-approval e-bike** (*powered cycle* – below 25 km/h and between 250-1000 watts and *moped*- ≤ 45 km/h and ≤ 4 000 watts).

The term *pedelec* (Electrical Power Assisted Cycles- EPAC) is used in 1 EU legal act[24] as a synonym for *electrical bicycles* and, without a definition, in other various 18 EU documents.

In a confusing way, in some acts, the terms *e-bikes* and *pedelecs* are used as referred to different categories[25].

In transport literature[26] the term e-bike refers to electrically power-assisted bicycles with functioning pedals. The terms *pedelec* or *slow e-bike* will be used where the electric power output is limited to 250 watts, (available only when the rider places pressure on the pedals) and when the speed is below 25 km/h. Other e-bikes will be called *speed-pedelecs or fast e-bikes*.

## 4. Rules governing the use of e-bikes

There are rules governing the use of e-bikes that are, in part, harmonized at European Union level such is the driving licenses or insurance directive. Other, still are in competence of the member states. This kind of rules govern: helmet obligations, number plate, traffic code and age limits.

Romanian legislation states that while driving on public roads, drivers of mopeds and persons carried on them are required to wear an approved helmet[27].

Electric cycles in the type-approval are subject to the European harmonized Directive 2006/126 on driving licences. This imposes the AM driving licence for all two and three-wheel vehicles with a maximum design speed of more than 25 km/h but not more than 45 km/h. As a consequence, speed - pedelec riders (mopeds between 25hm/h and ≤ 45 km/h and ≤ 4 000 watts) must have an AM driving licence.

Licences granted for any category shall be valid for vehicles in category AM. However, for driving licences issued on its territory, a Member State may limit the equivalences for category AM to categories A1, A2 and A, if that Member State imposes a practical test as a condition for obtaining category AM.

The Court of Justice of European Union had the opportunity to interpret Article 13(2) of Directive 2006/126/EC on driving licences, in the case Costin Popescu v Guvernul României[28]. The Court concluded that the provisions of Directive 2006/126/EC must be interpreted as not precluding national legislation, adopted in order to transpose that directive into national law, which terminates the authorization to ride mopeds without holding a driving licence, the issue of which is subject to passing tests or examinations similar to those required for driving other motor vehicles.

## 5. Internal market -insurances

The European Commission proposed that *electric bikes (e-bikes)* have to be covered also by Directive 2009/103/EC of the European Parliament and the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles. The European Commission had argued that any vehicle with any type of motor in any traffic situation should be treated as a motor vehicle and its users mandated into taking out expensive motor vehicle insurance, even if they had other 3rd party insurance[29]

According to the definition of Directive 2009/103/EC 'vehicle' means any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled`.

The Commission points out that `the evaluation demonstrated that new types of motor vehicles, such as electric bikes (e-bikes), segways, electric scooters etc., already fall within the scope of the Directive as

[24] Commission Regulation (EU) No 512/2013 of 4 June 2013 amending Regulation (EC) No 88/97 on the authorization of the exemption of imports of certain bicycle parts originating in the People's Republic of China from the extension by Council Regulation (EC) No 71/97 of the anti-dumping duty imposed by Council Regulation (EEC) No 2474/93, OJ L 152, 5.6.2013, p. 1–4.

[25] European road safety European Parliament resolution of 27 September 2011 on European road safety 2011-2020 (2010/2235(INI).

[26] Santacreu, Alexandre, Cycling Safety Summary and Conclusions of the ITF Roundtable on Cycling Safety 29-30 January 2018, Paris International Transport Forum, OECD, Paris, https://www.itf-oecd.org/sites/default/files/docs/cycling-safety-roundtable-summary.pdf

[27] Art. 36(2) Ordonanța de urgență nr. 195/2002 privind circulația pe drumurile publice, Monitorul Oficial nr. 670 din 3 august 2006.

[28] Case C-632/15: Judgment of the Court (Fourth Chamber) of 26 April 2017 (request for a preliminary ruling from the Înalta Curte de Casație și Justiție — Romania) — Costin Popescu v Guvernul României and Others.

[29] https://ecf.com/news-and-events/news/european-parliament-officially-takes-its-position-exclude-pedelecs-mandatory

interpreted by the Court of Justice in its case-law`. The Annex 7 of the Proposal for amending Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles [30] specifies three judgements in particular, the *Vnuk* judgment of 2014, the *Rodrigues de Andrade* judgement of 2017, and the *Torreiro* judgement[31] of 2017.

The *Vnuk*[32] judgment concerned an accident involving a tractor on a private property in Slovenia, a farm. The CJEU ruled that "Article 3(1) of [the] Directive … must be interpreted as meaning that the concept of 'use of vehicles' in that article covers any use of a vehicle that is consistent with the normal function of that vehicle. That concept may therefore cover the manoeuvre of a tractor in the courtyard of a farm in order to bring the trailer attached to that tractor into a barn, as in the case in the main proceedings, which is a matter for the referring court to determine."

The *Rodrigues de Andrade*[33] judgement provided further clarifications. The case concerned a fatal accident that occurred in a vineyard involving a stationary tractor. The Court stated that the concept of 'use of vehicles' within the meaning of Article 3(1) of that directive covers any use of a vehicle as a means of transport.

The European Parliament decided in 1st reading that e-bikes are excluded from the scope of the directive, since they are "smaller and are therefore less likely to cause significant damage to persons or property than others [such as cars or trucks] are", and their inclusion "would also undermine the uptake of these vehicles and discourage innovation"[34]. According to European Cycle Federation, the draft report which European Parliament voted, uses type approval to define a motor vehicle within the context of the Directive. This then excludes pedal assisted bicycles with power less than 250 watts and with a motor cut off speed at 25 km/h. Speed - pedelecs will not be excluded as they are type approved[35].

According to Romanian law, Art.76(1) of Government Emergency Order No 195/2002 on the use of the public highway[36], `vehicles registered, with the exception of those with animal traction, traveling on public roads shall have compulsory insurance for civil liability in the event of damage to third parties caused by traffic accidents, in accordance with the law`.

Art. 9(1) of Government Emergency Order No 195/2002 on the use of the public highway[37] , states that ` in order to be registered, registered or admitted into circulation, motor vehicles and agricultural or forestry tractors trailers and trams must be type-approved according to the law`. According to Art.12, `In order to travel on public roads, vehicles, with the exception of those drawn or pushed by hand and by bicycles, must be registered, as appropriate, and bear plates bearing the registration or registration number, with the form, size and content prescribed by the standards in force`.

The *mopeds* (between 25hm/h and ≤ 45 km/h and ≤ 4 000 watts) will fall, accordingly, in this category. By the other hand, *e-bike excluded to type-approval (*below 25 km/h and limited to 250 watts) and *powered cycle type-approval e-bike* (below 25 km/h and between 250-1000 watts) cannot be registered according to Romanian law, and therefore are not subject to insurance.

## 6. Health

The EU institutions indicates the health benefits of using bikes. The Council affirms that cycling benefits society. Children who cycle to school concentrate better than those who are dropped off. Employees who cycle to work claim fewer paid sick days. The health benefits of switching from car commuting to bicycle commuting amply outweigh the safety risks.[38] The Commission recognize the health benefits of cycling[39].

Physical inactivity is identified as the fourth leading risk factor for global mortality, representing six per cent of deaths globally. Levels of physical inactivity are rising in many countries. Across the globe, the percentage of children that walk or cycle to school has decreased from 82% to 14% within the last 30 years. International groups, including the World Health Organization, have thus recommended policy changes to combat physical inactivity. In addition, there is a growing recognition that reduced levels of physical activity can partly be explained by the dominance of the private car as a mode of transport in

[30] Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Directive Of The European Parliament And Of The Council amending Directive 2009/103/EC of the European Parliament and the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability, SWD/2018/247 final - 2018/0168 (COD).

[31] Judgment of the Court (Sixth Chamber) of 20 December 2017, José Luís Núñez Torreiro v AIG Europe Limited, Sucursal en España and Unión Española de Entidades Aseguradoras y Reaseguradoras (Unespa), Case C-334/16, ECLI identifier: ECLI:EU:C:2017:1007.

[32] Judgment of the Court, 4 September 2014, Damijan Vnuk v Zavarovalnica Triglav , Case C 162/13, ECLI identifier: ECLI:EU:C:2014:2146

[33] Judgment of the Court (Grand Chamber) of 28 November 2017, Isabel Maria Pinheiro Vieira Rodrigues de Andrade and Fausto da Silva Rodrigues de Andrade v José Manuel Proença Salvador and Others, Case C-514/16, ECLI identifier: ECLI:EU:C:2017:908.

[34] T8-0110/2019, Decision by Parliament, 13/02/2019,1st reading/single reading, 2018/0168(COD) Motor Insurance Directive: compensation of victims of motor vehicle accidents, insurance conditions and cover, combatting uninsured driving.

[35] https://ecf.com/news-and-events/news/european-parliament-officially-takes-its-position-exclude-pedelecs-mandatory

[36] Ordonanța de urgență nr. 195/2002 privind circulația pe drumurile publice, Monitorul Oficial nr. 670 din 3 august 2006.

[37] Ordonanța de urgență nr. 195/2002 privind circulația pe drumurile publice, Monitorul Oficial nr. 670 din 3 august 2006.

[38] Informal meeting of EU ministers for Transport Luxembourg, October 7th, 2015, Declaration on Cycling as a climate friendly Transport Mode.

[39] https://ec.europa.eu/transport/themes/clean-transport-urban-transport/cycling_en

urban society, as well as the role it plays in inhibiting both walking and cycling.[40]

Internationally, transport policy makers and urban planners are interested in encouraging cycling, given the potential to simultaneously achieve a number of goals – including addressing congestion; encouraging a switch from more polluting modes and thereby reducing local air pollution and greenhouse gas emissions; and increasing physical activity and thereby addressing obesity and a range of other health issues. Electrically-assisted bikes are one tool that may help to achieve this goal[41].

Beside the health benefits associated with physical activity, cycling is silent and clean, and shifting from motorised travel to cycling can reduce congestion and greenhouse gas emissions, whilst offering an affordable and inclusive mobility option[42].

## 7. Smart city

The European Commission affirms that EU has developed a shared European vision of sustainable urban and territorial development. European cities should be places of advanced social progress and environmental regeneration, as well as places of attraction and engines of economic growth based on a holistic integrated approach in which all aspects of sustainability are taken into account[43].

The EU co-funded research project CycleLogistics estimated that up to 51% of all logistics trips and 25% of commercial delivery trips in EU cities could be done by e-bikes. The world's cities are facing a complex set of challenges related to urban mobility, which are predicted to worsen as the volume of traffic caused by commercial delivery services and private trips increases[44].

Many bikes produced today are hi-tech products. New, lightweight materials are being developed and tested that can be used in other areas as well. This is especially true for electric bikes and their innovative components like batteries and new power trains, which have made electro-mobility a reality in the EU. Currently, many more electric bikes than electric cars are sold in Europe. Cycling is also becoming more and more connected, using ICT for applications like route planning, public bike systems or GPS tracking. With these new services, cycling becomes an integral part of the transport systems of future smart cites.

E-velomobility, is as an example of active e-mobility with relatively high user uptake compared to other active modes of e-mobility. Compared to electric cars, e-bikes consume less energy, are a more affordable mode of transport and have potential health benefits. Compared to 'traditional' cycling, e-cycling might appeal to those not currently interested in cycling or encourage existing cyclists to cycle more. It becomes clear that increasing the uptake of e-velomobility would help towards multiple policy goals such as health, sustainable and active transport, and business innovation[45].

## Conclusion

Electrical bicycles are within the scope of Internal Market legislation and the most relevant act applying is the Regulation on the approval and market surveillance of two- or three-wheel vehicles and quadricycles. There are rules governing the use of e-bikes that are, in part, harmonized at European Union level such is the driving licenses or insurance directive. Other, still are in competence of the member states.

The legal definition of e-bikes is not to be found in the EU legal acts. There are irregular terms in the legal acts of the European Union: bicycles, e-bikes and pedelecs[46], powered cycles, two-wheel mopeds, powered two-wheel vehicles, electric power assisted cycles (or pedelecs), motor bikes, two- or three-wheel vehicles, fast e-bikes (speed pedelecs) or electric bikes.

Although, e-cycling is seen as an integral part of the transport systems of the future, we can observe a contrast between the unclear definitions of electrical bicycles in European Union law and the impact on the internal market and prospective advantages on future smart cities.

The law is trying to keep up with societal and market trends.

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# THE JURISPRUDENCE - BASIC CONCEPTS OF BEING A FORMAL AND CONSTITUTIONAL SOURCE OF LAW (I)

**Emilian CIONGARU***

**Abstract**

*The jurisprudence could be characterised as being a combination of previous but also completed situations in fact, previous but also consumed facts, which have been materialised by legal sentences or guidance decisions given by courts and competent bodies, through which the solution to the problems of law tried, becomes binding for the other lower courts in all similar cases which will be tried, in order to ensure a uniform and unitary interpretation and enforcement of the law throughout the territory of the country. In order to be able to characterise jurisprudence in Romanian law, in the sense of choosing between being or not being a formal source of law, it is firstly necessary to analyse the system, the whole current legal framework, including as regards the organization of the judicial system and of the courts. Romanian national law is characterised through Roman Germanic law as being a procedural law in which the judicial activity is carried out on the basis of strict rules, as is that of the judge, who has the duty to receive and settle any claim within the competence of the courts, according to the law and no judge may refuse to judge on the grounds that the law does not provide, is unclear or incomplete and, in the case in which a case cannot be settled neither on the basis of the law nor of customary practices, and in the absence of the latter, nor on the basis of legal provisions for similar situations, it shall be judged on the basis of the general principles of law, having regard to all its circumstances and taking into account the requirements of equity.*

**Keywords:** *jurisprudence; internal law; procedural law; source of law; justice.*

## 1. Introductory elements of the concept of *jurisprudence*

Romanian national law is characterised[1] through Roman Germanic law as being a procedural law in which the judicial activity is carried out on the basis of strict rules, as is that of the judge, who has the duty to receive and settle any claim within the competence of the courts, according to the law and no judge may refuse to judge on the grounds that the law does not provide, is unclear or incomplete and, in the case in which a case cannot be settled neither on the basis of the law nor of customary practices, and in the absence of the latter, nor on the basis of legal provisions for similar situations, it shall be judged on the basis of the general principles of law[2], having regard to all its circumstances and taking into account the requirements of equity. It is also prohibited for the judge to lay down generally compulsory provisions through the decisions they issue in cases which are subject to their judgement - *New Code of Civil Procedure, Art. 5, Chapter II, Fundamental Principles of the Civil Process*.

In classical law the concept of *jurisprudence* is known under the names of: *legal practice* or *judicial practice* or under that of *casuistry* and is defined in The General Dictionary of the Romanian language[3] as being *all the solutions given by courts with regard to legal issues*.

Under a strictly legal aspect[4] *jurisprudence* could be characterised as being *a combination of previous but also completed situations in fact, which have been materialised by legal sentences or guidance decisions given by courts and competent bodies, through which the solution to the problems of law tried, becomes binding for the other lower courts in all similar cases which will be tried, in order to ensure a uniform and unitary interpretation and enforcement of the law throughout the territory of the country.*

Therefore, *the decisions of courts do not have a binding force for other similar causes and therefore cannot be considered as legal precedents*, as is the situation in the Anglo-Saxon legal system, system which in fact is a creation of *jurisprudence*.

In other words, the prohibition provided by Roman Germanic law, which is applied in Romanian law, may not lead to decisions which become legal precedent and consequently, *do not receive the quality of formal sources of law, i.e. they cannot have binding force.*

However, in accordance with constitutional provisions (Romanian Constitution, Art. 126 para. (3): The High Court of Cassation and Justice ensures the unitary interpretation and application of the law by the other courts of law, according to its competence. Law No. 304/2004, Art. 16 para. (2): The High Court of

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[1] Emil Cernea, Emil Molcut, *Istoria statului si dreptului romanesc*, (Sansa Publishing House, Bucharest, 1991), 24.

[2] Anita M. Naschitz, *Teoria si practica in procesul de creare a dreptului*, (Academiei Publishing House, Bucharest, 1969), 127.

[3] Vasile Breban, *Dictionarul General al limbii romane*, (Stiintifica si Enciclopedica Publishing House, Bucharest, 1987), 548, jurisprudenta**,** jurisprudente, s.f. Din fr. jurisprudence, lat. iurisprudentia.

[4] Sache Neculaescu, *Introducere in dreptul civil*, (Lumina Lex Publishing House, Bucharest, 2001), 25.

Cassation and Justice ensures the unitary interpretation and application of the law by the other courts, according to its competence) which are the same as those of the Law on judicial organization, the High Court of Cassation and Justice is given competences which establish that through its jurisprudence, to improve the legislation, for the purpose of ensuring uniform interpretation and unitary and uniform enforcement of the law at the level of the entire system through the procedure of the appeal in the interest of law - New Code of Civil Procedure, Chapter I, Appeal in the Interest of the Law, Art. 516 et seq.

But in *the Anglo-saxon legal system* jurisprudence has completely different dimensions in the sense that judicial solutions constitute legal precedents which acquire force and applicability equivalent to the law, for both parties and the courts[5].

For this reason, the jurisprudence in this system is given the nature of *formal source of law* and also within this system, the judge is given wider prerogatives, therefore having a double task, both in respect to the enforcement of the law and in terms of its creation.

## 2. The importance of *jurisprudence* in the interpretation and enforcement of positive law

As regards the role and importance of jurisprudence in the interpretation and enforcement of positive law, it can be said that it is an undeniable reality, even if in the Romanian law system it is not assigned the quality of formal source of law[6], and the powers of the Romanian judge are limited, both in the interpretation and the enforcement.

For better understanding it should be noted that the positive law represents all the existing legal rules in a society at a certain given point in time[7].

So, if in the Anglo-Saxon system the law is used as an additional source of law, in the Roman Germanic systems of law jurisprudence constitutes an additional source of law.

In this respect it might be said that, in the context of the evolution of the current legislation, the importance and the role of jurisprudence have acquired increasingly more obvious dimensions in the Romanian legal system as well.

In argumentation, this fact would be highlighted first as a result of the need for harmonization of national law with the provisions of the European legal system.

Secondly, the immediate, direct and priority enforcement of the European legal rules in national law[8] are mandatory principles, consecrated and dictated by the European legal order and also by the jurisprudence of the European Courts of Justice[9].

It should be pointed out in this respect that the legislation of the European Union categorically grants jurisprudence the qualification of source of law with regulatory attributes. [10]

Also in support of the growing role and importance of jurisprudence, it should also be stressed that it has the following characteristics: it contributes to the formation and consecration of the general principles of law; it constitutes an urgent need in the development, interpretation and enforcement of laws; it fills in the shortcomings in law texts, it completes and adapts them in accordance with new realities; it contributes to the elimination of conflicting provisions, to the repeal of those which have become obsolete and last but not least, in the Romanian legal system, through the High Court of Cassation and Justice, it has a primary role in achieving a uniform and unitary interpretation and enforcement of the law by the other courts.

In order to be able to characterise jurisprudence in Romanian law, in the sense of choosing between being or not being a formal source of law, it is firstly necessary to analyse the system, the whole current legal framework, including as regards the organization of the judicial system and of the courts.

Last but not least, a new study and approach to the prerogatives and the powers granted to the courts, to the Constitutional Court, to the Romanian judge, an objective analysis of the judicial practice in contrast with practical realities are necessary.

Not recognizing characteristic of source of law of Romanian jurisprudence has been duly substantiated and justified many times in doctrine by the fact that it would thus infringe the principle of separation and balance of powers in the state, which is one of the defining features of the rule of law,[11] and it would also breach constitutional provisions, and the courts would exceed their authority and acquire legislative powers.

Against such seemingly logical at first sight arguments, the question may arise of how such principles are violated in other countries such as: The U.S.A, Canada, England, France, Germany, etc. - countries which have recognised jurisprudence as formal source of law for a long time?!

Obviously, according to the current legislative framework, this can only be achieved through the adoption of new regulations, both at the level of the system, including that of the constitution, granting adequate powers and organising laws to the entire judicial apparatus, the Constitutional Court, the courts and magistrates.

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[5] Mihai Badescu, *Familii si tipuri de drept*, (Lumina Lex, Publishing House, Bucharest, 2002), 9.
[6] Ion Dogaru, *Elemente de teoria generala a dreptului*, (Oltenia Publishing House, Craiova, 1994), 7.
[7] Mihail Niemesch, *Teoria generala a dreptului*, (Hamangiu Publishing House, Bucharest, 2014), 27-29.
[8] Article 38 of the Statute of the International Court of Justice - *where European jurisprudence is mentioned as part of the sources of law*.
[9] Augustin Fuerea, *Manualul Uniunii Europene* – ediţia a – III – a revăzută şi adăugită, (Universul Juridic Publishing House, Bucharest, 2006). 37-41.
[10] Gabriel Micu, *Diplomatic Law*, (Pro Universitaria Publishing House, Bucharest, 2017), 77.
[11] Sofia Popescu. *Statul de drept in dezbaterile contemporane*. (Academia Romana Publishing House, Bucharest, 1998), 78-91.

However, beyond these controversies we could ask the question of what would happen if the current system, taking into account the existing legal realities, would judicial practice decisions be regarded as legal precedents equivalent to the law?

As regards the legality and soundness of decisions, of the effects, great reservations may be expressed, and, furthermore, the fear regarding the separation and balance of powers in the state may arise.

One of the important gains could be a uniform enforcement of the law, and the role of the judge would increase.

In the event that all these *technical* aspects would be theoretically resolved, with reference to the existing judicial practice, in the concrete realities in Romania, it may be observed, unfortunately, that: many different solutions are issued in similar causes; there are different interpretations of the same text of law; many decisions of the European Court of Human Rights are not complied with; revisions are allowed on the basis of others, although in their contents, the European Court has not found or assigned any quality to the applicant; cases are accepted or rejected by differently invoking the grounds; there is an arbitrary enforcement of texts of special laws; quite a lot of decisions of the Constitutional Court are not complied with or are enforced with delay, etc.

In this context the question arises, what would come out of this kind of *Romanian judicial precedents* resulting from such decisions, in the case that they would be granted the same powers as in the Anglo-Saxon system?

Numerous studies in comparative law[12], as in the entire literature, reveal on this subject that in order for a judicial decision to become a *precedent*, it requires an in-depth reasoning before being issued, to be well thought out and *to take into account only a situation in law*, not in fact.

On the other hand, *the judicial precedent* involves a much too technical approach, *specialized and exhaustive research* of decisions, for long periods of time[13], which is less convenient for the regular lawmaker.

In such a case, the question would also be if in such a difficult system, would access to justice be hindered or restricted?...

It is important to emphasise the fact that, regardless of the system, the essence of things is not and cannot be reduced to jurisprudence being or not being the formal source of law.

The quality of the act of justice firstly starts from the interests and will of the lawmaker who, as a general rule, is the representative of the political class, from the quality of the human factor, from creating and implementing settled, coherent and impartial legal system and framework, without the adoption of transient, equivocal, ineffective and inefficient laws for justice seekers as target recipients of legal rules and the justice system.

Furthermore, we should not overlook the most important thing, namely observing the law texts, their consistent enforcement, compliance with the terms and punishing those guilty in the event of non-compliance, the procedural provisions, as well as the accountability of the magistrate, which is one of the main objectives necessary and binding in the functioning of the justice system.

In support of these points of view, which are considered to be essential and of utmost importance, it should be stressed that paradoxes and anomalies are found not only in the Romanian justice system, but in many other systems. The European Court of Human Rights itself, though it does not speedily settle the requests that are addressed to it, in exchange, issues decisions of conviction of European states after many years, invoking reasons such as unreasonable time limits, lack of celerity, etc., which this court itself is unable to comply with.

Another aspect bizarre in the practice of the European Court of Human Rights would be that given the procedure of reference to the Court of actions of the justice seeker, as a copy, it is not even required to be certified.

We should also emphasise in this context that, without a precise definition of the institutions and the significance of the terms with which they operate, also applicable with regard to the text of the European Convention and the activity of the Court, there will still be arbitrary, different interpretations, and therefore such decisions.

In the reality of the Romanian law system, returning with the proposed analysis in order to find a proper answer to the question at hand, reference may be made to a certain category of examples which is considered to be eloquent in supporting, on the one hand, the non-lawfulness of many judicial decisions, as well as the non-uniform enforcement of the legislation.

We may take as an example, on this subject, the actions in the sphere of ownership, particularly claims for real estate, and this being a highly important and, at the same time, controversial matter.

In this respect, it may be observed that, unfortunately, most of the *precedents*, not judicial ones, but those of non-compliance with the legal provisions, for the non-unitary interpretation and enforcement of the texts of law, are to be found in such cases - many illegal, arbitrary or contradictory decisions in similar cases. For all these - nobody is held responsible, either under the pretext of the independence of the magistrate, of the separation and balance of powers in the state, etc.

Another serious aspect found in the practice of some courts would be that many times evaluations and qualifications of previous law texts are made in terms of constitutionality, going beyond their authority and violating the principle of separation and balance of

[12] Ioan Les. *Organizarea sistemului judiciar in dreptul comparat*, (All Beck Publishing House, Bucharest, 2005), 7–31.
[13] Aurel Pop, Gheorghe Beleiu, *Drept civil. Teoria generala a dreptului civil*, (University from Bucharest, 1980), 75.

powers in the state, which the European Court of Human Rights itself has never done.

So it may be concluded that the property is holy, in fact, exactly in this matter, paradoxically, the most situations in which *the real estate fight* has gained unimaginable, even tragic, meanings and the connotations, may be observed.

In judicial practice we can also observe a variety of decisions that are issued rather depending on the *quality of the person*, *their interest*, *lack of interest*, or *co-interest*, by the *financial power* of the justice seeker or by *their relations* and *position* in the political sphere.

We should remember only as an example some of the major cases of this situation in fact, namely: the increase in the instrumentalisation of law; the creation of *parallel institutions and instruments* which exceed the judiciary apparatus; ephemeral and ineffective laws adopted to serve certain *target recipients* and, last but not least, n order for them to serve certain election purposes and interests.

By way of example a multitude of legal rules may be mentioned, such as Law 10/2001, Law 112/1995, G.E.O. 40/1999, etc., only for the fact that both the number of former owners and of the tenants or the current owners, represented a special electoral interest, which led to real dramas, the *reparation* of illegalities committed with the *commission of* greater ones, which had great social implications on either side of justice seekers.

All these happened with the exclusive intention of achieving the above mentioned purpose, for the materialisation of which the political class resorted, in fact, to a traditional and original course of action in order *to please everyone*.

Within this category of examples multiple situations, multiple decisions given on the basis of *false notary acts*, obtained by the would-be *descendants* of the old owners, which they acquired illegally in various European countries or in other words: *to order*, without the applicant being required to prove with documents attesting such quality, may be highlighted. On the other hand, the ease of Romanian courts in recognising the content of such documents, judging them perfectly valid only for the simple fact that their *translation was certified* ?! should also be emphasised.

Another question that has arisen is how is it possible that a building which has been claimed in the whole by a justice seeker claiming to have the right to property, has been restituted in kind to them, and to another in equivalent, and in the case of other claims on the same building, some defendants have won the lawsuit, and others have lost through different decisions - in the same case, with the same parties and the same object?!

## Conclusions

Concluding, although the examples could continue, we think a clear answer to the question of whether jurisprudence in Romanian law could be a formal source of law or not, is very difficult to give under the current conditions, meaning that being able to become a *judicial precedent* is a premature problem at present and that a longer period of time would have to pass in order for this matter to be justifiably discussed, namely to ask the question but also to find the answer of how to achieve it.

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# RATING THE LEGAL SYSTEM: A STEP CLOSER TO THE FUTURE?

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**Abstract**

*Today we have almost everything at the tip of our fingers, or to be more precise, just one click away. Whether calling a cab, ordering food, making a reservation or booking a flight, you just have to log onto an online platform, and you are settled. The great thing is that, after the service is provided, you can - and are encouraged - to leave a comment speaking you mind, praising or complaining, with valid arguments.*

*Imagine a "platform" where you can not only leave a review of a restaurant, but a "platform" where you can even "rate" the quality of the judicial proceedings by some given criteria's involving the court (waiting room, courtroom's space, public timetable), the court's clerks (manners, efficiency) or, why not, the judges (law knowledge, duration of the process, commitment and celerity).*

*Would this be an infringement to the judge's independency, or would it bring a benefit to the judicial system by making the judges more aware of how their court decisions affect the people involved in their rulings?*

*This study is intended to create awareness on the modern changes that can be seen as challenges associated with the benefits or downsides of using the online platforms in the judicial system. The objective is to provide some practical and deontological recommendation which the Superior Council of Magistracy and the National Association of Bars might consider to include (if relevant to the circumstances of their respective jurisdiction) in guidance to their members.*

*Besides highlighting some deontological considerations, this study also explains the challenges that are of a more technical nature, including those related to maintaining the independency of the judge, the security of personal information and those related to specific ways that a "rate" given can be categorised as being accurate or being given in bad faith.*

**Keywords:** *judge's independency, celerity, rating the judicial system, practical recommendation, personal information*.

## 1. Introduction

This paper tries to raise awareness about the modern changes that can be seen as challenges when it comes to innovate the judicial system by introducing and using an online rating platform that brings the parties the opportunity to give practical recommendations or to give some sort of a feedback.

It is intended to foresee the tendency of the artificial intelligence to gain access (also) into the legal system and tries to seek an approach that, in the "hands" of a well-intended authority, could bring mostly benefits to the judicial system.

The idea of an evaluation of a particular "service", even though it is not new on the market, being used by providers of such services (e.g. restaurants, hotels, home rental agencies), has brought numerous advantages both ways, for clients and also for providers, being a tool for improvement in that specific field.

So, the question is, why not such a platform in the legal system where the party interested could rate the quality of the judicial proceedings regarding the court, the clerks or event the judges?

Maybe the reluctance that stopped such a platform from being created was in regard to the sensitive matter of how this will affect the judges' independency or how it will deal with the security of personal data. For judges to be impartial and their ruling to be solely their intimate conviction, there must be confidence that no external influence of any sort is exerted. In essence, without this guarantee, there is a danger that the party would lack the trust in the legal system.

Because of this our legal system has provisions in order to ensure the protection of the right and duty of the judge to be independent and impartial.

Such an online rating platform must not be seen as a way of infringement of those rights, but as a tool to improve some aspects of the judicial proceedings. Having objective categories and criteria of evaluation, knowing which questions to raise, for whom they are intended and how to "translate" the user's recommendations into real actions, this online rating platform could really make a difference in the "life in front of the court".

This paper is intended to answer two important questions: (i) which criteria would make an online rating platform practical and possible and (ii) what rules of deontological conduct might be affected by the use of an online rating platform.

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## 2. The purpose and working method of an online rating platform

The sole purpose of a platform where the people actually involved in the judicial proceedings can leave a "review" of their experience should be to improve the quality of a "service" from which many will benefit.

But for this online rating platform to have actual results there should be strict and objective categories and criteria on who can have access or what can be rated. Likewise, there must be a control over who can monitories the rating process.

The first problem that must be addressed refers to the authorities who should have control over the platform. And because it involves judges, lawyers, court clerks and the court – meaning the building itself, the existing conditions for the ruling process, the most prominent authorities are the Superior Council of Magistracy (hereinafter referred to as SCM) and the National Association of Bars hereinafter referred to as NAB).

The SCM has both the right and the obligation to defend the judges against any act of interference in or related to their professional activity which could affect the independence or impartiality of the judges, in accordance with Law no. 304/2004 on judicial organisation, republished, as subsequently amended and supplemented (hereinafter referred to as Law no. 304/2004), as well as against any act that could create suspicion on them.

Also, the SCM ensures the compliance with the law and the criteria of professional competence and ethics in the professional career of judges, power which is exercised in compliance with the provisions of Law no. 303/2004 on the status of judges and prosecutors, republished, with subsequent amendments and completions (hereinafter referred to as Law no. 303/2004).

Moreover, SCM has a significant role in the judges' carrier and also in the organisation and functioning of courts.

Therefore, it is right to say that, regarding the well-being and well-functioning of the judicial proceedings, the SCM is the authority who has the biggest interest on supervising the online rating platform.

The other authority that might have interest and can benefit by being involved in the online rating system is the NAB.

The NAB has an important role to play in defending the prestige of the lawyer proffesion, by establishing deontological rules and ensuring that they are respected. The provisions of Art. 10 (1) of Law no. 51/1995 for the organisation and practice of the lawyer's profession (hereinafter referred to as Law no. 51/1995) state that *the Bars and the National Association of Bars ensure the qualified exercise of the right of defence, competence and professional discipline, protection of the dignity and honour of lawyers*.

Therefore, who better to oversee that the lawyers have the best conditions to exercise their role that the NAB?

If these two authorities would work together and align to modern changes by creating and monitoring an online rating platform, it could bring great benefits to the judicial system.

The second and third aspect that should be consider and that refers to the categories and criteria for rating intertwine and can be view as a whole. There are three important specific areas of evaluation that can be accessed on the platform:

### 2.1. Rating the court itself

The first sign of a civilised and respectful judicial system is shown in the way the court and its surroundings are organised. Hence, a potential user should have the possibility to leave a review of a specific court regarding one or more of the following:

I. location. How far is the court located according to the city's points of interest? Is it easy to reach using public transportation?
II. parking space. Does the court have a parking lot for the people coming to the court: judges, clerks, auxiliary personal, lawyers, legal advisers, people involved in a trial? If it has, are there special parking lots for disabled persons?; are there enough parking lots in relation to the court's numbers of cases?
III. a special design area for photocopying. If the court has one, is it well supplied? Are you given the possibility to pay either by cash or by credit card? Do you have access to a fax machine or a computer for printing online documents?
IV. a postal office. Is there any postal office inside the court or nearby? Can you pay by cash and also by credit card?
V. a cloakroom. Is there a special place for storying clothes, luggage and umbrella?
VI. a vending machine. Is there any possibility to purchase water, juice, coffee, tea or something to eat on the premises?
VII. waiting benches near every courtroom and an electronic system for the pending files that are being judged in that courtroom. Do the parties involved in a trial have the possibility to rest outside, but near the courtroom, until it is their turn, if the courtroom is full? And if so, do they have the possibility to find out which case file is being judged in real time without entering the courtroom?
VIII. a waiting room for lawyers. Is there a special room for lawyers to wait for the hearing to start? Does it have enough space for storying files, robes, legislation books? Is the room provided with an electronic system that announces the pending files and the courtrooms where they are judged? Do lawyers have the possibility to rent a robe?

IX. (viii)the courtroom's space. Is there enough space/ benches for the public? Is there a special place for lawyers/ legal advisers/ the parties to study the case file folder?
X. (ix)the registry. the archives. Are they spacious enough for the clerks or the auxiliary personal to work? Is there a specially arranged place for the public to study documents in a case file and make notes? Are there any forms put at the public's disposal (e.g. request for studying and copying a case file, request for obtaining a certificate that a certain case file exists before that court, request for legalisation of document, and so on)? Is there place for a waiting line? Or even a waiting electronic system, both for lawyers/ legal advisers and for the parties or their legal representatives? Is the public timetable reasonable?
XI. (x) other facilities, like: is the court, courtrooms, waiting room or the registry/ archives equipped with air conditioner? Can you find a public toilet on the premises? Is there a police office nearby or even inside the court? Can you find an office that has a legal assistance service?
XII. (xi) on online platform of the court. Does it have: • the address; • the public timetable; • an online registry where you can upload a file to be attached to your court file, based on a unique user name and passwords; • an online archive where, using the same unique user details, you can consult your case file; • a tracking list of the court's hearings; • an automatic update of any change that was made to your case file?

There should be also a section for recommendations and improvements.

Taking part of a judicial proceeding is stressful as it is, no matter what side you are. It is time and money consuming and can easily get you off your nerves. There is no reason for not trying to ease the process. And the first step should be to identify the court's infrastructure problems and try to address them so the "legal experience" is as smooth as possible.

### 2.2. Rating the court's clerks

This could appear as a tricky situation, because it involves working and relating to people's needs and problems. And the human factor is very subjective and never constant. It can be affected by emotions, by the person's present state of the mind or the issues that may appear.

Our honest opinion is that, if there were better working conditions and an online interface as suggested above, the flow of actual people entering the court's registry and archives would be smaller and so the court's clerks would have a better management of the problems that are for them to solve.

Also, there should be a distinction between the clerks that work in the registry/ archives and the ones standing beside the judge in the courtroom.

After taking all this into consideration, the areas of evaluation of a court's clerk could be:

I. punctuality. Is there a public timetable? Does the clerk respond to the public's needs in that timeline? Is the clerk available in person in the registry/ archive or reachable by phone/ email during the public hours?
II. efficiency. Is the clerk well trained? Could he/ she help you regarding the issue that brought you to the registry/ archive?
III. respecting the law. First of all, does the clerk know the law provisions applicable to his/ hers profession? Is the clerk acting in the limits dictated by his/ hers attributions?
IV. manners. Does the clerk have the same respect no matter who enters the registry/ archive? Does the clerk show patience, a well-mannered attitude and is he/ she inclined to help with your problems rather than postpone you?
V. waiting time. Is there a reasonable waiting time in relation to your problem and the difficulty arising from it?

Rating the court's clerks on these criteria could give a sense of what are the existing problems: is there not enough personal for that specific court? Can the rating be improved by investing into the personal? Is there a need for training, teambuilding or having more people?

### 2.3. Rating the judges

Maybe one of the most sensitive parts of an online rating system would be evaluating, in an objective manner, a judge's conduct and behaviour in court. It can be difficult to "rate" the judge's appearing in front of the public and not his/hers decisions, so this is why it is important to find really clear objective criteria to do so. Because, in the end, the judge is the one who has the most powerful impact in the legal proceedings and the way he/ she behaves affects every party involved in a case file.

So, the judge should be a real professional and therefore, he/ she must be "rated" accordingly. There can be specific categories and criteria for evaluation, such as:

I. punctuality. If there is a starting hour of the hearing, does the judge arrive on time?
II. interest in knowing the case file. How well-prepared is the judge? Do he/ she know the documents, the previous rulings, the exceptions or the problems that arise in a specific file?
III. duration of the litigation. When did the trial start and when did it end? How long did it take? Were there any difficulties involving the parties, the documents or it emerged a need to involve other people into the case file, like certain specialists and that is the reason for the delaying of the process?
IV. duration of the writing of the decision after ruling. How long after the judge decided on a case it took him/ she to actually write the decision so the interested party could benefit from it?

V. law knowledge. Is the judge well-prepared, do he/she know the rules and principles not only in regard to a specific case file, but also in relation to the procedure of conducting a court meeting? Does the judge make obvious mistakes repetitively or is he/ she having minor setbacks?
VI. patience. respect. commitment. It may seem that these are three big words, but the problem is quite simple: is the judge *patient* with the people who do not have legal knowledges and therefore may seem confused of how the proceedings take place? Does the judge offer the same *respect* and *commitment* towards the lawyers/ legal advisers as it is requested from the latter regarding: wearing the robe, prioritising the case files where the parties have a legal representative? Does the judge have a neutral attitude and voce tone towards the parties or is he/ she being sarcastic or acts in a manner that can be seen as offensive?

## 3. Rules of deontological conduct which might be affected by the use of an online rating platform

For such a platform to exist and fulfil its purpose, it is important to identify the areas in which the SCM and/ or the NAB might need to interfere.

First of all, the judges and the court's clerks are no business people, so the online rating platform should not be a commercial one. Taking this into consideration, a level of control must exist and the SCM and the NAB may consider laying down some rules to ensure that the principles protecting the judicial system, in general, and the judges, in particular, are not compromised or threatened.

Second, the judicial system already has its rules intended to protect the people involved in a case ruling, such as: the claimants/ defendants, their lawyers, the prosecutors, if the case, the judges and the clerks. It is vital to adapt these rules to ensure the same level of protection in the online rating platform as it is in the traditional context. There is no objective reason why there should be other or new regulations that would make the judicial system more difficult to access in the digital environment.

In this context, the third and final area of concern for the SCM and the NAB is the legislation subject to be applicable regarding an online rating platform of the judicial proceedings. As it involves both persons outside and also inside the legal profession, this platform falls within the legislation applicable for the legal profession, such as: (i) the Romanian Constitution, (ii) Law no. 304/2004, (iii) Law no. 303/2004, (iv) Law no. 51/1995, (v) the Status of the profession of lawyers from 03.12.2011 (National Association of Bars), (vi) the Rules of internal order of the courts from 17.12.2015 (the SCM).

The use of an online rating platform may affect several professional rules of conduct. The most important challenge that can arise includes *issues relating to a judge's independency*.

The real question is whether rating a judge's actions in court may be seen as an interference in the ruling or even an infringement to the judge's independency.

According to Art. 124 (3) of the Romanian Constitution, judges are independent and are subject only to the law. This independency must be regarded in relation with the other two state powers: the Legislative and the Executive power. This does not exclude the intervention of the judicial control courts. Also, the judge's independency is not affected by the control of the SCM which is the body that has the authority to promote, transfer or sanction the judges, in accordance to the law.

Art. 2 (3) of Law no. 303/2004 also states that the judges are independent and are subject only to the law and must be impartial.

But what does this independency and impartiality refer to? It is really all about the requirement that the judge, in his ruling, has to settle disputes without any interference from any state authority of from any persons – legal or natural – in fact.

The independence also refers to the impartiality of the judge towards the parties of the case. Therefore, the judge's attitude must be neutral with regard to the position and interest of the litigants.

In accordance with this principle, no one can make suggestions or impose on the judge how to rule in a particular case. Both the appreciation of the state of fact and the choice of law enforcement in each particular case are and must remain the expression of the judge's intimate conviction, which must be formed without any influence or external interference.

Do we find ourselves in the situation of an external interference if, *after* a ruling is made, the parties involved in the case (the parties, their lawyers or their legal representatives) rate how the proceedings where held?

First of all, we must keep in mind that the rating is given *after* the judge has ruled in a particular case. Furthermore, the rating should be given *even after* the decision is written by the judge and communicated to the parties involved. Therefore, in the process of deliberation and decision, the judge is not affected of influenced by any opinion or rating.

Second, the online rating platform, as we see it, has some objective criteria based on which you can state your opinion on the quality of the judicial proceedings. It is definitely *not* a way to control the decision taken by the judge in a particular case, for that there are remedies given by the law, such as an appeal.

And finally, the results of the online rating platform could be made public to the judges only as part of their three-year evaluation, as regulated in the Decision of the SCM Plenary no. 1179 from 3 November 2015. The results on the online rating platform can be incorporated in the evaluation, based on the Evaluation Guideline of the Magistrates activity,

whose purpose is, at it states in Chapter I: *to establish the level of professional competence, to improve professional performances, to raise the efficiency of the courts' activities and to raise and maintain the public's trust in the legal system and to strengthen the quality of the system.*

## 4. Challenges associated with using an online rating platform

Besides the deontological considerations presented above, there are also other challenges related to the use of the online rating platform that are more technical but also need to be addressed.

There are two main areas of interest regarding the online rating platform concerning the IT security and the risk of profiling of data subject and reusing of data by the online provider.

When one of the persons interested in using the online rating platform starts generating data on the platform, he or she must be protected from the many dangers lurking on the internet, such as: viruses or malicious codes, identity theft or cyberfraud (e.g. pharming).

In terms of IT security, the platform providers should be selected based on the details provided, like actual information on what kind of IT security it will be attained, having certifications to support their claim.

What appears like an easy to use and attractive platform can have hidden risks, like the ability of the platform provider to analyse and reuse the information. What it would be comforting is if the platform provider would have specific terms and conditions that would clearly exclude profiling and even reusing after anonymisation.

## 5. Conclusion

To sum up the main outcomes of the paper, we can conclude that there are changes in the online sector that will reach and impact also the legal system. But we should not see this as a downside, but more as a challenge to improve some areas that are up for modification. If there is a real interest from the authorities that are involved directly into the legal proceedings, an online rating platform could result in a real helpful tool to upgrade and modernise the courts as we know them.

Although we must keep in mind that only by having objective categories and criteria, the independecy of judges is not infringed, this online platform can be a really good evaluation for the judges.

We consider this paper only the beginning point for a further more complex study which should involve also opinions from IT specialists on how such an online platform can be effectively implemented.

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# THE ROLE OF THE HEAD OF STATE IN THE MODERN WORLD

**Adrian-Gabriel DINESCU**[1]

**Abstract**

*In the modern world there are quite a few different interpretations of the notion of "head of state", varying to a wide degree: from a ruler who has absolute power and is not elected in a democratic manner to a leader who has a mere ceremonial role and who is subject to universal suffrage. There appear to be five main types of states in the modern world, each one with its own type of head of state : states in which the ruler wields absolute power, states in which the ruler wields a considerable amount of power but still shares it with another body not necessarily elected in a democratic fashion, states in which the head of state wields power but within a balance with the other powers of state, states in which the head of state holds little power, fulfilling the general role of mediator between the other powers and finally states in which the head of state has a mere ceremonial capacity. In this short paper we strive to briefly define the modern world with its complexities, to analyze the different types of states and how the role of the head of state is still carried out in these complex times.*

**Keywords:** *types of states, head of state, modern day, dictatorships, democracy.*

## 1. Introduction

Since the dawn of time humans, social creatures, have organized themselves into collectives which offer people the possibility of personal and social development, security and especially leadership.

All people crave leadership, as with human beings, conflicting views are something completely natural. Thus, a mechanism to solve stalemates had to be enacted.

This role of "leader" has been fulfilled throughout history by people holding a myriad of titles or functions, from tribe leader to emperor, from chieftain to hereditary monarch.

The manner in which this one leader served the interests of the many has varied. In some societies the leader merely followed his own agenda and fulfilled this function only for his own benefit, whilst other leaders have managed, through political discourse, to determine the way in which society evolved, to find ways in which radically different people with different opinions come to an understanding.

The power of the leader, also, has varied to a wide degree, from being an absolute ruler, who imposed his arbitrary rule upon the people he controlled, for example: absolute dictators, absolute monarchs, to being a simple symbolic representative of this power, fulfilling only ceremonial roles: constitutional monarchs, presidents of some republics etc.

The latter type of societies, fearing the inevitable spiral towards dictatorship if only one individual holds too much power for too long, have, in general, elected bodies in which elected individuals wield this power in the name of the represented.

## 2. The modern world

First of all, we should make a shot analysis on the concept of "modern world". What do we mean when we refer to "the modern world"? What do we mean when we use the word "modern"?

The term "modern", in general, is acknowledged to refer to contemporaneity, meaning the times in which we live. But modern is also accepted to be an epoch in human history, which started in the 20th century, after the end of the First World War[1].

Modernity meant the disillusion of the old empires, the disillusion of the old ways of life, the end of the great and ancient monarchies and also the emergence of general human rights.

It is well known that the First World War meant an end for the old European empires, but it also meant that new powers emerged, like the United States of America and Japan, but also the USSR, who fought to fill the power void created by the demise of the European empires[2].

Thus many experts claim that modernity began in the early 20th century, with the advent of human rights, of individual freedoms and with the emergence of a state in which the role of government is to ensure these rights.

The 20th century also meant a resurgence of despotic regimes: communism, fascism, nazism, in which, in the name of the general good, the individual was reduced to nothing but a cog in the infernal machine of the state, in which his personal wishes were less fulfilled than in the dark ages.

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[1] For a careful analysis on the destiny of humanity and the modern world, P. Negulescu, "*Destinul Omenirii, 4 volumes*", ed. Cugetarea, 1937-1944.

[2] See also for an analysis on the history of European imperialism: Gary Marks, *"Europe and Its Empires: From Rome to the European Union*", http://garymarks.web.unc.edu/files/2016/09/marks_2012_europe-and-its-empires.pdf.

The 20th century was, practically, a century of extremes, in which, through the advent of new technologies, humanity tried to find a common path towards the future.

Are we still living in modernity?

Some would claim not, as it has been shown that we are currently living in the post-modern era, in which the old values have been abandoned and it has been stated that post-modernity will be the "end of history".[3]

Its values entail that the individual is the most important element, that the fulfillment of his desires is the most and only important thing in the world and that all other concepts and values are without meaning, including the idea of state, leadership etc.[4]

Post-modernism has been said to have brought the relativization of all values, the individual being the core of all existence, and the goal of this existence is just self-indulgence.

Post-modernism was born out of the disappointment of the 20th century, in which the sciences flourished and ideas of utopian societies were widespread. Utopian society were present not only in books and discussions, but were also put into effect with devastating consequences, the dreams of men of a perfectly just and fair society ending in nightmarish dystopian realities.

Post-modernism, thus, allied with global capitalism, rejected these concepts and embraced, generally, self-gratification, a strive towards pleasure and the state and its leaders being only tolerated as long as they fulfilled all of the desires of the individual, having no power to push the individual or to force him in a certain direction.

Post-modernist thinkers consider that, rejecting the idea of state power, of leadership, will bring about a new and true era of prosperity and peace, as it does not recognize many of the concepts who brought war upon humanity.

## 3. The State

If the individual is the most important element in society, individual right always outweighing general interests, how can states even exist in this reality?

The state in the post-modern world is, generally, a weaker state, in which its powers are limited in favor of individual rights, the role of the state being mainly just to provide the general outline in which individuals express themselves.

However these post-modern states exist in a world in which there are still many failed states[5] or in which other states are still powerful, therefore the individual, for his own protection, has accepted the idea that the state must hold certain institutions which ensure its own survival, against other aggressive societies which did not embrace these utopian ideals of "the self".

Thus the role of the state in the world as is, the *modern world*, is to ensure the wellbeing of its citizens, to protect them from outside evils and to maintain inner stability.

The old role of the state to impose a direction on its individual has generally been eliminated in the modern democracies, as the individual did not accept the idea that their temporary pleasure must the sacrificed for a general and abstract future good.

However, post-modernism is a philosophy generally accepted in the Western democracies, and in a lesser degree in the rest of the world, which many claim is fully immersed in the modern world, a world in which conflicts between states can still be solved through armed struggle, in which the individual still is of little importance in the general scheme of things.

## 4. Various interpretations of the notion of "Head of state"

We can acknowledge that there are significant differences between philosophies regarding state organization, between different societies and thus there will be differences between the prerogatives of the head of state within these societies.

There are states in which the head of state still wields absolute power or close to absolute power. Usually these states still contain some sort of mock-Parliament which just rubber-stamps the decision of the head of state. These types of assemblies usually have only a ceremonial role.

These type of states still exist, unfortunately, and they tend to offer citizens a low quality of life, as the "supreme leader" tends to reject the enlightened ideals of democracy, equality and the rule of law.

In our opinion these types of states tend to fail, over time, the leader's power tends to diminish and erode and another more ambitious person will always seek to deprive him of his power and obtain it for himself.

These states have low stability on the long run and more often than not, after the death of the absolute ruler comes a period of high instability or even civil war.

Generally, states which embraced the communist or fascist philosophy tend to breed authoritarian regimes, but not necessarily, as there may be, especially in Africa and Latin American, leaders who through the use of military strength gain power and wield this power in a militaristic fashion[6].

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[3] Francis Fukuyama, "*The End of History and the Last Man*", audio book - https://www.amazon.com

[4] For an excellent analysis on post-modernism see R. Appignanesi, C. Garratt, „*Post-modernism. A Graphic Guide*", Icon Books Ltd, London, 2013.

[5] See also R. I. Rotberg, "*Failed States, Collapsed States, Weak States: Causes and Indicators*", https://www.wilsoncenter.org/sites/default/files/statefailureandstateweaknessinatimeofterror.pdf

[6] See also W. Weinstein, "*Military Rule in Africa*", available at :

However it needs to be said that in war-times these types of regimes seem to be stronger, as the ruler will, more than likely, be open to sacrifice a lot more of his people's time and lives to preserve the state than democratic societies which tend to have a low tolerance for war-weariness and constant struggle.

As an example, see Soviet Russia during the Second World War. It sacrificed a large portion of its population, a lot more than the western democracies, and through this struggle, has managed to gain the upper hand over another dictatorship, Nazi Germany. Of course, it can be said that Soviet Russia was weak and needed all this sacrifice from its citizens exactly because the dictator, in this case Joseph Stalin, massively weakened the state with widespread purges and disastrous economic policies.

The self-destructive tendencies of these regimes can be seen perfectly in this example: the Soviet Union was finally destroyed from within, by technological stagnation, economic destruction and excessive military spending. Also the Nazi regime, though initially praised for raising the standard of living by massive building projects, has self-destructed through irrational use of resources and costly wars.

Thus, without democratic discourse, things tend to fall apart over time as stagnation ensues, or the regime will eventually self-destruct through irrational decisions.

The second type of state is a state in which the leader holds a lot of power, but in which there is still a possibility of that leader, through in-fighting, to be deposed of that function.

This type of "authoritarian" democracy we usually see in present-day Asia, where the culture of the individual permits and even encourages this type of authoritarian rule, as human rights are usually accepted and enforced to a lesser degree.

This type of state is more dangerous from a general and historical perspective, as outside observers tend to view it as a stable and productive regime, in which citizens' rights are, more or less, protected by the state and in which business is encouraged and thus bringing a reasonable amount of prosperity for the individual.

This type of head of state tends to welcome business, as prosperity will bring him stability and recognition by the general public.

The danger comes in the form that the head of state holds a disproportionate amount of power and will over time tend to gather more and more power. There is also a tendency to encourage the personality cult and generally neglect the well-being of the individual and of the state.

Thus, on the long run, this type of regime in unsustainable.

Also, having the head of state make most the important decisions leads to a lot of them being bad decisions or mistakes, mistakes that in a democratic society tend to not be made, as there are far more checks and balances making sure that decision echoes the general wellbeing.

As an example of this state : modern-day China[7] which has departed for the absolute authoritarian days of Mao Tse Dong and after 1990 has embraced what has been called "authoritarian" capitalism with a particular blend of democracy, in which the head of state wields a lot of power, but does not impose absurd measures like in the absolute regime states. The head of state decides the general direction of society, and can be in office till death, but through general internal political infighting, his decisions are usually kept in check. Also, having embraced capitalism, the economy has been thriving through the 1990s and 2000s, only now reaching a point of stagnation.

The third type of state is a state in which the head of state has sufficient power, but there are in place sufficient types of checks and balances in order to ensure that the power is not abused.

These type of states usually take the form of presidential democracies, in which the head of state, usually called "President" is elected directly and wields a significant amount of power.

The checks and balances usually come in the form of a Parliament, which directly oversees the executive powers of the President, and can censor his decisions if need be.

As a perfect example of this state: the United States of America. They have embraced this type of head of state, in which the President wields significant executive power, though this power is appointed through democratic means and is censored by a democratically elected Congress.

The President of the United States of America wields a considerable amount of power, having legislative prerogatives, is the supreme commander of the military forces and has a wide degree of executive power.

The United States of America have embraced this type of state in which the separation of the three power of state is considered to be sacred, in which the judiciary is truly independent of the other powers and the Supreme Court has broad jurisdiction to deal with varied issues in the law making and enforcing process.

However, the President of the United States of America is in no way independent from the judiciary, can be and has been indicted[8], so the power he wields is in no way arbitrary and this is exactly what guarantees the separation of powers of state and ensures that no power becomes abusive.

The fourth type of state is that in which the head of state wields a low amount of power, being

https://www.jstor.org/stable/4185351?seq=1#page_scan_tab_contents

[7] See this article on modern day China by P. Link and J. Kurlantzick, *"China's Modern Authoritarianism"*, https://freedomhouse.org/article/chinas-modern-authoritarianism.

[8] See the indictment process of President Nixon, https://www.archives.gov/research/investigations/watergate/roadmap

considered in general to be a neutral power who brings balance between the three powers of state.

Romania has this type of President, who is technically the head of the executive branch, but shares power in relation to the prime-minister. He is also the head of the military and also can review the law making process and can ask the Parliament to review laws before passing them.

Romania does not have a long tradition in democracy, but has fought from the 18th century to try to balance the interests of opposing groups and to ensure that these interests do not collide with the general interests of the population and of the nation.

Prof. Dan Claudiu Dănișor has published in a recent paper an article regarding the "head of state as a neutral power" and has made an excellent summary of the situation of the Romanian President, being "*the neutral power, a power that is situated outside the three powers derived from the organization of the state on the basis of the principle of separation of powers, was conceived and institutionalized in various ways. One of them transforms the Head of State into a power that distances itself from political games (...). The Head of State plays the role of balancing power and that of mediator between legislative, executive and jurisdictional power and between state and society*."[9]

Thus, it can be seen that the president of such states, wields much less power than that of the third tier countries, as he has a relatively low amount of power, but acts as a mediator between the different powers and ensures the preservation of constitutional rights.

The fifth type of state is where the head of state has a mere ceremonial role.

This is the classic case of constitutional monarchies, where the monarch, generally hereditary, is officially the head of state, but wields a mostly ceremonial role.

For example, The United Kingdom of Great Britain is ruled by a King (or Queen) who acts as head of state and holds this function for life, but has little to no power in matters of state, the Prime Minister being the true head of state, wielding true powers in legislative and executive matters.

Other states which fall under this category are generally the parliamentary democracies, in which the President of the republic is not elected by the people directly, but is elected by Parliament. He generally has a limited role in the function of state.

## 5. Conclusion

As we could see through-out this short paper, the role of "head of state" in the modern world is varied and ranges from absolute power to minimal, ceremonial power.

This variance has its basis in society itself, its history and its values. A society with a troubled past in which leaders have abused their powers, but which has obtained a certain amount of democratic rule, will tend to have a head of state which has a limited amount of power, and who is elected directly, reducing to a minimum the risk of that leader becoming an absolute one. This is exactly the case in our country which has seen its fair share amount of absolute rulers, ranging from absolute monarchs to absolute dictators.

Our young democracy doesn't have confidence in itself yet and thus reduces the role of head of state to the function of a „mediator" between the other powers, offering firmly most of the power to the legislative branch who also elects the head of the executive, the prime-minister, and who even has the power to suspend the President.

Other countries who have a democratic tradition like the Unites States of America, in general, trust their heads of state and endow them with extended executive powers as to ensure smooth governance, but most importantly, the power to act decisively in case of emergency, whilst still being subject to the rule of law through the Court system.

In Romania, suffering this power void in cases of emergency, the executive has been empowered to pass "emergency ordinances" which come into effect immediately and can deal with a wide array of urgent and difficult situations. But, as any power can be abused, it can be noted that the number of "emergency ordinances" passed by the government is high and, lacking the necessary powers, the head of the state, the president, cannot intervene in this process and thus making his mediator role a mere ceremonial one.

This is a point we would like to make in this paper: as long as there is no trust between individuals in a certain society, as long as the balance of powers is not maintained and enough safeguards put forth to protect this delicate balance, the state will not function correctly and it will not serve the people.

And it's not the "powers" that will suffer the consequences, but the people who put them there in the first place!

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# TRICK OR TREAT: LINKING EU FUNDS TO RULE OF LAW

**Oana DIMITRIU**[*]

**Abstract**

*Along with the imposition of financial sanctions in the infringement procedure for failing to fulfil the obligations assumed by the Member States, and whereas in some cases these sanctions are not a sufficiently deterrent factor to determine a certain Member States to comply, it is increasingly more likely creating a mechanism to strengthen the link between EU funding and the rule of law, namely, suspending, reducing or restricting access to EU funds. In this way, respecting the rule of law becomes an essential prerequisite for a sound financial management at Union level.*

**Keywords:** *EU funds, rule of law, European Union, financial sanctions*

## 1. Application of financial sanctions: evolution of the methodology

The lack of financial sanctions has shown that it has a major influence on the compliance of Member States. Since 1996, the Commission has developed principles for the application of financial sanctions, principles which have subsequently been supplemented by increasingly clear and easy-to-use technical methods.[1] The Court of Justice has also played an important role in developing this practice, as it is now almost as a rule the imposition of financial sanctions for breaching EU law if compliance is not achieved within the deadlines.

The financial sanctions that may be imposed on Member States for failure to fulfil their obligations under EU law are *a lump* sum or *periodic penalty payments*, the cumulation of the two types of sanctions[2] being also requested by the Commission and imposed, even on its own initiative, by the Court of Justice.

Their application is based both on the finding of a failure to fulfill obligations (Article 260 (1) and Article 258 in conjunction with Article 260 (3) TFEU) and on the failure to comply with a judgment of the Court of Justice establishing a failure to fulfil obligations (Article 260 (2) TFEU).

Determining the sanction for States not implementing the judgments of the Court of Justice must be based on the purpose of the measure, namely ensuring the effective application of EU law. Thus, if the lump sum reflects the failure of the Member State to comply with the earlier judgment (in particular where there has been a prolonged delay), periodic penalty payments act as an incentive for the Member State to bring the infringement to an end as soon as possible.[3]

Since there are clear conditions and criteria for imposing and calculating these financial sanctions, any Member State may make an assessment of the sanction that may be imposed on it in the event of a breach of an obligation. Therefore the main purpose is discouragement through these sanctions, the amount of which must be large enough to determine the Member State to correct the situation and to end the infringement (should therefore be greater than the benefit that the Member State has from the infringement), but especially to determine the Member State not to repeat the same infringement.

With regard to the calculation of the proposed financial sanction, the Commission has applied an approach that reflects both the payment capacity of the Member State concerned and its institutional weight, and this is done by the *'n' factor*,[4] adding the gravity of the infringement and the duration of which the Commission takes into account when calculating the amount of a proposed penalty. Under the Treaties, *'n' factor* was calculated by reference to the GDP of a Member State and the number of votes allocated to it in the Council, thus being an appropriate means to reflect the ability of the Member State concerned to pay while

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[1] In 1996, European Commission published a first communication on the implementation of Article 171 TEC, entitled *Memorandum* (published in Official Journal C 242/6 of 21 August 1996), and in 1997 published a second communication which complements and expands the 1996 Communication and deals in particular with the method of calculating periodic penalty payments (published in Official Journal C 63/2 of 28 February 1997). In 2005 European Commission published the Communication on Application of Article 228 of the EC Treaty replacing the previous ones, http://ec.europa.eu/atwork/applying-eu-law/docs/sec_2005_1658_en.pdf and in 2017 a new Communication from the Commission - EU law: Better results through better application (published in Official Journal C 18 of 19 January 2017).

[2] The Court of Justice has for the first time admitted in its judgment of 12 July 2005, Commission v. France the possibility of imposing both a lump sum and a periodic penalty payment in cases where the infringement persisted for a considerable time and still risks to persist.

[3] Lorna Woods, Philippa Watson, *EU Law*, 12th edition, Oxford University Press, 2014, p. 258.

[4] SEC (2005) 1658, p. 14. Factor "n" is the geometric mean based on the gross domestic product (GDP) of the Member State in question and on the weighting of voting rights in the Council. In conclusion, the bigger and more economically stable the Member State, the biggest "n" factor is, namely the payment capacity of each Member State.

maintaining the variation between Member States within a reasonable timeframe.[5]

However, the Court of Justice has recently established that the Council voting rules can no longer be used for this purpose since starting 1st of April 2017 the voting system has changed in the Council and replaced by the double majority system as set out in Article 16 (4) TEU.[6] Consequently, when calculating *'n' factor*, the number of votes of a Member State in the Council is no longer of similar relevance, the predominant factor being the Member States' Gross Domestic Product (GDP).[7]

As regards the Member States' institutional weighting when calculating the *'n' factor*, the Commission considers that the *'n' factor* should not be based solely on the demographic or economic weight, but should also take account of the fact that each Member State has an intrinsic value in the institutional structure of the European Union. Thus, in order to maintain the balance between the payment capacity and the institutional weight of a Member State, the Commission will calculate the *'n' factor* on the basis of two elements: the GDP and the number of representatives in the European Parliament allocated to each Member State.[8]

To this end, the Commission will in future use as algorithm the number of representatives in the European Parliament allocated to each Member State. The amounts resulting from the application of this algorithm will not create unjustified differences between Member States and will remain as close as possible to the amounts resulting from the current calculation method, which are both proportionate and sufficiently dissuasive. Under the new methodology, the Commission's approach will continue to be firm, balanced and fair to all Member States. [9] However, the adapted methodology may lead to lower financial penalties compared to the current situation, but the resulting amounts are closer to the Court's practice, which generally sets fines lower than those proposed by the European Commission.

## 2. Rule of law: condition of membership of the European Union

### 2.1. The rule of law principle

The rule of law is a legally binding constitutional principle which is one of the basic principles characteristic of all the constitutional systems of the Member States of the European Union.[10]

Considering the provisions of Article 2 TEU, "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, **the rule of law** and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

Compliance with these principles is a membership condition to the Union, and Article 7 TEU and Article 354 TFEU give the EU institutions the means to ensure that these values are respected by all Member States.

Therefore, the need to classify a particular action as complying with the rule of law has emerged. Thus, all approaches have been taken into consideration and the rule of law has been defined as guaranting: the separation of powers; the legality of the administration, in particular legal certainty and unity and fundamental rights and freedoms and equality before the law.[11]

### 2.2. Rule of Law test

Once the criteria for accession to the European Union have been formulated[12], the rule of law has explicitly become a condition that any state wishing to join the European Union must fulfill. For this reason, the problem of the rule of law was treated as a separate chapter in all the European Commission reports on the conduct of the negotiations[13].

Although compliance with the Copenhagen criteria is a mandatory rule for accession to the European Union, enlargement has, over time, shown that they may create difficulties for the Union's ability to ensure respect for its fundamental values once a state has become a member. European Commissioner

[5] Case C-93/17, *Commission v. Greece* [2018], EU:C:2018:903, p. 132.

[6] See Communication from the Commission, *Modification of the calculation method for lump sum payments and daily penalty payments proposed by the Commission in infringements proceedings before the Court of Justice of the European Union* (2019/C 70/01) (published in Official Journal C 70/1 of 25 February 2019).

[7] Case C-93/17, *Commission v. Greece* [2018],, EU:C:2018:903, p. 138 and 142.

[8] Communication from the Commission (2019/C 70/01), cited above.

[9] http://europa.eu/rapid/press-release_IP-19-1288_en.htm

[10] Koen Lenaerts, *Curtea de Justiție și metoda dreptului comparat*, Revista Română de Drept European nr. 3/2016, p. 59 et seq.

[11] Stefanie Ricarda Roos, *The "Rule of Law" as a requirement for accession to the European Union*, Rule of law Program, Lecture no. 3, Konrad Adenauer Stiftung, 2008, p. 4.

[12] In 1993, the European Council set out three criteria to be met to become a EU member. These criteria, also called the "Copenhagen Criteria", are: 1. the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; 2. the existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union; 3. the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union and the administrative capacity to effectively apply and implement the acquis communautaire.

[13] See Radu Carp, The Struggle for the Rule of Law in Romania as an EU Member State: The Role of the Cooperation and Verification Mechanism, https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.252/

Viviane Reding called this situation "Copenhagen Dilemma".[14]

This creates a problem that needs to be addressed by introducing mechanisms able to make Member States comply with the obligations they have assumed at the time of accession.

### 2.3. Serious and persistent violation of values

The Treaty of Lisbon brought changes to the procedure laid down in Article 7 of the TEU as regards the Treaty establishing the European Community by referring to the "values of the Union", previously referring to "the principles referred to in Article 6 (1)" - namely, human rights as general principles of Union law.[15]

The Article 7 safeguard procedure for EU values was introduced in the Treaty of Amsterdam in 1997 and includes two mechanisms - *preventive measures*, if there is a clear risk of breaching EU values and *sanctions* if such a violation has already occurred."[16]

The so-called 'Article 7 procedure', entitled 'nuclear option',[17] has the following features:[18] it regulates the procedure for sanctioning a Member State's violation of Union values as set out in Article 2 TEU; has a strict scope of application; establishes a prevention mechanism in the case of a risk of breaches of these common values; establishes a sanction mechanism in case of violation of these values; is considered the most severe sanction; allows the suspension of voting rights in the event of a "serious and persistent breach" of EU values by a Member State.

Implementation of Article 7 TEU means that the infringement or the risk of an infringement meets certain essential conditions as listed by the Commission in 2003:[19] (1) either a "clear risk of serious breach" of the values listed in Article 2, for the prevention mechanism; (2) either a "serious and persistent breach" of the values in Article 2 for the sanctioning mechanism. In both cases the violation must be serious. This criterion can be judged on the subject of the violation (i.e. the target population, for example) and its result (violation of a single common value is sufficient to trigger the mechanism, but violation of several values may be a sign of a serious violation).

This procedure does not apply to individual situations of violation of fundamental rights, which fall within the jurisdiction of national, european and international courts, but to violations that meet the dimensions of a systematic problem or threat to the rule of law.

In 2014, the European Commission adopted a framework for analyzing the conditions for the implementation of Article 7 TEU. The Communication adopted by the Commission to this end - "A new EU framework for strengthening the rule of law"[20] - aims to clarify the situations in which the prevention and sanctioning mechanisms can be triggered in case of breach or risk violation of the common values of the Union.

The objective of the framework is to enable the Commission to identify a solution with the Member State concerned in order to prevent a systemic threat to the rule of law, which would become a "clear risk of serious infringement", which could trigger the application of Article 7 TEU. If there are clear indications of a systemic threat to the rule of law of a Member State, the Commission may launch a 'pre-procedural procedure for the Article 7 procedure', initiating a dialogue with that Member State.[21]

The new rule of law framework has the role to complete infringement procedures and to give effect to monitoring within the Union of Member States' compliance with the rule of law.

Creating a new framework certainly provides a mechanism that can solve the "Copenhagen Dilemma". The success of the infringement procedure that somehow inspires this new framework ensures confidence in the Commission's implementation of this procedure. Thus the failure of the "soft power" of the influence of politics and of the "nuclear option" as set out in Article 7 TEU is overcomed.[22]

But to give effect to this procedure, an essential step is to amend the Treaty and include this mechanism. Moreover, the lack of financial sanctions could deprive this framework of efficiency. The European Parliament proposed to sanction by freezing the funds allocated.[23]

From the application perspective, Poland is the first Member State against which the Commission has decided to initiate the procedure provided in Article 7 TEU and has also been subject to the new early warning framework through which a dialogue has been initiated on threats to the rule of law and the identification of solutions before resorting to the existing legal mechanisms referred to in Article 7. Hungary is the

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[14] Viviane Reding, Safeguarding the rule of law and solving the „Copenhagen dilemma": Towards a new EU-mechanism, http://europa.eu/rapid/press-release_SPEECH-13-348_en.htm

[15] Ion Gâlea, *Tratatele Uniunii Europene, Comentarii și explicații*, C.H. Beck, București, 2012, p. 28.

[16] *Rule of law concerns in member states: how the EU can act (infographic)*, http://www.europarl.europa.eu/news/en/headlines/eu-affairs/20180222STO98434/rule-of-law-concerns-how-the-eu-can-act-infographic

[17] In September 2012, President Barroso stated in his annual speech on the State of the Union: "We need a better developed set of instruments– not just the alternative between the "soft power" of political persuasion and the "nuclear option" of article 7 of the Treaty".

[18] COM(2003) 606 final, *Communication from the Commission on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based*, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52003DC0606&from=RO

[19] *Ibid*.

[20] COM(2014) 158 final, p. 1, http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-158-EN-F1-1.Pdf

[21] *Ibid*.

[22] Speech on the State of the Union 2012, http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm. See also Werner Schroeder, *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation*, Bloomsbury Publishing, 2016, p. 201.

[23] https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en.

second Member State against which the procedure provided in Article 7 TEU was triggered, the European Parliament being the one who exercised the right of initiative given the existence of a clear risk of a serious breach of the values on which the Union is founded, a serious deterioration of the rule of law, democracy and fundamental rights.

## 3. Liability of Member States for systemic infringements[24]

In general, procedures based on Article 258 TFEU are intended to signal and subsequently sanction specific and concrete infringements of EU law by Member States. It is assumed, however, that these violations are isolated, given that Member States are respecting their obligations deriving from the institutional treaties.[25]

Still, a solution is not provided for situations where a Member State's action is no longer in line with EU law, especially when a Member State disregards the fundamental EU principles of democracy, rule of law and protection of human rights.

The idea *of a systemic infringement action* has arisen in response to the question: *What can the European Union do about the Member States that no longer reliably play by the most fundamental European rules?*[26] This question is extremely present, as the Union faces a strong wave of actions contrary to the fundamental principles of EU law by some Member States (Poland, Hungary, Romania).

*A systemic infringement* is not defined by EU law, neither in primary law nor in secondary law. On the other hand, no regulations can be identified prohibiting the initiation of such a procedure. Further analysis also points out that "the distinction between an isolated violation and systemic or systematic violations is substantial. The difference is not just about repetition or duration, but also about the intensity of the violations."[27]

An action establishing a systemic infringement would enable the Commission to refer to the Court of Justice a general problem of deviating from basic EU principles. This is not possible in the context of a general infringement procedure.[28] In a case which can be considered as a pioneer in defining general and persistent violations, ruled against Ireland in 2005, the Court has held that the existence of a general administrative practice can be deduced from a number of individual breaches so that it can be established a "general and persistent violation" in charge of a state.[29]

If the Commission had the possibility to initiate several infringement actions against the same Member State by grouping complaints on the same subject (eg under Article 2 or Article 4 (3) TEU) in one action, it would be possible to demonstrate that all the collected and analyzed infringements would constitute a more serious infringement than the sum of the individual infringements[30] - so that the systemic breach can be demonstrated, where appropriate.

Amending the EU secondary legislation was suggested in the literature in order to provide the Commission and the Court of Justice with instruments able to determine the Member State concerned to comply with the judgment finding systemic breaches. Practically, secondary legislation could give the Commission the power to suspend EU funds for a Member State that refuses to comply as long as the infringement continues.[31]

Watching the current evolution of some Member States behaviour, the Commission needs to adapt the instruments made available by EU primary law to play its role as "Guardian of the Treaties" and thus respond to the new types of breaches. The initiation of a systemic infringement procedure where the Commission suspects that the Member State in question violates in a generalized manner the fundamental values of the European Union may represent such a development, a right answer which the Court of Justice should confirm.

## 4. Sanctioning Member States with the suspension of EU funds

### 4.1. Theoretical premise

Along with the imposition of financial sanctions in case of non-compliance with Courts judgments finding serious violations of EU law, and in particular because of the fact that in some situations these sanctions do not benefit from a deterrent factor strong enough to determine certain Member States to comply, we are in favor of amending European Union law to

[24] On the "systemic" notion in the context of the European Convention on Human Rights, see the Resolution of the Committee of Ministers Res (2004)3 of 12 May 2004 on judgments indicating the existence of a fundamental systemic problem (point 13), that states that certain structural or general deficiencies are being taken into account the legislation or practice of the State, or in case of repetitive cases triggered by causes that covers the same situation.

[25] Kim Lane Scheppele, *What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions, Verfassungsblog*, 2013, p. 1.

[26] *Ibid*.

[27] S.B.P., *Enforcing the Rule of Law in the EU. In the Name of Whom?* European Papers, vol. 1, 2016, no. 3, p. 771-776, http://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2016_3_2_ Editorial.pdf

[28] Paul Craig, Gráinne de Búrca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, 6th edition, Hamangiu, București, 2017, p. 504.

[29] Case C-494/01, *Commission v. Ireland* [2005], ECLI:EU:C:2005:250, p. 139, 151.

[30] Carlos Closa, Dimitry Kochenov, *Reinforcement of the rule of law. Oversight in the European Union, în Strengthening the rule of law in Europe. From a common concept to mechanisms of implementation*, Bloomsbury, 2016, p. 185.

[31] Kim Lane Scheppele, *cited above*, p. 9-10.

confer competence to the Commission and the Court of Justice to suspend EU funds granting[32] to a Member State that refuses to comply. We believe that this sanction could be proposed especially for those Member States which consistently refuse to respect the fundamental European values and when systemic breaches of EU law occur. Such a change can even be included in the Treaty on the Functioning of the European Union either as a complement to Article 260 TFEU or as a complement to the procedure set out in Article 7 TEU and 354 TFEU.

**4.2. The EU budget and the rule of law**

Commission has proposed in May 2018[33] a pragmatic and modern long-term budget[34] for 2021-2027.[35] A major innovation within the proposed budget is to strengthen the link between EU funding and the rule of law. Respect for the rule of law is an essential prerequisite for sound financial management and for the effectiveness of EU funding. The Commission therefore proposes a new mechanism to protect the EU budget from the financial risks linked to the general weaknesses affecting the rule of law in the Member States.

With the new instruments, the European Union will be able to suspend, reduce or restrict access to EU funding according to the nature, gravity and scale of deficiencies affecting the rule of law. Such a decision would be proposed by the Commission and adopted by the Council by a qualified majority vote.

In turn, European Commission President Jean-Claude Juncker stressed the need for this mechanism: "We will ensure sound financial management through the first ever rule of law mechanism. This is what it means to act responsibly with our taxpayers' money."[36]

The new rule of law mechanism has the role of protecting taxpayers' money in the EU. One of the prerequisites for sound financial management and effective EU funding is the successful functioning of rule of law in sectors such as the proper functioning of the judiciary and the prevention and punishment of fraud or corruption.

Although the role of this instrument is to sanction the Member States concerned, it is important that this mechanism does not affect the individual beneficiaries of EU funds as they can not be held responsible for the overall rule of law functioning.

**4.3. Proposal for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States**

In this context, the European Commission presented the Proposal for a Regulation on 3rd of May 2018.[37] In Parliament, the proposal was submitted to the Committee on Budgets (BUDG) and to the Committee on Budgetary Control (CONT), being requested also opinions from three other committees: the Committee on Civil Liberties, Justice and Home Affairs (LIBE), the Committee on Constitutional Affairs AFCO) and the Committee on Regional Development (REGI).

The European Court of Auditors gave its opinion on the proposal on 17th of August 2018 and made recommendations for clear and specific criteria to define what constitutes a generalized rule of law deficiency that should be established, stressing the need to protect the legitimate interests of EU funds beneficiaries.

On 3rd of October 2018 co-rapporteurs BUDG and CONT presented the draft report on the proposal with a number of amendments. The European Economic and Social Committee (EESC) and the European Committee of the Regions (CoR) endorsed the proposal on 18 September (EESC) and 9 October (CoR).

The report was voted on 13th of December 2018 and presented to the plenary on 18 December 2018. A plenary debate took place on 16th of January 2019 and on 17th of January 2019 Parliament adopted resolution T8-0038/2019[38] on the protection of the Union budget in in case of generalised deficiencies as regards the rule of law in the Member States.[39] Subsequently, the draft regulation was sent back to the BUDG and CONT committees for interinstitutional negotiations.

On 4th of April 2019 Parliament adopted the first reading legislative resolution on the proposal for a regulation. For this act to be considered adopted, it is also necessary for the Council of the European Union to approve it, whose presidency is assured for 6 months, starting with January 2019, by Romania. The application of this Regulation shall be effective from 1st of January 2021.

The Explanatory Memorandum states that there must be a close link between the obligations assumed by the Member States under Article 2 TEU (including the defense of the the rule of law values) and the possibility of accessing European funds. In these conditions, considering consistent gaps in the rule of

[32] The main sources of funds are the European Regional Development Fund, the Cohesion Fund and the European Social Fund.

[33] http://europa.eu/rapid/press-release_IP-18-3570_en.htm

[34] The EU's long-term budget, also referred to as the Multi-annual Financial Framework (MFF), provides a stable framework for the implementation of the EU's annual budget. It gives effect to the Union's political priorities in financial terms for a number of years and sets maximum annual amounts ("ceilings") for all EU spending and for the main expenditure categories/priorities ("budget lines").

[35] https://ec.europa.eu/commission/publications/factsheets-long-term-budget-proposals_en

[36] https://ec.europa.eu/malta/news/eu-budget-commission-proposes-modern-budget-union-protects-empowers-and-defends_en

[37] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018PC0324&from=RO

[38] http://www.europarl.europa.eu/doceo/document/TA-8-2019-0038_EN.html

[39] http://www.europarl.europa.eu/news/en/press-room/20190109IPR23011/member-states-jeopardising-the-rule-of-law-will-risk-losing-eu-funds

law and deviations from the rule of law principles in certain Member States, it has become desirable to create a mechanism for Member States to be sanctioned for non-compliance with the rule of law.

As set out in the Regulation, the rule of law requires that all public powers act within the bounds of the law, in accordance with the values of democracy and fundamental rights and under the control of independent and impartial tribunals, especially as the principles of legality, legal certainty, prohibition of arbitrariness of power executive, separation of powers in the state, and effective judicial protection of individuals by an independent court be respected. The rule of law is also a prerequisite for protecting the other EU fundamental values, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.

Article 3 of the Regulation details the reasons for triggering the rule of law mechanism while setting out cases where it may be considered a situation of generalised deficiencies as regards the rule of law:

a) endangering the independence of judiciary;
b) failing to prevent, correct and sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interests;
c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules, lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.

Limiting European funds to a Member State may also be possible for another category of reasons:

a) the proper functioning of the authorities of that Member State implementing the Union budget, in particular in the context of public procurement or grant procedures;
b) the proper functioning of investigation and public prosecution services in relation to the prosecution of fraud, corruption or other breaches of EU law relating to the implementation of the EU budget;
c) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a) and (b);
d) the prevention and sanctioning of fraud, corruption or other breaches of EU law relating to the implementation of the EU budget;
e) the recovery of funds unduly paid;
f) the effective and timely cooperation with the European Anti-fraud Office and with the European Public Prosecutor's Office.

According to the Regulation, Union actions affected or likely to be affected by the deficiency will be assessed as far as possible (Article 4 (3)).

Sanctions or appropriate measures which may be imposed under the Regulation (Article 4) and which must meet the requirement of proportionality to the nature, gravity and extent of the general rule of law deficiency are: 1. a suspension of the approval of one or more programmes or an amendment thereof; 2. a suspension of commitments; 3. a reduction of commitments, including through financial corrections or transfers to other spending programmes; 4. a reduction of pre-financing; 5. an interruption of payment deadlines; 6. a suspension of payments.

On the application of sanctions, the European Commission has the power to make a proposal to the Council of the European Union which shall become enforceable upon expiry of one month. The Council may invalidate the measure proposed by the Commission if, by a qualified majority, it votes against this proposal.

The Regulation also provides a procedure to lift measures, the Member State concerned being able to prove at any time that the generalised deficiency as regards the rule of law has been remedied (in full or in part) or has ceased to exist (Article 6).

The Regulation is binding in its entirety and directly applicable in all Member States and shall apply from the next multiannual financial framework, 2021-2027.

### 4.4. Commission concerns on strengthening the Rule of Law

In the series of actions undertaken by the Commission on strengthening the rule of law, a field subjected to improvements, the Commission published in April 2019 the Communication to the European Parliament, the European Council and the Council "Further strengthening the Rule of Law within the Union. State of play and possible next steps"[40], takes stock of the experience of recent years and sets out some possible avenues for reflection on future action. The Communication has as its starting point the public debate on the rule of law in the European Union and calls on the Union institutions - the European Parliament, the European Council, the Council - and the Member States and other stakeholders, including the judiciary and civil society, to contribute ideas to how the rule of law toolbox could develop in the future.

In the Commission's view, strengthening the rule of law could make an essential contribution to the future of the European Union. This would create greater clarity and consistency, help to ensure that all Member States are treated equally and would protect the common interests of all by effectively enforcing EU law in all Member States.

The Communication reviews the tools available for monitoring, assessing and protecting the rule of law

[40] https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-163-F1-EN-MAIN-PART-1.PDF

in the EU.[41] Experience gained in recent years has shown, in particular, the need for a better promotion of the rule of law, an early prevention of risks or violations of the rule of law, and an effective response to such problems in the Union. The Commission has identified three pillars that could help promote effective enforcement of the rule of law: 1. Better promotion; 2. Early prevention; 3. An adapted response.

As regards effective application, the Commission supports the opportunity of different approaches in specific policy areas, such as the proposal on the protection of the EU's financial interests and some improvements to the existing rule of law framework, including providing early information to European Parliament and the Council, and receiving support from these two institutions, but also setting clear deadlines for the duration of the dialogues.

European Commission will return to this issue with its own conclusions and proposals in June 2019, following the reactions of the institutions and society at large, as well as the evolution European Court of Justice the case-law.

## 5. Conclusions

The justification for the tightening of the sanctioning system also results from the fact that the founding states (but also the richest in the Union) are the ones that most frequently violate EU law and are subject to the highest financial sanctions, unlike the newer member states of the European Union that demonstrates a higher degree of compliance.

Also, EU Cohesion Funds are important support for Central and Eastern European states to help them overcome the gap between the richer and poorest parts of the continent[42].

However, the proposal to condition the granting of European funds to respecting the rule of law supports the struggle between Brussels and Poland and Hungary on democratic standards. This creates a new conditionality mechanism in terms of respecting the fundamental values of the EU and thus provides a solution to the Copenhagen Dilemma.

Although Jean-Claude Juncker, President of the European Commission, insisted that the plan to protect the EU budget in the case of rule of law generalised deficiencies does not concern a particular Member State, we can clearly interpret it as a strong notice to Poland and Hungary.

The Commission's plan also sends a warning message to other Member States where the rule of law principles are being threatened, such as Romania,[43] Slovakia and Malta.[44]

On the other hand, the big contributors to the EU budget (western Member States) welcome this measure of sanctioning states that, although they are the main beneficiaries of large sums of EU funds, choose not to respect European values.

Among the arguments put forward by the Member States concerned, the pressure of Brussels to respect the rule of law principles has been interpreted as a violation of their sovereignty. Without undermining the importance of state sovereignty, in our oppinion these arguments are losing substance in view of the following: a) values and principles have been ratified by national parliaments and signed by heads of state at the time of EU accession; b) the state of democracy in a Member State affects the state of democracy of the whole European Union; c) heads of State or Government have the right to vote in the Council, effectively controlling the future of the EU; d) the credibility of the EU as a normative power is affected if one of the states does not respect the values of the Union itself.

The different positioning of the Member States is likely to aggravate the very problem it seeks to solve, namely a deep gap between the two halves of the continent.

To address this, the plan was presented as a separate measure that could be adopted by EU member governments with so-called qualified majority, representing 55% of Member States and 65% of the EU population. European Union could apply this measure when it decides that there is a rule of law deficiency or a problem with financial management - and the Member State concerned would need a qualified majority vote to stop it.

The required conditionality thus makes it possible for Member States to take advantage of EU financial support only if they respect the rule of law principles. In other words, *tricking rule of law will leave EU Member States with no treats.*

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[41] We mention that on 11 March 2014, the European Commission adopted a new framework for addressing systemic threats to the rule of law in all EU Member States. This framework sets up an instrument within European Commission can initiate a multi-step dialogue with the Member State concerned to prevent the intensification of systemic threats to the rule of law. The most emblematic, but exceptional, instrument for defending the rule of law is the procedure under Article 7 TEU, which allows the EU to act in the event of a serious violation of the rule of law in a Member State. See above.

[42] COM(2017) 583 final, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - My region, My Europe, Our future: The 7th report on economic, social and territorial cohesion {SWD(2017) 330 final}, http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2017/0583/COM_COM(2017)0583_EN.pdf

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# ASPECTS OF THE EUROPEAN UNION'S SECONDARY LEGISLATION. CASE STUDY : FREE MOVEMENT OF SPOUSES THROUGH THE PROVISIONS OF THE DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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**Abstract**

*This study concentrates on one of the binding legal instruments of the secondary legislation of the European Union, as provided by article 288 of the Treaty on the Functioning of the European Union, the directive. Outlining its characteristics especially in comparison with those of the regulation, the paper also contains a short analyse of the evolution of preferences regarding the legal acts of the European Union. What is of significance is that the study refers to elements of both adopting and applying the European Union law. The second part is ensured by the presentation of a brief research into the topic of free movement of spouses in the framework of the Directive 2004/38/EC, as well as considering the jurisprudence of the Court of Justice of the European Union. The conclusions achieved are presented taking into account some of the most important contemporary factors which influence the activity of the European construction.*

**Keywords:** *secondary legislation of the European Union, directive, regulation, free movement of spouses*

## 1. Introduction

The European Union has an autonomous legal order, acknowledged by the Luxembourg Justice Court through the well known decision given in the case Costa vs / E.N.E.L., in which, the aforementioned was characterized as being "its own legal order, integrated in the juridical system of the member states"[1]. The listed elements should be understood taking into account another corrolary concept, also stated by the Court, who ruled that (the Union) "the Community constitutes a new international law legal order... whose subjects are not only the member states, but also their citizens"[2].

Although the European Union's legal order is susceptible of several understandings, a fact illustrated suggestively by the specialized doctrine [3], we want to direct attention to the idea according to which, in short, the Union's legal order can be presnted as being an ensemble of juridical norms - which can take some of the more diverse forms -, which regulate the entirety of juridical relations which appear, are changed and come to a close according to the European Union law. Taking as a reference the criterion of legal force, we can identify the following categories of legal norms of the Union: "Primary, original law; secondary, derivative law; rules of law coming from the external arrangements of the European Communities/European Union; the complementary law and unwritten law"[4].

One of the reference works in the field[5] states that "The Lisbon Treaty introduced a hierarchy of more formal legal rules than existed previously", appreciating that, at this moment, "there are five categories in this hierarchy". First of all, we are talking of the constitutive treaties[6] and the Charter of Fundamental Rights. To this we add the general principles of law, legislative acts, delegate regulations but, in equal measure, the implementing acts.[7] Thus, within the framework of European Union's juridical dimension, there is a variety of instruments which may be used for carrying out European construct's goals and ideals. Among all these, we will concentrate our analysis on a certain category pertaining to the legislative norms of the European Union - legal acts whose number was reduced when the Lisbon Treaty

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[1] Decision Flaminio Costa vs./ E.N.E.L., 6/64, ECLI:EU:C:1964:66.

[2] Decision NV Algemene Transport- en Expeditie Onderneming van Gend & Loos vs./ Netherlands Inland Revenue Administration, 26/62, ECLI:EU:C:1963:1.

[3] For example, see Augustin Fuerea, *Manualul Uniunii Europene* (*Handbook to the European Union*), Ediția a VI-a, revăzută și adăugită, Editura Universul Juridic, București, 2016, pp. 228-229.

[4] Ion P. Filipescu, Augustin Fuerea, *Drept instituțional comunitar european* (European Institutional Communitary Law), ediția a V-a, Editura Actami, București, 2000, pp. 32-34.

[5] Paul Craig, Grainne de Burca, (translated under the coordination of Beatrice Andresan-Grigoriu), *Dreptul Uniunii Europene: comentarii, jurisprudență și doctrină*, (European Union Law: commentaries, jurisprudence and doctrine) Ediția a VI-a, Editura Hamangiu, București, 2017 pp. 135-136.

[6] The Treaty on European Union and the Treaty on the Functioning of the European Union - TEU and TFEU.

[7] Without making extensive comments regarding this "ranking", because that is not the main scope of our analysis, we would like to mention that, on first sight, it seems a mainly formal one, which raises multiple interpretation issues, and even, as the author of the mentioned paper adds, "incomplete, in the sense that there are certain legal acts which are not easily falling into either of these categories."

entered into force[8], from ten to five[9], respectively: regulation, directive, decision, recommendation and opinion - namely the directive category.

This study refers both to elements related to the adoption and implementation of this category of legal documents. The second dimension invoked will be presented through the prism of analysis of certain aspects of European Union' substantive law in the field of the freedom of movements of persons. More precisely, part of our analysis is dedicated to the restricted sphere of beneficiaries of this liberty, falling under the category of "family members", respectively spouses.

The importance of this initiative comes from the dynamics of this segment of European union law - recognized, understood and accepted as a separate branch of law - to which it is dedicated and by the necessity of a permanent actualization of information available in specialized papers, given the multitude of practical situations where they are applicable. Having as central scope of our study the directive, an objective we assume is that of underlining the essential elements differentiating this type of legislative act from the regulation or decision. Also, we are taking into account the outlining of criteria taken into account at the moment of choosing to legislate by this type of act, as well as presenting the impact, the legal consequences such option generates. All the above-mentioned shall be highlighted in correlation with a case study on the free movement of spouses, as this subject should be understood within the meaning of the European Union law.

In order to achieve the objectives stated, we will use the following ways: research of the specific primary and derivative legislation of the European Union, but also the analysis of representative decisions in this regard of the Court of Justice of the European Union, as well as the specialized doctrine[10]. Examining the aforementioned will lead to an assertion of the main ideas in the matter and of personal theoretical conclusions, in agreement with the present challenges of the practice in this field, all presented in a style that should be accessible to all those interested in this topic.

Although the doctrine cannot be considered insufficient in this regard, some of the reference works being already mentioned in the above, it is essential to add new research to them, research that answers the challenge to be in agreement, from several perspective, with this field which concerns the citizens directly and which is special because it is constantly transforming, especially in the present international context.

## 2. Content

### 2.1. The directive, legislative act belonging to the secondary legislation of the European Union

The governing rules in the primary law are represented, in this case, by article 288 of the Treaty on the Functioning of the European Union[11] (hereinafter TFEU), the content of which we consider relevant to reproduce for the good understanding of approaching this subject: "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions./ A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States./ A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods./ A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them./ Recommendations and opinions shall have no binding force."

"The ensemble of unilateral acts of the European Union's institutions"[12] represents what is known as derivative, secondary law of the European Union, such institutions using, in order to "accomplish objectives... both mandatory legal rules and non-mandatory ones"[13]; the said have, in certain cases, even the possibility to choose the legal ruling they consider opportune for a given situation - obviously, while respecting certain conditions, stipulated in article 296 TFEU. We are talking about the obligation to respect procedure norms, as well as to exercise this option by taking into account the proportionality principle and not lastly, to offer the reasons. In this context it is mandatory to note another stipulation of the mentioned article, respectively the fact that the institutions may use this "option right" only in case treaties don't establish the type of act which is to be adopted. However, it is necessary to highlight that, at the present time, "the Union has three main types of formal legal norms at its disposal: regulations, directives, decisions"[14], which are adopted in accordance with the rules stated by article 297 TFEU[15],

[8] 1st December 2009.

[9] As shown in the contents of the studies "Legislația UE- sinteze (EU legislation - syntheses)", available at the address https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=LEGISSUM:ai0032, accessed at 21.1.2018.

[10] By way of example, we mention: Augustin Fuerea, *Dreptul Uniunii Europene: principii, acțiuni, libertăți*, (European Union Law: Principles, Actions, Liberties) Editura Universul Juridic, București, 2016; Guy Isaac, Marc Blanquet, *Droit général de l'Union européenne,* (General Law of the European Union) 10e édition, Dalloz, Paris, 2012; Paul Craig, Grainne de Burca, op. cit.; Nicoleta Diaconu, *Dreptul Uniunii Europene: politicile Uniunii Europene* (European Union Law: European Union Policies), Editura Universul Juridic, București, 2017.

[11] Published in the Ofiicial Journal C 326 , 26/10/2012 pp. 0001 – 0390.

[12] Augustin Fuerea, Manualul Uniunii Europene (Handbook to the European Union), op. cit., p. 230.

[13] Paul Craig, Grainne de Burca, op. cit., p. 116.

[14] Paul Craig, Grainne de Burca, op. cit., p. 135.

[15] (1) Legislative acts adopted under the ordinary legislative procedure shall be signed by the President of the European Parliament and by the President of the Council. / Legislative acts adopted under a special legislative procedure shall be signed by the President of the institution which adopted them...

the said three being the legislative acts through which to carry out, to realize "the European Union's policy in any particular field"[16].

According to the provisions representing the governing rules we are discussing[17], the directive can have as recipients one, several or all member states, being mandatory for those it addresses, but only in regards to the result which is to be achieved, while leaving at the discretion of the member states, more precisely to the national authorities, the competence to choose the form and means to achieve its imposed "goal".

Unlike the decision, "the directive is a general applicability text, withing all EU countries"[18], and unlike the regulation, which is applied in the internal legal order of the member states immediately after entering into force[19], the directive is not directly applicable in the internal law system of the countries belonging to the Union, it has to be first transposed into the national legislation before being applicable in each member state. Such transposition is a subject we will cover again in this work, similar to how we will give more explanations regarding the notion of "direct effect", which we will just mention now through the lens of the differences between the specific statute of the regulation and that applicable to the directive. Therefore, comparative to the regulation, the directive "does not benefit from direct applicability and, as a consequence, doesn't benefit from a direct effect either"[20], the resulting rule being that private persons cannot invoke and use the provisions of the directive in front of national courts.

However, there were situations which can be considered exceptions, where "the force of the directives was increased by decisions given by the ECJ"[21]. We believe that this is also due to the fact that "there were enough times when litigants invoked the provisions of a directive in front of the national courts... as a result of the preliminary questions, the Court of Justice in Luxembourg has developed a rich jurisprudence in the field, recognizing, under certain conditions, the direct effect of this legal act of the European Union"[22]. In the specialized doctrine, there is even more vehement support regarding the rulings the Court made in this regard, showing it to have judged as follows: "directives have a direct effect, private person being able to use them in actions directed against the state[23] and including that "a Member State may be responsible for repairing the injury caused as a result of not implementing a directive"[24]. But we cannot neglect the fact that, even in this latter work invoked, which deals comprehensively with the "theory of direct effect"[25] (of the mandatory norms of the European Union), the author stresses that "the significance of the notion of direct effect remains controversial"[26], categorizing directives in the sphere of the legislative acts in connection with which the most problematic aspects have arisen in practice, for many years.

In support of the idea presented above we note, for example, the decision of Judge PhD Carmen Popoiag[27] to address the Court of Justice and raise, inter alia, "the issue of the possibility of direct applicability of communitary law by the Romanian court"[28], exactly based upon the merits of the fact that "since 1974, the Court ruled that the former article 3 paragraph (1) of the Directive 64/221[29] was susceptible to cause direct effects"[30]- in certain conditions; in practice, we are talking about the possibility to limit the right to freedom of movement based upon the exclusive existence of a personal behaviour of the litigant, and of the fact that such conduct must necessarily affect public order[31].

### 2.2. The right to choose. Regulation or Directive? Advantages and disadvantages

The possibility for the legislative act at the level of the European Union to result in either regulations or directives gives it "a valuable flexibility. The direct applicability of regulations means that they must be

(2) Non-legislative acts adopted in the form of regulations, directives or decisions, when the latter do not specify to whom they are addressed, shall be signed by the President of the institution which adopted them…

[16] Paul Craig, Grainne de Burca, op. cit., p. 135.

[17] Article 288 TFEU.

[18] According to the studies *Legislația UE -sinteze* (*EU Legislation - Summary)*, available at the address https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=LEGISSUM:ai0032, accesed on 24.01.2018.

[19] According to the article 297 TFEU, legislative acts shall enter into force on the date laid down by their text or, in the absence thereof, on the twentieth day following that of its publication in the Official Journal of the European Union.

[20] Augustin Fuerea, *Manualul Uniunii Europene* (*Handbook to the European Union*), op. cit., p. 238.

[21] Paul Craig, Grainne de Burca, op. cit., p. 120.

[22] Mihaela Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia* (European Union Law and its Particularities), ediția a II-a, revăzută și adăugită, Editura Universul Juridic, București, 2015, p. 93.

[23] Paul Craig, Grainne de Burca, op. cit., p. 120.

[24] Ibid.

[25] Paul Craig, Grainne de Burca, op. cit., p. 206.

[26] Ibid.

[27] For details, see Carmen Popoiag, *Hotărarea pronuntată în cauza "Jipa" (C33/2007-a C.J.C.E.)- Aspecte și implicații practice*, (Decision given in the "Jipa" case (C33/2007-a C.J.C.E.) - Practical Aspects and Implications) Revista Română de Drept Comunitar, nr. 6 din 2008, pp. 115-119.

[28] Mihai Banu, Daniel-Mihai Șandru, *Cauza C-33/077, Jipa- Prima acțiune preliminară a unei instanțe românești la Curtea de Justiție a Comunităților Europene (Case C-33/077 Jipa - the First Preliminary Case of a Romanian Court at the European Communities Court of Justice)*, Revista Română de Drept Comunitar, nr. 6 din 2008, p. 110.

[29] Actually, we are talking about article 27 (2) of Directive 2004/38.

[30] Mihai Banu, Daniel-Mihai Șandru, op. cit, p. 110.

[31] Decision Yvonne Duyn vs. Home Office, 41/74, ECLI:EU:C:1974:133, pct. 13.

able to be directly "parachuted" in the legal systems of member states, in the form they have"[32]. In such a situation, it is understood that the provisions of a regulation must be designed so as to contain references to all the aspects and hypotheses of the "situation" which is the object of the regulation. We do not think it unusual that, in practice, especially when the field which is the scope of the regulation is either a more complex one, or a more delicate one, a lot of difficulties appear in the designing of such a type of normative act. Some of the reasons we appreciate as being relevant are the differences between legal systems or legislation in force in the member states on that matter; we would like to add the differences, some very substantial (in case of certain countries) between administrative, social and even cultural systems.

The above mentioned should not be taken as having the role of diminishing the significance or practical usability of the directive, but only to help us spotlight better the cases in which the decision to choose a directive (instead of elaborating a regulation, but without limitation to just this case) has proven effective, especially through the lens of the fact that it offers the recipient member states the freedom regarding the manner of implementing the directive, more specifically the way to choose and implement measure in order to reach the mandatory goal pursued. "But they shouldn't be considered vague, because they are not. The goals to be reached by the member states are established to the smallest details"[33]. All these characteristics create the ideal legislative act of the European Union for the concretization of great scale legislative reform or for carrying out a process of harmonizing the member states' legislation - the directive.

We cannot continue our analysis without underlining the fact that, in time, the preferences for juridical interventions at the level of (E)EC[34], or at the level of the Union, respectively, have undergone, obviously, a lot of changes[35]. A clear example in this regard is presented in the introduction of the paper "Directiva -act de dreptul Uniunii Europene - și dreptul român" (The Directive - European Union Legal Act - and the Romanian Law) and it refers to the Declaration no. 4 regarding article 100 a of the EEC Treaty, annexed to the final part of the Single European Act[36], which states: "In its proposals, the Commission shall give priority to the use of the directive instrument, in case harmonization implies, in one or more of the member states, changes in legislation"[37].

Regarding the concept of harmonization, we like to note that it is susceptible, in general, to be understood in two ways, namely minimum harmonization and maximum (complete) harmonization, the distinction being important from the perspective of the mandatory requirements. In essence, for the minimum harmonization, the directive imposes minimal standards, these being the situations where in some of the member states there are already higher standards in force. On the other hand, when we speak about maximum harmonization, we have to take into account the fact that the countries in the Union cannot impose stricter norms than those established through the directive[38].

Through all these last clarifications we tried to outline, in short, the situations in which the advantages of using directives bestows upon them (or, at least, used to bestow) a preferential place in relation to the regulation, at times when there is the possibility to choose a certain type of normative act.

We cannot advance in our analysis without bringing into discussion another relevant idea for the aforementioned, namely that "a new directive did not necessarily presuppose transposition into national law"[39]. At present, the situation is completely different, "taking into account the generalization of publishing the directives in the Official Journal of the European Union and of the obligation of the member states to include a link to the directive in the transposition measures, together with designing and publishing a concordance table between the transposition decisions and the directive"[40], to which other reasons having to do with the entire evolution of legislative provisions of the European Union, as well as the legislative differences between the 28 member states are added. Consequently, "exceptions to the obligation for the adoption of (new) internal legal acts, which is the responsibility of the Member State in order to implement a new Directive, can no longer be conceived"[41]. However, some authors indicate situations where there is no need to adopt internal laws in order to transposition some provisions from a directive, but we would like to highlight that in this case we are discussing about certain specific provisions[42].

[32] Paul Craig, Grainne de Burca, op. cit., p. 119.
[33] Paul Craig, Grainne de Burca, op. cit., p. 120.
[34] European Economic Community/European Community.
[35] This aspect is mentioned also in the introduction of the paper coordinated by Daniel-Mihail Șandru, Constantin Mihai Banu, Dragoș Alin Călin, *Directiva - act de dreptul Uniunii Europene- și dreptul român* (The Directive - European Union Legal Act - and the Romanian Law), Editura Universitară, București, 2016, p. 15.
[36] Signed in 1986, which entered into force in 1987.
[37] Daniel-Mihail Șandru, Constantin Mihai Banu, Dragoș Alin Călin, op. cit, p. 15.
[38] See *Legislația UE- sinteze* (*EU Legislation - Summary),* https://eur-lex.europa.eu/legal-content/RO/TXT/?uri =LEGISSUM%3of the14527, accessed on 25/01/2019.
[39] Daniel-Mihail Șandru, Constantin Mihai Banu, Dragoș Alin Călin, op. cit., p. 16.
[40] Ibid.
[41] Ibid.
[42] Irina Alexe, Constantin Mihai Banu, *Transpunerea directivei prin ordonanță de urgență. Exemple recente din dreptul român și aspecte comparate* (The Transposition of the Directive through an Emergency Ordinance. Recent Examples from the Romanian Law and Comparative

Moreover, the differences appearing regarding the legal status of the directives can be seen as normal and correlative to the evolution taking place during the years. For example, at the beginning of the European construction, the directive wasn't published, like the regulation, this particular fact creating consequences regarding the moment when the transposition deadline started. The Court of Justice of the European Union states that "according to the second subparagraph of Article 191 of the EEC Treaty, applicable at the time of the adoption of... the directive (with significance for the question concerned), directives are (were) notified to their addressees and enter (were entering) into force by such notification. Therefore, not the date of publication, but the date of notification to... the member state.. was relevant to determine when the period of transposition of such directive began"[43].

As a curiosity, we want to present a short analogy, in terms of terminology, between what the Treaty establishing a Constitution for Europe - which never entered into force, not being ratified - called the "European framework law", and the meaning of the term "directive" today. The above mentioned treaty defined the European framework law as being "a normative act which constitutes as an obligation for each recipient member state the goal to be reached, while at the same time allowing the national authorities the competence regarding choosing the form and means"[44]. During a simple read through the governing rules on the subject (already mentioned) regarding the directive, respectively the third part of article 288 TFEU, it is clear that the essential disposition in the primary law regarding the directive is identical with that in the Treaty for establishing a Constitution for Europe, which defined the European framework law. The same treaty defined "European law" as being the normative act with a general character "mandatory in all its elements and directly applicable in all member states"[45], the same being also the elements defining, in the present European Union legal order, the notion of regulation.

As mentioned until now, in summary, the situations where using the directive as a normative act offers multiple benefits, but also a few of its evolutive elements -both at conceptual level and on the practical one, we consider that, for a complete analysis, it is necessary to bring into discussion some disadvantages it has, at least regarding the practice in this field.

One of the documents invoking some of these aspects is "The Monti Report", presented by Professor Mario Monti, to the President of the European Commission at the time (May 9, 2010), Jose Manuel Barroso. This report acknowledges the advantage of directives of allowing an adjustment of norms to local situations and preferences, but also indicates the following disadvantages: "the time gap between the adoption at the European Union level and implementation on the ground", but also "the risk of non-implementation or over-regulation at national level." The conclusion in this regard is that "there are more and more reasons to choose regulations than directives as a preferred juridical technique for regulating the single market... our recommendation being to mainly use regulations"[46]. The respective report refers to the single market because that is the main scope of the said document, but we deem that this idea is, surely, applicable in regards to different subjects. Moreover, the European Commission show a constant concern to "identify what areas of the current legislative corpus could be improved"[47]. In this regard, it shall draw up and assess EU policies and rules in a transparent manner, starting from concrete data and integrating the opinions of the citizens and interested parties - all these being carried out through the use of an "Agenda for better regulation".

### 2.3. Items relating to the application of the Directive, derivative legislative act of the European Union

Returning to the study's main scope, we note the following statement, together with the mention that we agree with its meaning: "In addition to the definition from the Treaty, it should be borne in mind that any directive is in connection with three dates, time periods or events"[48].

First of all, it has to do with the time of the adoption of the directive, after completion of either the ordinary legislative procedure[49], or one of the special legislative procedures. In the first case noted, the adoption moment can be identified in the light of the time of the signing of the document by the president of the European Parliament and by the president of the Council, as is apparent from Article 297 TFEU. The same article states that, in case we are talking about a directive which is adopted in accordance with a special legislative procedure, then it shall be signed by the

Aspects.), published in the paper *Directiva - act de dreptul Uniunii Europene - și dreptul român* (The Directive - European Union Legal Act - and the Romanian Law), Editura Universitară, București, 2016, p. 140.

[43] Decision Jetair NV and BTW-eenheid BTWE Travel4you vs. FOD Financiën, C-599/12, ECLI:EU:C:2014:144, point 25.

[44]https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2004:310:FULL&from=RO, accesed on 25.01.2019, unauthorized (personal) translation.

[45] Ibid.

[46] This report is mentioned in this way by Daniel-Mihail Șandru in the study *Directiva -act de dreptul Uniunii Europene- și simplificarea normativă* (The directive - European Union Legislative Act - and Normative Simplification) published in the paper coordinated together with Constantin Mihai Banu, Dragoș Alin Călin, op. cit., p. 44.

[47] For more details, see the official page of the European Commission, *O mai buna legiferare: de ce și cum* (Better Regulation: Why and How), https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_ro, accessed on 25.01.2019.

[48] Daniel-Mihail Șandru, Constantin Mihai Banu, Dragoș Alin Călin, op. cit, p. 16.

[49] Also knownd as the co-decision procedure; for more details, see Paul Craig, Grainne de Burca, op. cit, p. 140.

president of the institution which adopted it. The two types of legislative procedure are determined in accordance with the provisions of article 289 TFEU, the treaty being also the instrument by which the practical manner of their functioning is explained[50].

As mentioned, the next moment having important meaning is the date the directive enters into force, which we will not explain further, as the relevant elements were already mentioned in the present study.

Hereinafter we will discuss the third important moment we mentioned, respectively the transposition date or, if we want to be very precise, the transposition deadline. Each directive states such a deadline, which is calculated from the date of its entering into force, and, according to recent practice, the rule is that it shall not be longer than two years [51], but this period can, obviously, be much shorter[52]. The duration of this deadline is the period available to the member states to adopt all measures necessary so the directive may enter into force in the countries of the Union, respectively to adopt a law which would transpose it, but also any other national measures which aim to reach the goals set by the directive. By the expiration of the deadline, the member states must send the Commission the text for the national transposition measures[53], which integrate the dispositions of the directive into the national legislation and serve to achieve the aims imposed by it. The Commission verifies that the measures are complete and fulfill all necessary conditions for achieving the desired result.

If, after its examination, the Commission finds that the answer is "no", it may initiate the EU law infringement proceedings and may start an action against that country before the Court of Justice of the EU (the failure to enforce its decision may lead to a new conviction, which could generate penalties). As it becomes clear from what we just mentioned, a total lack of care from the member state is not required, the Commission may start an infringement procedure if the directives were not transposed correctly, such being sufficient reason in this regard[54].

Regarding the obligations which the directive recipient, namely the member state, has to fulfill in this determined period, various controversies appeared in practice, the Court of Justice being the one which helped in establishing an unified practice, at least regarding certain aspects. An edifying example in this respect is the decision given in the case C-129/96 (Inter-Environnement Wallonie ASBL vs. Région wallonne)[55], through which it is stated that through this deadline, indicated by the directive, the aim is "mainly to give the member states the time needed to adopt the measures needed for the transposition, thus the said states cannot be held responsible for not transposing the directive in the national legal order before the expiry of the deadline granted"[56]. Regarding the states obligations, it is noted that they shall adopt, during the transposition deadline "the measures needed to ensure the fulfilling of the goal stated by the directive..."[57]. Therefore, although the states shall not be subject to the obligation to adopt such measures before the expiry of the time limit for transposition into national law, the Court shows that "within this period, the member states should be able to refrain from adopting provisions which could seriously compromise the result stated by the directive[58]. We believe that this last requirement is natural, whereas we are of the opinion that the activity to be carried out at national level does not have to take into account just the adoption of legal acts, the target being the implementation of legal acts adopted pursuant to the requirements of the directive.[59]

All these are components of the second phase of the legislative process, that is the implementing phase for the legislation, towards which the European Commission manifests a permanent interest, there being in place even a monitoring mechanism in this regard. Regarding directives, yearly the Commission publishes a report evaluating the results the member states achieved in regard to essential aspects of applying EU law and presenting the main evolutions of that year. The report[60] is also sent to the European parliament and to the national authorities, the most recent such document containing the analysis made during the year 2017.

As mentioned, the Commissin checks if the countries belonging to the European Union communicate the transposition measures and if they transpose fully, correctly and timely the provisions of the directives into the national legislation. However, delayed transposition of directives by the member

[50] For the ordinary legislative procedure, refer to article 294 TFEU, and for details on the special legislative procedures, see, for instance, article 86 and article 89 TFEU.

[51] According to https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=LEGISSUM%3Al14527, accessed on 25.01.2019.

[52] As an example, we highlight that there are situations when a term of only three months was imposed for the transposition - the Directive proposal of the European Parliament and of the Council for the ammendment of Directive 91/477/EEC on the purchase and possession of weapons.

[53] The national transposition methods can be identified using the following link: https://eur-lex.europa.eu/collection/n-law/mne.html?locale=ro, accessed on 25.01.2019.

[54] See https://ec.europa.eu/info/law/law-making-process/applying-eu-law/monitoring-implementation-eu-directives_ro, accessed on 25.01.2019.

[55] ECLI: ECLI:EU:C:1997:628.

[56] Decision Inter-Environnement Wallonie ASBL versus Région wallonne, C-129/96, ECLI:EU:C:1997:628, paragraph 42 and the following.

[57] Ibid.

[58] Ibid.

[59] For details, see Daniel-Mihail Șandru, Constantin Mihai Banu, Dragoș Alin Călin, op. cit, p. 22.

[60] These reports can be viewed for free, at the address https://ec.europa.eu/info/publications/annual-reports-monitoring-application-eu-law_en, accessed on 26.01.2018.

states of the European Union "remains a problem, due to the persistence of which citizens and businesses can not enjoy the tangible benefits of the European Union legislation"[61]. After 2016, as a result of the publication of the annual report in December, the Union has set the objective of deficit reduction of the transposition into national law at 1%, an objective we deem, at least in the current context, though extremely beneficial, as being very bold.

For the member states the transposition is, also, a subject involving multiple challenges, since they have to face the most varied legal situations, linked to this operation, at the conceptual level, but especially at the procedural one[62]. A complex example in this regard, in Romania, refers to the transposition of the Directive 2004/38/EC[63] of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance).[64]

From the full name of the directive we just mentioned, another classification of directives can be made, some having the purpose of introducing new provisions, in a field which was not yet the object of a regulation, others of completing or amending already implemented normative acts. The list can go on with those containing provisions like repeals or establishing provisions titled "framework regulations". Also, in some cases the directive could cover, for reasons of clarity and coherence, two distinct normative acts in the shape of a new regulation.

Next, we will dedicate our study to an analysis of the main scope of Directive 2004/38/EC, concentrating our particular efforts on the free movement of spouses, in the larger context of provisions concerning the free movement of persons.

### 2.4. Elements of principle on the free movement of persons

The free movement of persons is one of the four basic freedoms of the European union law, together with the free movement of goods, services and capital. According to rules established by the Treaty on the Functioning of the European Union (TFEU), this "in practice refers to... the free movement having as recipients the workers, a freedom which Bernard Teyssié considers to be a fundamental right which national courts have to defend"[65].

The main grounds of this subject matter, part of the primary legislation of the Union, is represented by article 45 TFEU, which we cite in the following, for coherency reasons: "(1) Freedom of movement for workers shall be secured within the Union./ (2) Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment./ (3) It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:(a) to accept offers of employment actually made;/ (b) to move freely within the territory of Member States for this purpose;/ (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;/ (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission./ (4) The provisions of this Article shall not apply to employment in the public service."

These provisions, fundamental for the field comprising the scope of our study, must be interpreted in the broader context instituted by Title IV of the said treaty and corroborated with the normative acts which govern the field of freedom of movement of the workers, taking into account the categories of beneficiaries, the rights they gain correlative to this freedom, but also the exceptions which can appear. In addition to all these mentioned, we have to take into account the jurisprudence of the Court of Justice of the European Union, which is essentially relevant from the perspective of defining the fundamental notions with which the subject matter of free movement of people operates. The diversity and complexity of practical situations that may appear in this field, of great interest and highly dynamic, is reflected both at the level of the regulatory framework, as well as the jurisprudential one.

In order to advance in our analysis, we deem it essential to underline the distinction "between this freedom of movement, relating exclusively to workers, and the freedom of movement in the Union space that is regulated by the Treaty as a right benefiting all citizens

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[61] *Legislația UE- sinteze (EU Legislation - Summary),* https://eur-lex.europa.eu/legal-content/RO/TXT/?uri =LEGISSUM%3Al14527, accessed on 25.01.2019.

[62] For a more detailed analysis regarding these aspects, please see the study *Transpunerea directivei prin ordonanță de urgență. Exemple recente din dreptul român și aspecte comparate* (The Transposition of the Directive through an Emergency Ordinance. Recent Examples from the Romanian Law and Comparative Aspects.), published in -Daniel-Mihail Șandru, Constantin Mihai Banu, Dragoș Alin Călin, op. cit., pp. 132-173.

[63] Published in the Official Journal of the European Union, L 158, 30.4.2004, pp. 77-123, https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32004L0038, accessed on 26.01.2019.

[64] For an illuminating analysis of this directive in terms of transposition into national law in Romania, see Augustine Fuerea Tratatul de aderare a României la Uniunea Europeană privind libera circulație a persoanelor (II) (Treaty of Accession of Romania to the European Union on the free movement of persons (II)), Revista română de drept Comunitar, nr. 6/2009, pp. 15-24.

[65] Augustin Fuerea, *Dreptul Uniunii Europene: principii, acțiuni, libertăți* (European Union Law: Principles, Actions, Liberties), op. cit., p. 19.

of the member states"[66]. We will concentrate on the first case, where "the person, citizen of a member state of the European union, moves on the territory of another state with the stated purpose of accepting an offer of employment actually made"[67] and not the status of the free movement right, based upon which such "movement takes place with any other purpose in mind".

### 2.5. The main categories of beneficiaries of the freedom of movement

The level of primary legislation imposes, in addition to the category of employees, which we have already indicated, other categories of recipients of this freedom of movement - a fundamental element of the internal market and the European construction in the form in which it is known today.

First of all, article 48 TFEU discusses, in the first paragraph, the migrant employees or those self-employed, to which it adds the persons in their care. The scope of potential recipients is extended, by the provisions of article 49 the second paragraph to include in this category companies, too[68]. Although for a complete and thorough understanding of the beneficiaries of freedom of movement each category should be the scope of a distinct analysis (many of the basic notions were not defined in any treaty or the secondary legislation), given the main scope of the present study, we will limit ourselves to a few essential notes regarding the concept of "worker" which is used, as we have shown, even in the primary law of the European Union.

Currently, the term "worker" is an autonomous concept of the European Union law, as the Court "insisted since the start"[69], with the purpose of avoiding the situation in which each state could offer its own interpretation of such a concept, "according to whim and frustrate the treaty's objectives"[70]. 'The Court has assumed the final authority to define its meaning and scope and self-conferred a <<hermeneutic monopoly>> to counteract any unilateral restrictions" of the member states, with regard to rules on freedom of movement"[71]. In summary, according to the Luxembourg Court, any person who carries out genuine and effective service tasks is a worker, insignificant activities being excepted, when they can be considered "purely marginal and ancillary"[72] . The need for a relationship of subordination[73] is the element that distinguishes economic activity under article 45, from independent economic activities, such as the creation and management of businesses, companies[74]. Thus, the worker is the person who performs, under somebody's leadership, a genuine and effective work, for which he is paid. We also add that we should not forget that the meaning of this notion is not always identical, thus having to pay attention, in our interpretation, to the legal context in which it is used. We deem that such claims shouldn't have been overlooked, being essential for understanding the subject we discuss and having a direct connection to it.

In accordance with article 46 TFEU "The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45…". This provision has resulted in the adoption, over time, of numerous regulations and directives applicable in this matter.

Currently, an example of legislation that strengthened and codified a significant number of regulations is Directive 2004/38 on freedom of movement and residence within member states for Union citizens and their family members[75]. Besides strengthening and codifying, another innovation of this directive "consisted in the introduction of the right of permanent residence for nationals of the European union and their families, after years of uninterrupted legal residence in another Member State"[76]. Regarding regulations, we talk about Regulation no. 492/2011[77], its main scope being the main rights a national worker of the member states can acquire, both for himself and for their family members (the concept of national is

[66] Augustin Fuerea, *Dreptul Uniunii Europene: principii, acțiuni, libertăți* (European Union Law: Principles, Actions, Liberties), op. cit, p. 192.
[67] Augustin Fuerea, *Dreptul Uniunii Europene: principii, acțiuni, libertăți* (European Union Law: Principles, Actions, Liberties), op. cit, p. 192.
[68] According to Article 54 TFEU, through the term companies, in the scope of the present provisions, we have to think about: "companies formed in accordance with civil or commercial law, including cooperative societies and other legal persons, public or private, except non-profits".
[69] For a detailed analysis of the concept of worker within the confines of European Union law, see Paul Craig, Grainne de Burca op. cit., pp. 833-845.
[70] Case M.K.H. Unger, married R. Hoekstra versus Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten à Utrecht, 75/63, ECLI:EU:C:1964:19.
[71] Paul Craig, Grainne de Burca, op. cit., p. 834 invoking Giuseppe, Federico Mancini *The free movement of workers in the case-law of the European Court of Justice.*
[72] Case C.P.M. Meeusen versus Hoofddirectie van de Informatie Beheer Groep, C-337/97, ECLI:EU:C:1999:38.
[73] Case Aldona Malgorzata Jany and Others versus Staatssecretaris van Justitie, C-268/99, ECLI:EU:C:2001:251.
[74] Mentioned in Article 49 TFEU.
[75] Its full name is Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC; text with relevance for EEA, available at:https://eurlex.europa.eu/legalcontent/RO/TXT/?uri=celex%3A32004L0038, accessed on 07.02.2019.
[76] Paul Craig, Grainne de Burca, op. cit., p. 834.
[77] The Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union; text with EEA relevance, available at the address:https://eur-lex.europa.eu/legalcontent/RO/TXT/?uri= celex%3A32011R0492.

clarified by Law no. 157/2005 for the ratification of the Accession Treaty of Romania to the European Union[78], in Article 3: "by national of a Member State we mean the natural or legal person having the citizenship, respectively the nationality of that State, in accordance with the domestic legislation of said state").

Given the above, it is clear that the analysis of this subject is susceptible of being done several ways, but regardless of the variant we choose, we have to relate the study of free movement of persons "both to the primary instruments of European communitary law (the founding treaties and the amending ones, including Romania's Accession treaty to the European Union)… as well as to the derivative instruments of the same European communitary law"[79]. Also we'd like to mention, as a supplementary information, the existence of a transition regime regarding the freedom of movement of persons, which must be taken into account - this is still currently applying, but just in the case of Croatian workers (who joined in July 2013), until June 2020. According to specialized doctrine, the workers right to freedom of movement was "nuanced in relation to the 2004 extension, when ten Central and Eastern European states joined"[80]; this situation was a premiere, in the sense that the European Union admitted new members "refusing them, at the same time, the immediate right to benefit from one of the four fundamental liberties"[81]. This transition regime granted the already member states the right to choose for the "delayed" application (for up to seven years) of the full freedom of movement rights - obviously, referring to workers from the new states. Without getting into detail regarding this transition regime, we note that it ended on April 30, 2011, for the ten states, and in the case of our country and Bulgaria, it ceased to be effective on December 31, 2013[82].

Returning to the list of the main categories of beneficiaries - from the perspective of the derivative legislation, very relevant is the Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states. Starting with the directive title, one notices the outlining of another category of persons susceptible to be recipients of such freedom: family members (of salaried migrant workers or of self-employed ones). What this notion means is clarified right in the text of the directive, namely article 2, which clarifies also the meaning of the notions "Union citizen", "host member state"[83]. Therefore, in accordance with article 2 of the directive specified, "member of the family means: (a)/ the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;/ (c) the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b);/ (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)." Article 3 establishes the recipients of the present directive and takes into account: any citizen of the Union, as well as the members of their family (according to the definition in article 2 we presented), who moves or has their residence in a member state, different than the one whose national he/she is. In this context it is necessary to emphasize that the above mentioned must be understood in conjunction with article 7, paragraph 4 of Directive, under which: "…only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner"[84].

### 2.6. The spouse, family member and beneficiary of freedom of movement. Legal perspective

To achieve the aim of our research, we will continue to restrict the scope of this study to one of the "subcategories" of beneficiaries of the freedom of movement, established explicitly through the legislative acts belonging to the secondary legislation of the European Union - the spouse, family member of the migrant worker or self-employed.

For starters, we will mention a few aspects highlighted by the European Commission, through a communication[85], which we deem relevant for our topic. Regarding Directive 2004/38/CE, which simplified and strengthened the right to free movement and residence for the Union citizens and their family members - so, implicitly, for spouses - the Commission reminds that it "must be interpreted and applied in accordance with the fundamental rights, especially the right to respecting private and family life, the principle of nondiscrimination, children's rights and the right to

[78] This is the shortened name of Law 157/2005.

[79] Augustin Fuerea, Tratatul de Aderare a României la Uniunea Europeană (II) (Treaty of Accession of Romania to the European Union (II)). Libera circulație a persoanelor (Personal Freedom of Movement), Revista Română de Drept Comunitar, nr. 6/2008, p. 25.

[80] Paul Craig, Grainne de Burca, op cit, p. 844.

[81] Ibid.

[82] According to those mentioned by Paul Craig, Grainne de Burca, op cit, p. 845.

[83] Any person having the citizenship of a member state; the member state to which a citizen of the Union moves in order to exercise the drept to freedom of movement and residence.

[84] This note is also mentioned in the specialized doctrine, Augustin Fuerea, op. cit, p. 216.

[85] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on guidance for a better transposition and application of Directive 2004/38/EC on the right to move and reside freely within the Member States for Union citizens and their family members, Brussels, 2.7.2009 COM(2009) 313, p. 3.

an efficient recourse[86]". All these are guaranteed by the European Charter on Human Rights, as reflected in the Charter of Fundamental Rights of the European Union, but also in the case law of the Court in Luxembourg[87]. For spouses, we deem that the possibility to move and, eventually, reside together is a *sine qua non* condition for the respect of private and family life; we do not deny that this might happen even if the spouse having the capacity of worker is not joined by the other spouse, but the decision should belong exclusively to the two, and they should also have the ability to change it at any time.

Also, the Commission highlights the fact that the aforementioned directive is applied only to Union citizens who are moving or have their residence in another member state (not the one they are citizens of), as well as to their family members who accompany them or join them. An example we find illuminating about this is: "X, citizen of a third party country, lives for a while now in a host member state. She wishes for her husband, citizen of a third party country, to join her." Could the two benefit from the rights bestowed by the directive, even if they are not citizens of the Union? The answer is, obviously, no, "the respective member state having full rights to impose norms regarding the right of spouses of citizens from a third party country, they themselves citizens of a third party state, to join them." We add that we don't, thus, deny the fact that other instruments of European Union law could be applicable, just that in this case we take into account strictly the provisions of the above mentioned directive. Maintaining the same line, we want to add that although the freedom of movement, respective spouses freedom of movement, is a fundamental element for the juridical order of the European Union, and derogation from this principle is of strict interpretation[88], it does not represent, in any case, an unlimited right, and beneficiaries have a series of obligation -we will not mention them in detail, but we need to say they involve respecting the laws of the host country.

Returning to the category of spouses in the meaning of the normative framework set in place by Directive 2004/38, we provide that, "in principle, valid marriages contracted anywhere in the world must be recognized[89]". Those must be separated from the forced marriages, "where the consent of one of the parties is missing or not respected," since they don't fall within the scope of protection established by international law or European Union law. In turn, forced marriages must be differentiated by arranged marriages, which, according to the European Commission, are finalized with the full and freely expressed consent of the parties, when the marriage is contracted, even if a third party is involved, who, generally, has the main role in choosing the partner. All these must not be confused with what is called convenience marriages, according to the directive - "union types contracted exclusively in order to benefit from freedom of movement and residence"[90], marriages which grant the spouses rights they couldn't benefit from any other way. We notice that this type of marriage fulfills all the features to be an abuse of right which, as defined by the directive, "can be defined as an artificial behaviour, adopted strictly with the purpose of gaining the right to freedom of movement and residence, in accordance with communitary law that, in spite of compliance with conditions set out in communitary norms, does not correspond to the goal of such provisions". As it is clear from the above mentioned, in order to be in the presence of an abuse of right - in our case, the convenience marriage - it is not necessary to violate the provisions of the European Union in the strictest sense, the goal being that it must have the "illicit" characteristics, being opposed to the provisions established by law. The same way, the definition of convenience marriages can be extended, finding applicability in case of other types of unions contracted only with the purpose to benefit from the right of free movement and residence. As an example, we add: partnerships, fictitious adoption, "the situation when a EU citizen declares that he is the father of a child from a third party state, so that the child and its mother should benefit from citizenship and residence right, while knowing he is not the child's father and not being willing to assume parental responsibility".[91]

Similar to the rights member states have in regards to protecting themselves against abuse, in the case of convenience marriages, they have the right to adopt certain internal measures, which should not affect the effectiveness of the Union law -through provisions that impinge on the rights of citizens, for example, by stipulating different provisions based upon the nationality criterion.

The judgment given in the ECHR Case Alilouch El Abasse versus the Netherlands is representative for another right the member states have regarding recognizing marriages, respectively that they can choose not to recognize "polygamous marriages, contracted in accordance with the law of a third party state, but which might contravene to the internal juridical order". The directive which is the scope of our analysis also allows states "to investigate individual cases in which there is a well-founded suspicion of

[86] Ibid.

[87] As an example, we mention The Court Ruling of April 29, 2004, in the joint cases C-482/01 and C-493/01, Georgios Orfanopoulos et all and Raffaele Oliveri vs. Land Baden-Württemberg, ECLI:EU:C:2003:455.

[88] The restriction of the right of entry and right of residence can be done for reasons of public order, public safety or public health, according to Chapter VI of the directive -which is the scope of our discussion. From the point of view of case law, we mention the Court Decision of July 10, 2008 (request for ordering a preliminary decision issued by Dâmbovița Tribunal - the first preliminary question formulated by a Romanian Court) - Ministry of Administration and Interior - General Directorate of Passports Bucharest/ versus Gheorghe Jipa.

[89] COM(2009) 313, p. 4.

[90] Directive 2004/38/EC, point 28.

[91] COM(2009) 313, p. 16.

abuse of law[92]", but the European Union law "prohibits systematic checks"[93]. For the purposes of limiting the abuse which may be committed by the Member States, this time, the Commission has identified a number of criteria by which the respective state can appreciate, according to the share in which they check out, if they find themselves or not in the case of an abuse of right. Here are a few criteria which can suggest the uncorrupted, from a legal standpoint, relationship between spouses: the spouse who is citizen of a third party state wouldn't have any issue in obtaining the right of residence in their own name or has previously already resided, legally, in the member state of the citizen; the two have a long term relationship; the two own a common domicile/form a single household for a long time; the two already entered into a legal/financial long term agreement, with joint responsibilities; the marriage is long lasting.

## 3. Conclusions

Given the above mentioned, we can say that an evaluation of the evolution of normative acts at the level of the European Union is a painstaking activity, for which we must keep in mind not just the "quantity" of a certain normative act, but also elements pertaining to the causes of adopting such an act, other criteria like "adjacent factors... like the number of preliminary rulings regarding a certain directive or actions regarding its validity"[94]. Thus, our opinion is that in such an analysis, we should prioritize the "qualitative-historical[95]" criterion, such a study being able to offer accurate results for directives which have already been in force for a while, and all these, while taking into account various relevant aspects, which could be reflected in the juridical context, for each case.

The complexity of the particulars of the European Union legal order is reflected, as we tried to show through this analysis, in the matter of the dynamics of its normative acts, both from the perspective of their adoption and their applicability. From the point of view of the second line of thinking, that of the implementing the derivative legislation of the European Union, we took into account several elements of substantive law particular to the freedom of movement of persons, particularly spouses, mainly from the perspective of the provisions of Directive 2004/38/CE, without limitation.

Without being able to say we exhausted all aspects correlative to our subject, we are convinced that the present study can be a solid start point for expanding on this subject in a later research. In this regard, we suggest that one must take into account not only the possible changes which are to take place at the level of normative acts, according to the evolution of situations which can involve delicate aspects from a legal standpoint, like Brexit, but also the future guidelines of the Luxembourg Court in this regard.

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[92] Ibid.
[93] Ibid.; According to the Commission, the interdiction referrs not only to checks involving all migrants, but also to checks regarding certain groups, for example, with a specific ethnic origin.
[94] Daniel-Mihail Șandru, Constantin Mihai Banu, Dragoș Alin Călin, op cit, p. 46
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[1] Published in the Official Journal of the European Union, *L 158, 30.4.2004, p. 77-123, https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32004L0038, accesed on 26.01.2019.*

# THE CONTRIBUTION OF THE ROMANIAN CONSTITUTIONAL COURT TO ESTABLISH THE RELATION BETWEEN THE RIGHT TO PROPERTY AND THE RIGHT TO A HEALTHY ENVIRONMENT

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**Abstract**

*The present study aims to establish the relation between the right to property and the right to a healthy environment from the perspective of the jurisprudence of the Romanian Constitutional Court.*

*The relation between these two fundamental rights is emphasized by the limitations brought to the attributes of the right to property by the exigencies of the environmental protection. Nowadays, in the context of a more and more polluted environment, property rights are becoming more and more pronounced to circumscribe their attributes of environmental significance.*

*The study starts from the presentation of the environmental limitations of the exercise of the property right established by the constitutional provisions and continues with an analysis of the main decisions of the Constitutional Court pronounced in this matter.*

*Our analysis allows us to conclude that the right to a healthy environment contributes significantly to the strengthening of property rights by reference to the requirements of individual welfare and those of the survival of humans and species.*

**Keywords:** *the right to a healthy environment, the right to property, limitations, Romanian Constitution, the jurisprudence of the Romanian Constitutional Court.*

## 1. Introduction

The judicial literature[1] considers that property is the basis of the development of human society, being the premise for each economic activity. Over time, this has been treated as a fundamental issue, as well as of the collective existence. It has provided the possibility for individuals to acces and to appropriate natural assets or created by their activities. This possibility, however, has determined the man to gradually give up his symbiosis with the natural environment and to begin a struggle against the nature, permanently seeking to master it. It is an undeniable fact that the miraculous balance of nature and harmony between ecosystems is in danger. One must not ignore the fact that the success of the economic development, remarkable, has affected this balance. Paradoxically, in the age in which the man has became the "master of the planet", he realized that he cannot escape the "laws of the nature" and that he entirely depends on the natural environment.

By referring to this new order, the contemporaneity insists on the contemplation of people's mission of being the guardians of nature and of finding the much-desired balance between economic development and the protection of the environment. For the achievement of this mission, a very important and difficult role was attributed to the law.

The emergence of environmental norms has not been achieved without confrontation but has been supported by a strong consensus that finds its rationale in the categorical imperative of surviving spaces, species, and even in the imperative of human survival. Thus, the statement of certain norms for the environmental protection has established an interaction between the right of individuals to a healthy environment and the traditional right to property.

This interaction has developed and transformed into a complex relation, of mutual conditions and interdependence. Through environmental protection – seen as a major public interest – it is achieved a balance between the individual rights and the general exigences of life.

## 2. About the limitations of the performance of the right to private property in favor of environmental protection

The right to property is considered as the most important patrimonial right. It represents the fundament for all the other real rights and secures the means of life necessary to an individual. This importance of the right to property for individuals and society has led to its

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[1] C. Bîrsan, Drept civil. *Drepturile reale principale* (Bucharest: Hamangiu, 2013), 33; E. Chelaru, *Legea nr. 10/2001 privind regimul juridic al unor imobile preluate abuziv în perioada 6 martie 1945-22 decembrie 1989 comentată şi adnotată* (Bucharest: All Beck, 2001), 3.

regulation at an international, European, communitarian and national level[2].

In Romania, the regulation of the right to property has had an accelerated evolution after 1990 regarding its statement as fundamental right and as civil subjective law. Starting from the fact that the right to property is the only real right providing to its owner the complete performance of the attributes of an asset, were stated means of restitution, restoration and establishment of the private property, as well as means for its protection[3].

Currently, Art 44, Para 2 Line 1 of the revised Constitution states the right to property, mentioning that "Private property is guaranteed and protected equally by the law, regardless of its owner". The second thesis of the article mentions that the limitations and the content of the right to property shall be established by the law. Para 4 states that no one shall be expropriated, except on grounds of public utility, established according to the law, against just compensation paid in advance.

Regarding the Romanian Civil Code, it defines property in Art 555 Para 1 as being "the right of the owver to exclusively, absolutely and continuous possess, use and dispose of an asset, according to the law".

Starting from these provisions, the judicial literature defined the right to property as being "the real right which offers its owner the attributes of possession, use and disposal (*jus possidendi*, *jus fruendi* and *jus abutendi*) of a private asset, attributes which may be exclusively, absolutely and continuously performed within the material and legal limits"[4].

The statement and guarantee of human rights do not exclude the possibility of their limitation. In this regard, it has been shown that "the existence of certain unconditioned rights, theoretically cannot be accepted within a constitutional democratic system. The absence of the limits and conditions for performance stated by laws, constitutions or international judicial instruments can lead to arbitrary or abuse of rights, because it would not allow the differentiation between legal and illegal behavior. The existence of certain limits for the performance of some fundamental rights is justified by the constitutional protection or by the protection through international legal instruments of important human or state values"[5].

Both the Universal Declaration of Human Rights, as well as the two International Covenants of 1966 admit the existence of limitations regarding the exercise of certain rights. This possibility is also found in Art 53 of the Romanian Constitution restricting some rights and fundamental freedoms, but only as exceptions, temporary and conditional, without affecting the very substance of the right[6].

The reasons which could generate the limitation of the exercise of certain rights are of strict interpretation. These are stated by Art 53 of the Constitution and aims: the defense of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe.

From the constitutional provisions, there are three essential conditions, which must be observed cumulatively in order to be able to restrict the exercise of certain rights, namely: the limitation can be stated only by the law, reasoned by the existence of situations identified by norms, aiming the public interest and the protection of the fundamental rights; the limitation shall be proportionate with the situation generating it; the limitation shall be temporary and not harm the substance of the right or of the fundamental freedom[7].

The provisions of Art 53 must be interpreted in relation to Art 44 Para 1 second thesis of the Constitution, according to which the content and limits of the right to property are stated by the law, as well as in relation to Art 44 Para 7 which states that the right to property compels to the observance of duties relating to environmental protection and insurance of neighborliness, as well as of other duties incumbent upon the owner.

The legal fundament of the limitation is completed by Art 620 of the Civil Code, which states that: "(1) The law may be the limit of the performance of the right to property either for a public interest, or a private one. (2) The legal limits for private interest can be temporarily altered or removed through the parties' agreement. for the opposability to third parties it is necessary the fulfilment of the advertising formalities required by the law".

The content of Art 44 Para 7 of the Constitution is reiterated by Art 603 of the Civil Code. Art 603 states a legal limit, having as starting point the public interest of environmental protection. According to Art 1 of the G.E.O No 195/2005 on environmental protection states that "it represents a major objective of public interest".

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[2] See also E. Chelaru and A. Pîrvu, *Drept Civil. Drepturi Reale* (Pitești: University of Pitești Publishing-house, 2016), 17; E. Chelaru, *Drept civil. Drepturile reale principale în reglementarea Noului Cod civil* (Bucharest: C.H.Beck, 2013), 44-67.

[3] For more details, see: Aspazia Cojocaru, „Reflectarea exigențelor constituționale în legislația României referitoare la dreptul de proprietate", în *Buletinul Curții Constituționale* no. 2 (2009), (https://www.ccr.ro/uploads/Publicatii%20si%20statistici /Buletin%202009/cojocaru.pdf)

[4] V.Stoica, *Drept civil. Drepturile reale principale* (Bucharest: C.H.Beck, 2009), 93.

[5] M. Andreescu and A. Puran, *Drept constituțional. Teoria generală și instituții constituționale* (Bucharest: C.H. Beck, 2016), 264-265.

[6] A se vedea: R. Duminică, „Limitations of the right to property in favor of environmental protection in Romanian law", International Interdisciplinary Conference *Constitutional Right to Property – Methods of Violation and Means of Protection*, University of Rzeszow, Poland, 11-12th October 2018.

[7] Andreescu and Puran, *Drept constituțional. Teoria generală și instituții constituționale*, 254-255.

The judicial literature8, regarding the obligations for environmental protection, has considered them as extremely complex, being adopted "based on the principles and strategic elements leading to sustainable development" (Art 1 Para 1 of the G.E.O No 195/2005). Acording to Art 6 of the Ordinance, the environmental protection represents an obligation of the central and local public administration authorities, as well as an obligation for all natural and legal persons.

Though both the constitutional text, as well as Art 603 included in Chapter 3 of the Civil Code (Legal limits for the right to private property), Section 1 (Legal limits) use the term "tasks" for environmental protection, we appreciate along other theoreticians[9] that these norms "establish a limitation in the performance of the right to property, not in the meaning of as hindrance, as an obligation of not to do, but in the meaning of the legal obligation of to do". More specifically, the owner has the obligation to comply with the tasks on environmental protection.

Under the conditions stated by Art 626 of the Civil Code, "if the public order or good morals are not violated", there are possible environmental limitations of the right to property through legal acts.

Beyond the limitations of the right to property stated by the Constitution, the Civil Code and the G.E.O No 195/2005, we find important limitations stated by other special normative acts, among which we mention: Law No 50/1991 regarding the authorization of construction works, the General Regulation of Urban Planning approved by Government Decision No 625/1996, the Water Law No 107/1996, Law No 350/2001 on spatial planning and urban planning, Law No 46/2008 on the Forest Code, Law No 18/1991 on land resources etc. As an example, we enlist the most known limitations on the right to private property stated by special laws: limitations of the right to property through land-use measures; restrictions on the exercise of the property right through urbanism plans; limitations of the property right through the protection of historical monuments; limitations of property ownership attributes for priority archaeological interest areas; special expropriation for ecological public utility; legal servitude of the protection and security of energy capacities; property rights limitations resulting from the protection of water resources; property rights limitations on the protection of soil, subsoil and terrestrial ecosystems; protected area regime and property ownership attributes; limiting the use of goods through environmental protection requirements; servitude of the hunting ground etc.[10].

In this context of amplifying the limitations of the right to property for environmental protection, the concept of property is being redefined. Thus, we are talking about an environmental property set up to describe situations where purchases or attributions of property rights are made, in order to improve the protection of the environment and natural resources[11].

The notion of *Environmental Property* has been established by common law specialists and it is considered as a component of the evolution of the concept of property. This concept has emerged simultaneously with the international affirmation and constitutionalization of the right to environment, so it arose the issue of ecological exigencies in the performance of this right in relation with the other fundamental rights in general, and especially with the right to property. The declared purpose of the notion of environmental property is that of establishing the situations in which a property title has been granted or acquired for the environmental protection or its preservation[12].

## 3. The contribution of the Romanian Constitutional Court in the establishment of the relation between the right to property and the exigencies of the environmental protection

Over time, in accordance with the jurisprudence of the European Court of Human Rights, the Constitutional Court has established through its own jurisprudence that the right to property is not absolute, thus it can be limited through legal provisions.

Notified with requests for non-constitutionality of different norms aiming the environment protection, invoking the violation of Art 44 of the Constitution referring to the right to private property, the Constitutional Court has mentioned that the legislator has the competence to establish an appropriate legal framework for the performance of the attributes of the right to property, without harming the general or particular legitimate interests of other subjects of law, thus stating a few reasonable limitations of its performance[13].

As mentioned by the judicial literature[14], in accordance with the principle of proportionality, the limitations brought to the right to property shall be reasonable. It means that those limitations shall have to be appropriate for guaranteeing this fundamental right.

Also, by applying the principle of proportionality in the area of the protection of the right to property, the Court has stated that it refers to the compliance with the obligations in the area of the environment protection, obligations established for general interest. Thus, the state is authorized to establish norms for the protection

[8] Bîrsan, Drept civil. Drepturile reale principale, 72.
[9] A. Duşcă, Dreptul mediului (Bucharest: Universul Juridic, 2014), 35.
[10] Duminică, „Limitations of the right to property in favor of environmental protection in Romanian law".
[11] V. Marcusohn, „Protecția mediului prin intermediul instrumentelor economice și impactul acestora asupra dreptului de proprietate", în Revista Română de Dreptul Mediului, nr. 1 (2012): 23.
[12] M. Duțu and A. Duțu, Dreptul de proprietate și exigențele protecției mediului (Bucharest: Universul Juridic, 2011), 192.
[13] Decisions of the Constitutional Court No 121/2004, No 143, 166, 537, 616, 860 din 2007, No 826/2008, No 558/2010.
[14] Andreescu and Puran, *Drept constituțional. Teoria generală și instituții constituționale*, 294.

of agriculture, silviculture, domestic animals etc. The Court has also underlined that these norms are constitutional for as long as the obligations stated are reasonable.

In this regard, as an example, it has been stated in the jurisprudence of the Constitutional Court that the natural and legal persons have certain obligations established by the law in the area of the environment protection and insuring this fundamental right and that these obligations "cannot be seen as violations of fundamental rights (…) such as the right to property"[15].

In shaping the relation between the right to property and the right to a healthy environment, it has relevance and worth being debated about, the Decision No 824/7 July 2008[16] on the exception of unconstitutionality of Art 71 of the G.E.O No 195/2005 on environmental protection.

More specifically, by analyzing the exception of unconstitutionality, the Court has stated that its author claimed, mainly, the unjustified limitation of the right to property stated by Art 44 Para 1 of the Constitution. The invoked reason was that the criticized legal text forbids and sanctions the change of the destination of the lands set as green spaces and/or as such foreseen in the urbanization documentation, the reduction of their surfaces or their relocation, irrespective of their legal regime.

The Court stated that the provisions of Art 71 of the G.E.O No 195/2005 have been included in the current regulation by Art 1, Point 1 of the G.E.O No 114/2007, adopted based on Art 115 Para 4 of the Constitution. In the issuance of this act, as stated by its preamble, it has been taken into account the "the degradation of the green spaces on the territory of Romanian localities, caused by their destruction as a result of the development of economic and social activities", aiming "the improvement of the environmental features and life quality by increasing the green areas in localities", the protection and sustainable development of life standards of their inhabitants.

Therefore, the Court stated that "the protection and guaranteeing the right to a healthy environment, stated by Art 35 of the Constitution, represent the purpose of Art 71 of the G.E.O No 195/2005 on environmental protection". Moreover, the Constitutional Court emphasized that the right to property invoked by Art 44 of the Constitution is not absolute, aspect continuously emphasized in its jurisprudence.

Moreover, the Court mentioned that "the limitation of the exercise of the right to property (…) also has a moral and social justification, given that the rigorous compliance with these norms represents a major objective for the protection of the environment, thus of the existing green areas, having a direct connection with the level of public health, which represents a value of national interest".

Therefore, the Court has dismissed as unreasoned the request for unconstitutionality according to which the examined legal provisions are contradictory with Art 44 Para 1-2 and Art 53of the Constitution, regarding the right to property and the limitation of the exercise of certain rights or freedoms, because "the measure ordered by the criticized legal text does not harm the substance of the right, establishing only an objective and reasonable limitation, in accordance with the fundamental principles"[17].

Another litigation through which the Constitutional Court has contributed in shaping the relation between the right to property and the exigencies of the environmental protection is the Decision of the Constitutional Court No 834/2016 – the exception for unconstitutionality of Art 10, Art 17 and Art 51 of the Law No 46/2008 on the Forest Code, as well as of Point 42 of the annex to the Law 46/2008. The authors of the exception for unconstitutionality have claimed that the criticized provisions are unconstitutional because they violate the right to property, taking into consideration that these provisions compel the natural persons owing a forestry fund to provide guard services through a forest district.

As effect of the examination of the exception for unconstitutionality, the Court has stated that "according to Art 44 Para 1 of the Constitution, the content and limits of the right to property shall be established by law"[18]. Also, the court underlined, by maintaining its previous point of view[19], that "based on these constitutional provisions, the legislator has the competence to establish the legal framework for the performance of the right to property, within the principle sense given by the Constitution, so that it does not collide with the general or particular legitimate interests of other subjects of law, thus stating certain reasonable limitations in its capitalization, as a guaranteed subjective right".

The Court also mentioned that the constitutional provision allows the legislator that, in considering certain specific interests, to state rules harmonizing the incidence of other fundamental rights than the property

[15] Decision of the Constitutional Court No 1623/3 December 2009 on the exception for unconstitutionality of Art 96 Para 3 Point 1, related to Art 94, Para 1, Let b) of the G.E.O No 195/2005 on environmental protection, published in the Official Gazette, Part 1, No 42/19 January 2010.

[16] Decision of the Constitutional Court No 824/7 July 2008 on the exception for unconstitutionality of Art 71 of the G.E.O No 195/2005on environmental protection, published in the Official Gazette No 587/5 August 2008. For an analysis of this decision, see also: Duțu and Duțu, *Dreptul de proprietate și exigențele protecției mediului*, 80-81.

[17] Decision of the Constitutional Court No 824/7 July 2008 on the exception for unconstitutionality of Art 71 of the G.E.O No 195/2005on environmental protection, published in the Official Gazette No 587/5 August 2008.

[18] Decision of the Constitutional Court No 834/2016 – the exception for unconstitutionality of Art 10, Art 17 and Art 51 of the Law No 46/2008 on the Forest Code, as well as of Point 42 of the annex to the Law 46/2008, published in the Official Gazette, Part 1, No 141/24 February 2016.

[19] Decision of the Constitutional Court No 59/17 February 2004, published in the Official Gazette, Part 1, No 203/9 March 2004.

right in a systematic interpretation of the Constitution, so that they will not be suppressed by the regulation of the property right. Not least, the Court has mentioned that Art 44 Para 1 of the fundamental law allows the establishment of legal limitations in the performance of the property right, as constantly stated by its jurisprudence[20], with the purpose of protecting the public interests, such as the interest in sanitation and public health, the social, cultural-historical, urbanistic and architectural interests etc., with the condition that these legal limitations do not harm the very substance of the property right[21].

Regarding the provisions of the Law No 46/2008, the Court has stated that Title 2 and 3 refer to strict rules concerning the obligations of the owner of a forestry fund, regardless of the form of ownership, on the obligation of compliance with the forestry regime and the rules on environmental protection, of forestry arrangements, as well as other obligations. These obligations are an application, legislatively, of the constitutional provisions of Art 44 Para 7, according to which "the right to property compels to respect for the duties relating to environmental protection and assuring neighborliness, as well as to other duties binding on the owner in accordance with the law or as is customary".

Also, the Court has added that in "the virtue of the fact that the forest represents an asset of national interest, the legislator has established a strict legislative framework in the area of the content of the property right over it"[22]. The legislator has established in this respect the content of the property right over the forest/forestry fund, especially for a correct application of Art 44 Para 1 and 7 of the Constitution. Thus, the measures stated by the legal provisions are obligations imposed for the owner in considering the asset in order to insure the sustainable development of the forest/forestry fund.

As a conclusion, given the aimed legitimate purpose, the Court has rejected the exception for unconstitutionality and stated that "that the special regime governing the use attribute, including the obligation for the owners to conclude the management contract/forestry service, is appropriate, necessary and proportionate, respecting a fair balance between the general interests of the company and the particular interests of right-holders property"[23].

Constantly, the Court's jurisprudence[24], that the imposition of standards in terms of urban planning and spatial planning, as well as ensuring security in construction, is a general interest. Thus, the legislator may adopt necessary and customary laws in the field of construction in order to determine the use of the goods in accordance with the general interest, without the property being lipped by its substance.

By way of example, we present the considerations grounding the Decision of the Constitutional Court No 469/2011 regarding the dismissal of the exception for unconstitutionality of Art 47 Para 5 of the Law No 350/2001 regarding urban and territorial planning[25].

In this case, the author of the objection of unconstitutionality argued that the provisions of Art 47 Para 5 are unconstitutional insofar as they permit the modification of the rules on land occupation and the location of the constructions and the related facilities through a zonal urban plan, without the consent of the neighbors affected by the new changes, "which limits the exploitation of the property right as guaranteed by Art 44 Para 7 of the Romanian Constitution".

As effect of the examination of the exception for unconstitutionality, the Court has stated that Art 44 Para 1 of the Constitution states the possibility of establishing legal limits for the performance of the property right, for the protection of certain public interests: for general or fiscal economic interest, in the public interest, in the interests of sanitation and public health, in the social, historical, urban and architectural interest etc., with the condition that these legal limitations do not harm the substance of the property right. According to the criticized legal text, the Local Urbanistic Plan establishes regulations regarding the rules on the building regime, the function of the area, the maximum allowed height, the utilization rate of the land, the percentage of the territorial occupation, the removal of buildings from alignment and the distances to the lateral and posterior limits of the plot, the architectural characteristics of the buildings, the admissible materials. Under these conditions, the Court has stated that the "legislator has the competence to establish the legal framework for the performance of the property right, so that it will not collide with the general or particular legitimate interests of other

[20] Decision of the Constitutional Court No 469/2011, published in the Official Gazette, Part 1, No 473/6 July 2011.

[21] Decision of the Constitutional Court No 834/2016 – the exception for unconstitutionality of Art 10, Art 17 and Art 51 of the Law No 46/2008 on the Forest Code, as well as of Point 42 of the annex to the Law 46/2008, published in the Official Gazette, Part 1, No 141/24 February 2016.

[22] Decision of the Constitutional Court No 834/2016 – the exception for unconstitutionality of Art 10, Art 17 and Art 51 of the Law No 46/2008 on the Forest Code, as well as of Point 42 of the annex to the Law 46/2008, published in the Official Gazette, Part 1, No 141/24 February 2016.

[23] Decision of the Constitutional Court No 834/2016 – the exception for unconstitutionality of Art 10, Art 17 and Art 51 of the Law No 46/2008 on the Forest Code, as well as of Point 42 of the annex to the Law 46/2008, published in the Official Gazette, Part 1, No 141/24 February 2016.

[24] See also the Decision of the Constitutional Court No 918/23 June 2009; Decision of the Constitutional Court No 77/14 March 2002; Decision of the Constitutional Court No 150/22 February 2007; Decision of the Constitutional Court No 1344/22 October 2009; Decision of the Constitutional Court No 1124/23 September 2010.

[25] Decision of the Constitutional Court No 469/2011 regarding the dismissal of the exception for unconstitutionality of Art 47 Para 5 of the Law No 350/2001 regarding urban and territorial planning, published in the Official Gazette, Part 1, No 473/06 July 2011.

subjects of law"[26] and has concluded that "through the criticized regulation, the legislator only expressed these imperatives, within the limits and according to its constitutional competence, the criticized text not being contradictory with the invoked constitutional provisions"[27].

## 4. Conclusions

The jurisprudence mentioned by way of example represents a proof of the contribution brought in time by the Constitutional Court to the definition of the relation between the property right and the exigencies of environmental protection.

The norms regarding the environmental protection limiting the performance of the property right are seen in different areas, such as: water, soil, subsoil and terrestrial ecosystems' protection, in the area of protecting the human settlements etc., but it is important to mention that these limitations are accepted and considered as legitimate only if they do not harm the existence of the right. Also, as it is emphasized by the Constitutional Court's jurisprudence, these limitations of the property right must be reasonable, namely appropriate for guaranteeing this fundamental right.

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[26] Decision of the Constitutional Court No 469/2011 regarding the dismissal of the exception for unconstitutionality of Art 47 Para 5 of the Law No 350/2001 regarding urban and territorial planning, published in the Official Gazette, Part 1, No 473/06 July 2011.

[27] Decision of the Constitutional Court No 469/2011 regarding the dismissal of the exception for unconstitutionality of Art 47 Para 5 of the Law No 350/2001 regarding urban and territorial planning, published in the Official Gazette, Part 1, No 473/06 July 2011.

# THE TERM OF "RELEVANT MARKET", AS ELEMENT OF DOMINANT POSITION PROVIDED BY ART. 102 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

**Cornelia Beatrice Gabriela ENE-DINU***

**Abstract**

*The term of relevant market was used for the first time in the Sherman Act of 1890, condemning monopolies or monopoly attempts. The term of relevant market is analyzed as being the place where demand and supply of products or services, interchangeable with each other, are confronting; however, the term of "relevant market" is much more complex than that, being characterized by fundamental dimensions in connection with the term of product (service) market and geographic market, both in close connection.*

**Keywords:** *relevant market, monopolies, product market, geographic market, dominant position*

## 1. Terminology issues

The term of relevant market was used for the first time in the Sherman Act of 1890, condemning monopolies or monopoly attempts which can lead to higher prices and lower production than under normal competition conditions.

Currently, the term of relevant market is defined by art. 102 TFEU (former art. 82 EC), as a primary source of the European Union law[1], which provides that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

In what concerns the term of undertakings, we should note that, although the term is used by art. 101 para. 1 TFEU, a definition of the term cannot be found. The EU courts and authorities in the field of competition adopted a broad concept of the term. In case Hofner, the European Court of Justice noted that the term of enterprise covers any entity engaged in an economic activity, regardless of its legal status and the way it is financed.[2]

In essence, art. 102 TFEU concerns the control of market power by either one company or a number of companies under certain conditions. Within this regulation, not the market power itself is prohibited. What is condemnable in the TFEU view is the abuse of power in the market, therefore, the intention of the European lawmaker is to encourage competition and, in this way, the most efficient participants break apart from others in the market as a result of consumers' choices in relation to the goods or services proposed.

This article aims to analyze the term of relevant market, as well as the term of market power, determined by the dominant position of a participant to the economic life.

The relevant market is defined as the place where demand and supply of products or services, interchangeable with each other, are confronting. In the economic literature, the relevant market can also be called pertinent market, reference market, sectoral market etc. Global market and relevant market can be distinguished locally, nationally, regionally.

Defined as the place of confrontation between the demand of supply of products and services which are considered by the buyers as interchangeable with each other, but not interchangeable with other goods or services offered, the relevant market is the place where effective competition between economic operators takes place.

Therefore, the term of relevant market is particularly complex, being characterized by three fundamental dimensions: product (service) market, geographic market, both in close connection, as well as time aspect. The dominant position held by an economic agent within the domestic market, position that can affect trade between the Member States, must be assessed in connection with the three elements referred above.

The definition assigned to the term of product market is in close connection with the term of "product". Product analysis must take into account both demand and supply issues. On the demand side, products must be interchangeable, from the point of view of the buyer. The interchangeable nature of products, from the demand perspective, involves checking cross elasticity of product[3]. It is deemed that cross elasticity of product is high if the increase of the

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[1] N. Popa coordonator, E. Anghel, C. Ene-Dinu, L. Spătaru-Negură, *Teoria Generală a Dreptului. Caiet de Seminar,* Edition 3, C.H. Beck Publishing House, Bucharest, 2017, p. 153,

[2] Case C-41/90, *Hofner şi Elser/Macroton GmbH* (1991) ECR I-1979

[3] Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene. Comentarii, jurisprudenţă şi doctrină*, Hamangiu Publishing House, Bucharest, 2017, p. 1188

price of the product makes a great number of buyers choose another product of the same type. The existence of cross elasticity reveals that the products are, actually, part of the same market.

From the perspective of the supply, the market includes only sellers who manufacture the relevant product or who can easily change their production to provide substitution or related products. Therefore, even if certain companies manufacture different products, it can be easy at a certain point in time for a company to adjust its equipment in order to produce the goods manufactured by a competitor on the market. Under these terms, the two products can be deemed part of the same market.

## 2. The view of European case law on the relevant market term

From the perspective of the case law, the term of relevant market of the product is analyzed in case Clearstream Banking AG and Clearstream International SA. The statement of reasons provides that, as resulting from Commission Notice on the definition of relevant market for the purposes of Community competition law[4], "a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use". In order to define relevant market, we can also take into account the supply-side substitutability, in cases where it would have effects equivalent to those of demand-side substitution in terms of efficiency and immediate level. This means that the suppliers are able to reorient their production to relevant products and market them on short term without significant additional costs or risks, in response to small but permanent variations in relative prices. In this respect, the Commission does not make a manifest error of assessment in holding that there is a specific market for primary clearing and settlement services for securities issued in accordance with the German law, different from the secondary service market, since, due to the fact an undertaking holds a monopoly in fact on the market and is therefore an unavoidable partner for those primary services, there is no substitutability either on the demand side nor on the supply side of those services. Therefore, a secondary market with specific features in terms of the demand and the supply and supplies products or provides services which occupy an essential place and which are not interchangeable on the more general market to which it belongs, must be regarded as a distinct market of goods or services. In this background, it is sufficient for a potential, even hypothetic market to be identified, a situation which occurs when the goods or services are indispensable for the exercise of a particular activity and where there is an effective demand for them from the undertakings pursuing that activity. Therefore, the possibility of identifying two different production stages associated with the fact that the upstream product is an indispensable element for the supply of the downstream product is decisive.[5]

Apparently simple, this definition of the product market raises some issues. First of all, it is necessary to identify the factors that are taken into account in the analysis of the relevant product market.

These were presented as the degree of physical resemblance between the products (services) concerned; the price differences between two products; the cost of switching between two competing products; consumers' preferences for a particular type/category of product to the detriment of another type/category of product; similar or different classifications of the large industry. Secondly, an important element in defining the relevant market is the structure of products demanded by consumers. Therefore, products with the same physical structure are interchangeable (i.e.: butter and margarine). In many situations, consumers may regard certain products as substitutable and therefore classified in the same relevant market, even if they differ in their materiality.

A particular issue is the segment of branded products that typically have a higher price than other less well-known similar products. There are situations where the consumers consider that the products which do not benefit from a reputed brand as substitutes for them, but it should be noted that this will not happen for any type of product. For example, high quality wines are part of the same relevant market, while ordinary table wines will not be in the same category. Therefore, an increase in the price of a high-quality wine cannot lead buyers to move towards a lower quality wine, although it may cause them to buy another high-quality wine. In case France Telecom, the Court of First Instance held that markets of low-speed internet and high-speed internet are distinct, since the possibility of reciprocal replacement of products is insufficient between them.

Therefore, in order to analyze the dominant position of an undertaking in a particular sectoral market, the possibilities of exercising competition must be assessed within the market which groups all the products or services which, depending on their features, can meet constant needs and are hardly substitutable to other products or services. Furthermore, since the definition of the relevant market serves to assess whether the concerned undertaking has the power to prevent effective competition from being maintained and to behave independently from its competitors and service providers, the limitation to the analysis of the objective features of the services in question is not possible, but it is also necessary to take account of the

[4] The European Commission, *Notice on the definition of relevant market for the purposes of Community competition law* (97/C 372/03), published in the Official Journal of the European Union of 09.12.1997, vol 003, p 60-6

[5] T-301/04, *Clearstream Banking AG and Clearstream International SA/Commission* (2009) ECR II-3195

competition conditions and of the structure of the market demand and supply.

If a product is likely to be used for different purposes and in case these different uses respond to certain economic needs, also different, it must be accepted that the respective product may, where appropriate, belong to different markets, which may have different characteristics, both from the point of view of the structure and the competition conditions. This finding does not justify the conclusion that such a product can form a single market, the same with all the other products which, in the various uses which it may have, may substitute it and compete with it.

The concept of relevant market entails, indeed, that effective competition may exist between the products which are part of this market, which implies a sufficient degree of substitutability for the same use among all the products on the same market.

The Commission Notice on the definition of relevant market for the purposes of Community competition law provides that "a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use". According to this notice, the assessment of the substitutability of demand determines the set of products perceived as substitutable by the consumer.

Therefore, with regard to the internet access sector, as there is not just a difference in comfort or quality between high-speed and low-speed internet, these differences in usage, specificity and performance are supplemented by an important price difference between the two, and even though high-speed and low-speed internet have a certain degree of substitutability, it functions asymmetrically, the migrations of customers from high-speed internet offers to low-speed internet offers is negligible compared to migration in the opposite direction, the Commission was right to find that a sufficient degree of substitutability between high-speed and low-speed access did not exist and to define the market in question as that of high-speed internet access for residential customers.[6]

## 3. The geographic market, part of the relevant market notion

The relevant geographic market comprises the area of the economic agents specialized in the production and supply of the products included in the product market. It is a territory where all traders operate under identical or sufficiently homogenous competition conditions in connection with relevant products or services. The homogeneity of market conditions is not a concept to be viewed in absolute terms. It is not necessary for the objective competition requirements between economic operators to be perfectly homogeneous. It is sufficient that they are similar or sufficiently homogeneous[7]. Therefore, it cannot be considered that only areas where the objective conditions of competition are heterogeneous constitute a uniform market[8]. The establishment of this territorial area takes into account the consumers' behavior regarding the possibility of replacing products manufactured in different geographical areas.

The elements that the Commission considers relevant to define the geographic market[9] in case of a litigation generated by the dominant position within the market, concern, first of all, the aspects in connection with *past evidence of diversion of orders to other areas*. In some cases, evidence could be available in connection with the fact that some price fluctuations between different areas have led to customers' feedback. Generally, quantitative tests used to define the product market can also be used to define the geographic market. However, it should be borne in mind that some price comparisons at an international scale may be more complex as a result of certain factors, such as exchange rate movements, taxation and product differentiation.

Another relevant aspect in defining geographic market is represented by the *basic demand characteristics* for the relevant product, which can determine the dimension of the geographic market. Certain factors, such as national preferences or preferences for national brands, language, culture and lifestyle, as well as the need for local presence, have a great potential to limit the geographical scope of competition.

Furthermore, where appropriate, the Commission will contact the main customers and competitors of the parties in its enquiries, to gather their *views* on the boundaries of the geographic market as well as most of the factual information it requires to reach a conclusion on the scope of the market when they are sufficiently backed by factual evidence.

An examination of the customers' current *geographic pattern of purchases* provides useful evidence as to the possible scope of the geographic market. When customers purchase from companies located anywhere in the Community or the EEA on similar terms, or they procure their supplies through effective tendering procedures in which companies from anywhere in the Community or the EEA submit bids, usually the geographic market will be considered to be Community-wide.

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[6] Case T-340/03, *France Telecom SA/Commission* (2007) ECR II-107, confirmed in second appeal case C-202/07 P, *France Telecom SA/Commission* (2009) ECR I-2369

[7] Judgment of the Court of February 14th, 1978, *United Brands and United Brands Continentaal/Commission*, 27/76, Rec., p. 207, items 44 and 53, and Judgment of the Tribunal of November 22nd, 2001, *AAMS/Commission*, T-139/98, Rec., p. II-3413, item 39

[8] Judgment of the Tribunal of October 21st, 1997, *Deutsche Bahn/Comisia*, T-229/94, Rec., p. II-1689, item 92

[9] The European Commission, *Notice on the definition of relevant market for the purpose of Community competition law* (97/C 372/03), published in the Official Journal of the European Union of 09.12.1997, vol 003, p 60-64

When the number of customers is so large that it is not possible to obtain through them a clear picture of geographic purchasing patterns, information on *trade flows* might be used alternatively, provided that the trade statistics are available with a sufficient degree of detail for the relevant products. Trade flows, and above all, the rationale behind trade flows provide useful insights and information for the purpose of establishing the scope of the geographic market but are not in themselves conclusive.

The absence of trans-border purchases or trade flows, for instance, does not necessarily mean that the market is at most national in scope. Still, *barriers* isolating the national market have to be identified before it is concluded that the relevant geographic market in such a case is national.

The clearest obstacle for a customer to divert its orders to other areas is the impact of transport costs and transport restrictions arising from legislation or from the nature of the relevant products. The impact of transport costs will usually limit the scope of the geographic market for bulky, low-value products, bearing in mind that a transport disadvantage might also be compensated by a comparative advantage in other costs (labor costs or raw materials).

If they exceed a certain profitability threshold, then the cost of transport becomes a major factor in separating distinct relevant markets. The relevant geographic market does not entail the production of economic goods in the same area or locality, but the accessibility to the buyers. In this connection, in case Napier Brown-British Sugar[10], the Commission decided that, in order to establish if a British company was holding a dominant position in the production and sale of sugar, the relevant market was Great Britain, since imports were very limited and functioned as a supplementation for British space, not as an alternative.

Access to distribution in a given area, regulatory barriers still existing in certain sectors, quotas and custom tariffs might also constitute barriers isolating a geographic area from the competitive pressure of companies located outside that area. Significant switching costs in procuring supplies from companies located in other countries constitute additional sources of such barriers.

The third element that should be taken into account when defining the concept of relevant market is the time factor. By analyzing the time element of the markets, an undertaking, under art. 101 TFEU, may hold a dominant position on the market at some point in the year. This is possible when competition from other products is reduced due to their seasonality.

Furthermore, technological progress and changes in consumer's habits change the boundaries between the markets[11], thus giving a time dimension to the concept of product market.

In this respect, in case Elopak Italia Srl/Tetra Pak[12], the Commission considers that the analysis used to define a market should cover only a short period, due to the fact that over a long period, during which technological progress may occur and consumer habits evolve, structures will change and the very boundaries between the various markets shift. A short period corresponds more to the economic operative time during which a given company exercises its power on the market and, consequently, on which one must concentrate in order to assess that power. In connection to the case, the replacement on the market of one type of packaging material by another is essentially the result of changes in consumer habits, changes that are the result of a long-term process.

The Commission does not deny that producers can, to a certain extent, hasten or delay the evolvement of consumer habits through measures aimed at influencing the consumer in his choice of packaging but, this is a costly and long-term process, the outcome of which remains uncertain.

## 4. Conclusions

It is unanimously accepted at European level that art. 102 TFEU seeks to protect consumers and not certain competitors. This goal requires the protection of the competition process against market foreclosure phenomenon. Although the practice in the field is rich, the settlement of a case based on art. 102 TFEU entails difficult issues in defining relevant market, establishing domination and the notion of abuse.

The limits of the special liability of the dominant companies are not yet clear in the case-law, making it difficult for the dominant company to know what is allowed and what is not. The approach based on the legal form of art. 102 TFEU must be supplemented by the analysis of the economic effect entailed by the liability under this article.

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[10] *88/518*/EEC: Commission Decision of July 18th, *1988*, Napier Brown c. British Sugar, published in Official Journal *L 284*, 19.10.*1988*, p. *41*

[11] Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene. Comentarii, jurisprudenţă şi doctrină*, Hamangiu Publishing House, Bucharest, 2017, p. 1193

[12] Decision 92/163, *Elopak Italia Srl/Tetra Pak* (1992), published in Official Journal L72/1 of 18.03.1992, p. 0001 - 0068

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# THE PROTECTION OF PERSONAL DATA - AN ESSENTIAL COMPONENT OF THE FUNDAMENTAL HUMAN RIGHTS

**Augustin FUEREA**[*]

**Abstract**

*In terms of human rights in general, and their promotion and protection, especially, developments have been and will continue to remain diverse and complex. This aspect addresses equally the concerns about the identification of human rights, as well as the establishment, consecration of methods and mechanisms that can lead to the promotion and protection of human rights through legal instruments. A faithful reflection of such developments on the protection of personal data of individuals is provided to us by the reports of the European Commission to the European Parliament, the Council, the Economic and Social Committee, the Committee of the Regions and presented starting from 2010, after the Charter of Fundamental Rights of the European Union became legally binding on 1 December 2009, with the entry into force of the Treaty of Lisbon.*

**Keywords:** *human rights; the protection of personal data; the Commission reports; the case law of the CJEU1. Introductory Aspects*

In terms of human rights in general, and their promotion and protection, especially, developments have been and will continue to remain diverse and complex. This aspect addresses equally the concerns about the identification of human rights, as well as the establishment, consecration of methods and mechanisms that can lead to the promotion and protection of human rights through legal instruments.

The levels of such concerns have been and will also remain different, with reference to the national, regional (European[1] and not only) level and to the general, universal level. Deepening, in the sense of an appropriate waiver of the areas of interest, and of the necessary correlation of rights with human obligations, has given rise to a considerable diversity, from antiquity to the present day. Whether we are considering the state of peace or war, the man, with his rights, has been at the heart of concerns. Edifying are the developments recorded by the international humanitarian law of armed conflicts, referred to in the doctrine as the "King of Human Rights"[2], for the state of war in which the man has been long enough, but also for the rules governing such rights over time of peace. The state of peace is relative because, very often, we hear or see multiple information that leads to the area of the media war, a war that includes personal data of the individual, of the natural person. The preoccupation for the protection of such data is not at all recent, as it seems, given its intensified concerns over the last period of time.

Being an extremely generous approach, with multiple sides (philosophical, economic, psychological, theological, military, juridical, etc.), we intend to analyse only its legal dimension, in synthesis, at general, international, European and national level. "Among the ever-evolving subjects, the protection of personal data occupies a privileged and secure place"[3].

A faithful reflection of such developments on the protection of personal data of individuals is provided to us by the reports of the European Commission to the European Parliament, the Council, the Economic and Social Committee, the Committee of the Regions and presented as from 2010, after the Charter of Fundamental Rights of the European Union became legally binding on 1 December 2009, with the entry into force of the Treaty of Lisbon[4].

As the European Commission itself states in its first report[5], "the Charter [...] [becoming binding] has led to a substantial reinforcement of European Union governance by the rule of law. It is a milestone on a path begun decades ago"[6]. This is happening on the occasion of the entry into force of the Charter, as the Court of Justice of the European Union was the only one entitled to oblige the Union and, implicitly, the Member States to respect the fundamental rights. At a careful analysis of the content, we cannot help accepting the Commission's statements in the 2010 Report, assertions according to which "the Charter embodies in a single, coherent and legally binding

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[1] Our attention will be circumscribed to this regional level, but not only.

[2] Ion Cloșcă, Ion Suceava, *Tratat de drept inernațional umanitar*, V.I.S. PRINT s.r.l. Publishing house, Bucharest, 2000, p. 3.

[3] Călina Jugastru, *Proceduri și autorități în noul drept european al protecției datelor cu caracter personal*, Universul Juridic Magazine, no. 6/2017, p.112.

[4] Signed on December 13, 2007.

[5] *The 2010 Report on the application of the EU Charter of Fundamental Rights*, Brussels, 30.3.2011 COM (2011) 160 final, available at:https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0160:FIN:EN:PDF

[6] Ibid., p. 2.

instrument the fundamental rights which are binding upon the EU institutions and bodies"[7].

It is worth noting that, including in the field of data protection for individuals, the Charter applies to Member States only when it comes to the enforcement of the European Union law. The Member States of the European Union have the essential role of guaranteeing compliance with the fundamental rights at national level, according to their own fundamental laws[8].

The international and universal dimension of the European Union's concerns regarding the fundamental rights is reflected in the *Union's Annual Report on Human Rights and Democracy in the World*, a document distinct from that of the Commission, which presents the Union's actions in non-EU countries. It is the evidence of EU reporting to the UN human rights standards which are referred to in Article 21 of the Treaty on European Union.

## 2. Developments in the field of personal data protection at EU level

The headquarters of the matter is Article 8 of the Charter, which guarantees the right of individuals to the protection of personal data. Developments in new technologies have been able to increase the concerns of citizens in general, and of the European Union in particular on the most numerous and diverse issues such as video surveillance systems at the workplace; social networking sites; collecting data in census operations; the funding of research into new technologies in the field of security and more.

Given that technological developments enable individuals to get involved in the easy dissemination of a large amount of information about themselves (behaviour, preferences, etc.), reaching out to the general public, even on a global scale, the European Commission required, in 2010 an "exhaustive" study on data protection in the European Union[9].

The concerns of the European Parliament are meritorious in the matter, given that, for example, on 10 February 2010, it stressed the need for data protection to be better taken into account in international agreements on data transfers for the purpose of fighting terrorism, by voting against the proposed agreement on the Terrorist Financing Tracking Programme. Following that refusal of the European Parliament, the Commission drew up a new proposal, taking into account the need for personal data protection, that time being endorsed by the European Parliament and entered into force on 1 August 2010[10].

Starting from the 2011 Report, the Commission has made the assessment that "the Charter became a landmark commonly used in EU policy-making"[11], including, we add, policies that had an incidence on the protection of personal data.

Interesting is the issue of the Commission's approach to develop the legislation on the use of security scanners designed to detect dangerous goods carried by passengers at airports in the European Union. Informing passengers in this regard is important, but also their right to adopt another method. EU Regulation no. 1141/2011[12] provides detailed conditions regarding the respect for the right to the protection of personal data and private life (preservation, storage, copying of data or images).

An important place in the economy of the 2011 Report is covered by references to European Union data storage rules[13], which are analysed in a separate Commission evaluation report. In addition to the positive aspects highlighted in the Report, the Commission insisted on the need to improve the transposition of the Data Protection Directive in the Member States.

Among the important developments in the field of data protection, a special place has the enforcement of

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[7] Idem.

[8] By way of example, art. 20 of the Constitution of Romania, republished: "(1) The constitutional provisions regarding citizens' rights and freedoms shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the pacts and other treaties to which Romania is a party. (2) If there are inconsistencies between the covenants and the treaties on fundamental human rights, to which Romania is a party, and the internal laws, the international regulations shall prevail, unless the Constitution or the internal laws contain more favourable provisions".

[9] The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *A comprehensive approach of the protection of personal data in the European Union*, COM(2010) 609 final, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do? uri = COM:2010:0609:FIN:EN:PDF.

[10] It concerns the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States of America in the framework of the Terrorist Finance Tracking Programme, OJ L 195, 27.7.2010.

[11] The 2011 Report on the application of the EU Charter of Fundamental Rights, Brussels, 16.4.2012, COM(2012) 169 final, available at http://ec.europa.eu/transparency/regdoc/rep/1/2012/EN/1-2012-169-EN-F1-1.Pdf

[12] Regulation (EU) no. 1141/2011 of the Commission supplementing the common basic standards on civil aviation security with regard to the use of security scanners at EU airports, OJ L 293 11.11.2011. Implementing Regulation (EU) no. 1147/2011 of the Commission on implementing Common Basic Standards in the field of aviation security with regard to the use of security scanners at EU airports, OJ L 294, 12.11.2011. For more details regarding the application of the regulation, see Mihaela Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia,* second edition, revised and added, Universul Juridic Publishing house, Bucharest, 2015, p. 157-158; Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing house, Bucharest, 2011, pp. 68-69; Elena Emilia Ștefan, *Scurte considerații asupra răspunderii membrilor Guvernului*, Drept Public Journal, no. 2/2017, Universul Juridic Publishing house, Bucharest, pp. 91.

[13] Commission report:*Evaluation Report on the Data Retention Directive* (*Directive 2006/24/EC*), COM(2011) 225 final, available at:http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0225:FIN:EN:PDF. The Data Retention Directive requires Member States to impose on providers of publicly available electronic communications services or public communications networks the obligation to keep traffic and location data for a period of between six months and two years for research, investigation and prosecution of serious crimes.

Regulation (EU) 2016/679[14], in the process of ascending the digitization of the entire social, economic life, and beyond. The regulation is intended to be the result of a process of major reform of the adopted and enforced rules in the field. Data protection is often realistically correlated to the right to privacy, both of which are regulated by the Charter and by the Treaty on the Functioning of the European Union, plus the European Convention on Human Rights of the Council of Europe[15].

Even if it appears to be a novelty, especially in non-specialized environments, Regulation (EU) 2016/679 does not intervene on an empty ground, but represents, as the Commission pointed out, an update and modernization of the principles enshrined in the 1995 directive[16]. The reform aims, among other things, at greater accountability for operators who process personal data, effectively contributing to the strengthening of the role of independent, autonomous national authorities[17]. The right to delete data or the "right to be forgotten", as metaphorically has been retained by the practice of the field, joins other rights, such as the right to pseudonymization; the right to opposition; the right to restrict processing, and so on. An important component is given by the right to information[18], plus the expression of consent. All this is corroborated with the possibility of facilitating better data protection by the data subjects in the online environment.

A plus of value but also of legal essence is that the proposed and achieved reform "extends the general principles and rules of data protection to police and judicial authorities"[19].

The exceptions included in the reform sought to ensure a balance between the right to data protection and the freedom of expression for journalistic purposes, for example, taken into account by the Romanian legislator, in the law on implementing measures for Regulation (EU) 2016/679[20] (Chapter III - Derogations).

In 2013, according to the Commission's report, visible progress was made on the protection of personal data. An important step was the concern about deepening some legal consequences and the substantiation of certain rights, such as the explicit consent, "the right to be forgotten", the right to portability (transmission) of data and the right to be informed about the violation of the personal data security.

## 3. The Case law of the CJEU

The Commission's monitoring of the enforcement of data protection legislation aimed in 2013 at the application by Austria of the Court's judgment[21] in 2012, which found that the data protection supervisory authority was not independent. In that regard, Austria took measures to amend the relevant legislation by making sure that "the member of the authority managing the day-to-day (...) [data protection] activity is subject to supervision only by the President of the Authority and that the authority does not take part of the Federal Chancellery, but has its own budget and staff"[22].

In 2010, the Court of Justice of the European Union[23], referring explicitly to the importance of fundamental human rights, the scope of data protection, invalidated those parts of EU law "which required the publication of the names of natural persons that were recipients of funds deriving from the European Agricultural Guarantee Fund and the European Agricultural Fund for Rural Development"[24].

The developments that the society has made, contribute decisively to the agenda with priorities of the European Commission's legislative initiative. This is why the European Commission's 2014 report devotes a distinct part on "human rights in the digital environment", following the enforcement of the provisions of the Charter with a special reference to the field. The case that was the subject of the analysis,

[14] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Regulation on data protection), OJ L 119, 4.5.2016.

[15] "The mere recording of data relating to the private life of an individual constitutes an interference within the meaning of Art. 8 [of the European Convention on Human Rights, which guarantees the right to respect for private and family life, domicile and correspondence] ", according to the Information Sheet - Personal Data Protection, November 2017, p. 1 (available at https://www.echr.coe.int/Documents/FS_Data_RON.pdf)

[16] It involves Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data, OJ L281, 23.11.1995.

[17] In Romania:the National Authority for the Supervision of Personal Data Processing.

[18] Case *Bărbulescu v. Romania*, ECHR decision of 5 September 2017.

[19] The 2014 Report on the Application of the EU Charter of Fundamental Rights, Brussels, 8.5.2015, COM(2015) 191 final, available at:http://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-191-EN-F1-1.PDF, p. 3

[20] Law no. 190/2018 on implementing measures for the implementation of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), published in the Official Gazette of Romania, Part I, no. 651 of July 26, 2018.

[21] Judgment of the Court of 16 October 2012, *Commission v. Austria*, C-614/10, EU:C:2012:631.

[22] The 2013 Report on the application of the Charter of Fundamental Rights of the EU, Brussels, 14.4.2014 COM (2014) 224 final, available at:http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com(2014) 0224/com_com(2014)0224_en.pdf, p. 9.

[23] On the role of the EU Court of Justice jurisprudence in the development of EU law, see Mihaela-Augustina Dumitrașcu, *cited above*, pp. 182-188; Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridic,* Hamangiu Publishing House, Bucharest, 2016, pp. 156-165.

[24] Judgment of the Court of 9 October 2010, *Volker und Markus Schecke and Eifert* Joined Cases C-92/09 and C-93/09, EU:C:2010:662.

justifying the European Union executive's sufficiently careful attention to the topic, is *Digital Rights Ireland*[25]. The derivative headquarters of the matter at that time was the Data Retention Directive[26], a directive which the Luxembourg Court invalidated, considering that it no longer responded to the provisions of the Charter (Articles 7 and 8) on fundamental rights to respect the privacy and protection of personal data. Significant is that, "the judgment of the Court clarified that EU secondary legislation had to contain certain safeguards to protect the fundamental rights, including provisions on professional secrecy grounds and prior administrative or judicial controls, and that these issues cannot be left to the latitude of the national legislator"[27].

Even if in the same case, the Luxembourg Court found that "keeping data served a legitimate objective of general interest", it "considered that the intervention of the directive (...) in the fundamental rights to privacy and the protection of personal data was not limited to the strict minimum"[28].

The impact of the judgment in this case concerns all the institutions of the European Union which at this level are important links to the legislative process. The concrete reflection materialized in an immediate action by the Commission, which in December 2014 updated its "Guidelines on methodological measures to be taken to verify the compatibility with the fundamental rights at the level of the Council's preparatory bodies", getting involved - even in the Council's staff training activity, in this respect.

The same technological developments contributed to what the Commission called in its 2014 report "the digital revolution", which is likely to worry and that led to the amplification of its efforts above all to collect, use and disseminate personal data, but not only. Developments "on global surveillance programmes highlight the need for more effective measures to protect the fundamental rights, in particular the right to privacy and personal data protection"[29].

Another important tool developed this time by the Council of Europe, which is placed in a universal international context[30], is the "Human Rights Guidelines for Internet Users" (fair access to the internet, discrimination of some people by setting profiles, unequal relationship between recipients of data and providers of this data, intellectual property rights and obligations, etc.).

The origins of Regulation (EU) 2016/679 and Directive (EU) 2016/680[31] are met in the Commission's proposals of January 2012 on the General Regulation on Data Protection and the Directive addressed to police and judicial authorities in the same field. The Commission's negotiations also extended to transfers of data to the USA, in the sense of concluding a framework agreement on data protection, in order to achieve a new regime of safety for these transfers.

"In the case of *Google*[32], the EU has an obligation to comply with EU data protection law (Articles 7 and 8 of the Charter) and must therefore respond to requests to remove links to certain personal data, under certain conditions ("the right to be forgotten")"[33].

The Head of the European Union's executive[34], in the framework of the political guidelines presented to the European Parliament, went further demanding that the obstacles between Member States with regard to the regulations are adopted in the areas of personal data protection, namely: telecommunications; Copyright; radio frequency management and competition law are removed.

For the 2015 Activity Report, the agreement between the European Parliament and the Council in December on the "data protection reform package" was important. The package covers the protection of fundamental rights to privacy and the protection of personal data[35], both of which are essential for the digital single market.

Efforts on the drafting and adoption of the Regulation and the Directive, which have already been

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[25] Judgment of the Court of 8 April 2014, *Digital Rights Ireland Ltd v. Ministry of Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, Joined Cases C-293/12 and C-594/12, EU:C:2014:238.

[26] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC OJ L 105, 13.4.2006.

[27] The 2014 Report on the Application of the EU Charter of Fundamental Rights, Brussels, 8.5.2015, COM (2015) 191 final, available at:http://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1 -2015-191-EN-F1-1.PDF, p. 3.

[28] Idem.

[29] Ibid., p. 13.

[30] See, for example, the current discussions about the large data volumes ("Big Data"), as highlighted in the Large Data Volume and Privacy Report published by the United States White House (http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_5.1.14_final_print.pdf), Report of the State Council of France on Digital Technology and Fundamental Rights (http://www.conseiletat.fr/content/download /33163/287555/ version/1/file/Digital%20technology%20and%20fundamental%20rights%20and%20freedoms.pdf) or the Draft Declaration on the matter of Internet Rights prepared by the Research Committee on Rights and Obligations in the Field of Internet within the Chamber of Deputies of Italy (according to the 2014 Report on the Application of the EU Charter of Fundamental Rights, *cited above*, p. 13, footnote 47).

[31] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data by the competent authorities for the purposes of prevention, detection, investigation or prosecution of criminal offenses or the execution of penalties and concerning the free movement of such data and repealing the Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016.

[32] Judgment of the Court of 13 May 2014, Google Spain SL and Google Inc. C./Agenda Española de Protección de Datos (EDPS) and Mario Costeja González, Case C-131/12, EU:C:2014:317.

[33] The 2014 Report on the Application of the EU Charter of Fundamental Rights, cited above, pp. 14-15.

[34] Jean-Claude Juncker.

[35] Articles 7 and 8 of the Charter.

mentioned, continued, and it was established that the enforcement would start no latter than 2018, which has already happened on 25 May.

Continuing work in this area, we find that a proposal in 2014 materialized so that in September 2015, the Commission finalized the EU-US Data Protection Framework Agreement. The Agreement "will provide data protection safeguards for any transfer of personal data between the EU and the US regarding any police or judicial cooperation in criminal matters. Under the agreement, when their personal data is transferred to US law enforcement authorities, and this data is inaccurate or illegally processed, EU citizens - who do not reside in the US - will have access to remedies in US courts. This provision represents a significant improvement in the situation with regard to the US judicial remedy"[36].

Simultaneously with developments in the work of the institutions involved in the legislative process, we cannot fail to notice the CJEU's case-law, which is in line with these developments in the field, and to which the 2015 Commission's Report does not hesitate to refer. This is related to the *Schrems*[37] accusation where the CJEU invalidated the Commission's Decision of 2000 on the safety sphere. That "was a decision to establish the adequacy of the level of data protection under Article 25 (6) of the Data Protection Directive (...) and authorized the transfer of personal data to a third country, in this case the United States. The decision found an acceptable level of protection under national law or international commitments assumed by the US. The transfer of personal data to US servers by the Irish Facebook subsidiary authorized by that finding of suitability was challenged before an Irish court, in particular, following the 2013 disclosure of mass surveillance by American information"[38].

Since the Luxembourg Court ruled that legislation which gives the public authorities access to the content of electronic communications in general, violated the fundamental right to respect for private life, the Commission published guidance on the possibilities of the data transfer, also making reference to *Schrems* judgment, "establishing alternative systems for transfers of personal data to the US until a new framework is established"[39].

In its Annual Report of 2017 on the application of the EU Charter of Fundamental Rights[40], the Court highlighted Opinion 1/15 on the Canada-EU Agreement Draft on the transfer of data from the Record with the passengers' names from the European Union to Canada, adopted on 26 July 2017. The Commission noted that the Luxembourg Court "found that several provisions of the proposed agreement were incompatible with the right to respect for privacy (Article 7 of the Charter) and the protection of personal data (Article 8 of the Charter)"[41]. "The Court expressed its concern about the proportionality, clarity and precision of the rules set out in the agreement and the lack of justification for the transfer, processing and storage of sensitive data. The Commission is examining carefully the most appropriate way to eliminate the concerns raised by the Court in order to ensure the security of EU citizens while fully respecting fundamental rights, in particular the right to data protection"[42].

To all these, some aspects concerning anonymization[43], activities within a religious community[44], and written answers provided in a professional examination[45] are added.

## 4. Conclusions

We can conclude that the concern for the respect of fundamental human rights, including from the point of view of the protection of personal data, has been, is and will remain a constant of European and international domestic regulations, in general, and of the jurisprudence of the field, as well as of the specialized doctrine[46] for a long time, from now on.

[36] The 2015 Report on the application of the EU Charter of Fundamental Rights, Brussels, 19.5.2016, COM (2016) 265 final, available at http://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1- 2015-191-EN-F1-1.PDF, p. 8.

[37] Judgment of the Court of 6 October 2015, *Maximillian Schrems v./Data Protection Commissioner*, Case C-362/14, EU:C:2015 650.

[38] The 2015 Report on the Application of the EU Charter of Fundamental Rights, *cited above*, pp. 8-9.

[39] "On February 2, 2016, the European Commission and the US agreed on a new framework for transatlantic data flows:the EU-US Shield for Privacy. On 29 February 2016, the Commission presented a draft decision on the adequacy of the level of protection, taking into account the requirements set out in the Schrems judgment "(2015 Report on the Application of the EU Charter of Fundamental Rights, *cited above*, p. 9.

[40] Brussels, 4.6.2018, COM (2018) 396 final, available at http://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-396-F1-EN-MAIN-PART -1.PDF

[41] The 2017Annual Report on the application of the EU Charter of Fundamental Rights, Bruxelles, 4.6.2018, COM(2018) 396 final, available at http://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-396-F1-EN-MAIN-PART-1.PDFp. 12.

[42] Idem.

[43] "Starting from July 1st, 2018, preliminary cases involving individuals will be anonymized" (CJUE Press Release 96/18, available at https://curia.europa.eu/jcms/upload/docs/application/ pdf/2018-06/cp180096ro.pdf)

[44] "A religious community (...) is an operator with its preachers in the processing of personal data collected in a home-based preaching activity" (CJUE Press Release, No. 103/18, available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-07/cp180103ro.pdf).

[45] "Written answers provided in a professional examination and any comments by the examiner on these answers are personal data of the candidate to which he has, in principle, the right to access" (CJUE Press Release, No. 140/17, available at:https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-12/cp170140ro.pdf).

[46] Augustin Fuerea, *Aplicarea regulamentului general privind protecția datelor*, Dreptul Journal, nr. 7/2018, pp. 100-116.

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- Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data by the competent authorities for the purposes of prevention, detection, investigation or prosecution of criminal offenses or the execution of penalties and concerning the free movement of such data and repealing the Council Framework Decision 2008/977/JHA;
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# CONSTITUTIONAL ANALYSIS ON AMENDMENTS TO LAW No.317/2004

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**Abstract**

*This study seeks to analyze the amendments made to Law no.317/2004 on the Superior Council of Magistracy, which has let to extensive debates in the Romanian public and legal space. The analysis is based on the jurisprudence of the Constitutional Court of Romania, which claims several important constitutional principles for the organization and functioning of the Superior Council of Magistracy, the independence of the justice being the focus of the Constitutional Court*.

**Keywords:** *Constitutional Court, the principle of the independence of justice, Superior Council of Magistracy, the Judicial Power.*

## 1. Introduction

This study seeks to emphasize the importance of the one of the most important principles enshrined both in the Romanian Constitution and in international and regional legal instruments (such as Pacts, Statements and Conventions), namely the principle of the independence of justice, clearly regarded as Judicial Power, within the principle of separation and the balance of the three powers in the state, as they are expressly and univocally mentioned in article 1 paragraph 4 of the Romanian Constitution.

This principle of the independence of justice is well established in the purpose and the main role of the Superior Council of Magistracy, namely in article 133 paragraph 1 of the Constitution, according to which "the Superior Council of Magistracy is the guarantor of the independence of Justice". From the systematic interpretation of the rules governing Title III (Public Authorities), Chapter VI (Judicial Authority) of the fundamental law, it is concluded that this is indeed the main role of the Superior Council of Magistracy, i.e. guaranteeing the independence of justice and all the other attributions of the Superior Council of Magistracy is subsuming this purpose, namely it has the role to enslaving and protecting the independence of justice. A similar constitutional norm is found in article 134 paragraph 4, which emphasizes that a corollary purpose and the essential and primordial role of the Superior Council of Magistracy, namely the "guarantor of the independence of justice".

## 2. Content

What is the meaning of "Justice" in the Romanian Constitution and in general in the legal language of international public law? The answer is simple and it is consecrated in an ample and precise way. Thus, from the corroboration of article 124 with article 126 paragraph 1 of the Constitution, it can be concluded without any doubt that the justice, i.e. the exercise of the Judicial Power, is only realized by the courts and the judges belonging to these courts, on the basis of procedural regulations that are explicitly and unambiguous established by the procedural law (procedural codes of any kind based on which the courts and, implicitly, the other judicial entities – the criminal investigations bodies of the police, the Public Ministry etc. - are being adopted by law according to article 126 paragraph 2 of the Constitution). In all important international regulations (pacts, conventions and declarations of rights), the term "Justice" has exactly the same meaning as in the Romanian Constitution, namely the courts who have the role of interpreting and applying the law to the concrete cases deducted on the basis of substantive law and procedural regulations governed by the procedural law (civil procedure, criminal procedure, commercial procedure, administrative procedure).

In this respect, we consider that the (very correctly identified) provisions of article 126 paragraph 1 (Justice is made by the Supreme Court of Cassation and Justice and by the other courts established by the law) corroborated with the provisions of article 133 paragraph 1 and article 134 paragraph 4 of the Constitution, which expressly enshrines the role of the SCM (the Superior Council of Magistracy is the guarantor of the independence of justice) the law amending Law no. 317/2004 amends article 24 paragraph 1 of the Law no. 317/2004 establishing that the Superior Council of Magistracy is headed by a president – judge, assisted by a vice-president – prosecutor, who can come only from the judges, or prosecutors elected by the general assemblies of the

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courts, or the prosecutor's offices. This clarification of the legislator is welcome in order to make clearer this essential role of the Superior Council of Magistracy to defend the independence of justice in the meaning offered by the Constitution on the question of justice as mentioned above.

Therefore, the essential role of the Superior Council of Magistracy is to guarantee the independence of the judiciary – of the Judicial Power listed in article 1 paragraph 4 of the Constitution. It is also noted that article 131 and 132 of the Constitution established the role of the Public Ministry and the status of prosecutors, without any reference to the independence of justice, but to the general interests of the society, the rule of law and the right and freedoms of citizens.

Somehow indirectly, the fundamental law further establishes in article 23 (individual freedom) and article 24 (the right to defense) that, contrary to the activity of prosecutors, there is and is constitutionally constituted the activity of lawyers, i.e. specialized persons who give consistency and effectiveness to the right to defense and the presumption of innocence. Also, taking into account the numerous law cases of the European Court of Human Rights, the prosecutor and the lawyer have equal roles in the courts, in the light of the principle of equality of arms and the right to a fair trial as a whole. It should be noted that the imperative of the equitable process as a constitutional principle is found in the Romanian Constitution in article 21 paragraph 3 (the parties have right to a fair trial…).

As such, if the law would expressly allow for the independence of the justice to be ensured with a presiding Superior Council of Magistracy elected amongst the prosecutors, then, by symmetry within the meaning of article 6 of the European Convention on Human Rights and article 21 paragraph 3 of the Romanian Constitution, it should be possible the election of a president of Superior Council of Magistracy among lawyers in the field, in order to equalize the two professions with an essential role in the conduct of judicial proceedings before the courts, in order to ensure a fair trial, as stipulated by the provisions of article 6 of the European Convention on Human Rights, especially the law cases of the European Court of Human Rights, as well as article 21 of the Constitution and the jurisprudence of the Constitutional Court on article 21 paragraph 3.

Of courts, in several states within the European Union, where these are judicial councils for administering courts and prosecutors' offices, and for the management of judges' and prosecutors' careers, we can find various solutions, for example with a much wider presence of representatives of civil society in those judicial councils (in France, for example, their number exceeds practically the number of judges and prosecutors elected in the two professions), but regardless of the concrete normative solution, the basic law established by the Supreme Council of Magistracy, namely the independence of justice, the other part nowhere is allowed any form of monopoly or interference of the other professional entity in the magistracy – namely prosecutors – over the entire constitutional scaffolding dedicated to the judges' career and the functioning of the courts of law.

For example, in the French or Belgian legislation in this area, the large number of representatives of civil society (i.e. remarkable lawyers from other professions) can determine the leadership of the representative judicial councils from this professional segment outside the magistrates, i.e. it is possible to implement an arbitration function within the Judicial Power and separately within the Public Ministry on administrative and career issued. But a major interference from one magistrate profession to the other is not possible. In the current version of Law no. 317/2004, this interference appears unfortunately to be possible and obviously does not correspond to the purpose and role of the Superior Council of Magistracy as a guarantor of the independence of justice ("*ratio legis*").

Obviously, article 133 paragraph 3 of the Constitution would allow the Superior Council of Magistracy's president to be elected by the Superior Council of Magistracy's Plenum of the elected prosecutors in accordance with article 133 paragraph 2 letter a, but the consequence is clearly removed from the purpose and role of the Superior Council of Magistracy (guarantor of the independence of justice) interpreted in a natural connection with article 21 paragraph 3 and article 124, article 126 paragraph 1 and article 1 paragraph 4 on the separation of powers in the state.

By Decision no. 61 of February 31, 2018 regarding the object of unconstitutionality of the Law for amending the Law no. 317/2004 on the organization and functioning of the Superior Council of Magistracy as a whole and, in particular, the provisions of article I item 4, 5, 7, 15, 19, 20, 34, 46 and 62 thereof, the Court held, with reference to article 1 item 19 and 20 of the law examined, that the new way of choosing the Superior Council of Magistracy's leadership – the president of the section for judges is the president of the Superior Council of Magistracy and the president of the section of prosecutors is the vice-president of the Superior Council of Magistracy, therefore *ope legis* the president of the Superior Council of Magistracy is a judge and the vice-president a prosecutor, violate the provisions of article 133 paragraph 3 of the Constitution, in that it makes the difference that the Constitution does not stipulate, regarding the vocation to be elected president of the Superior Council of Magistracy, among the elected members of the Superior Council of Magistracy.

The Court notes that the current Law no. 317/2204 stipulates, in article 24 paragraph 1, the fact that the president and the vice-president of the Superior Council of Magistracy are elected from the judges and prosecutors elected as members of the Superior Council of Magistracy and who are part of different section (it is the expression of the law), but the meaning of this

text is to ensure at Superior Council of Magistracy management level representation equal to both judges and prosecutors, but without determining which of the two categories of magistrates an be elected as president of the Superior Council of Magistracy and who as vice-president of the Superior Council of Magistracy.

A modification similar to that under the law examined was introduced on the occasion of the Legislative Initiative of May 23, 2012 on the revision of the Romanian Constitution, the draft of the constitutional revision saying, in relation to article 133 paragraph 3 of the Constitution, that the president of the Superior Council of Magistracy is elected among the 9 judges of the corresponding section. In the opinion sent to the Romanian authorities on that occasion, the Commission for Democracy though Law (Venice Commission) expressed the reservation and the difficulty of accepting such a proposal, since the Superior Council of Magistracy is maintained in its constitutional structure, as a single entity, representative of both branches of the magistracy, but in which the vocation to be elected president must equally belong to any of the judges or prosecutors without distinction. According to the Venice Commission, if there is to be a single council whose mission is to represent the two branches of the magistracy, it would not be right that the president can not be elected from the members of the two branches.

At the same time, the Court notes that following the new organic legislator's philosophy, prosecutors are excluded from the right to vote for the election of the Superior Council of Magistracy's president as a leader and a representative of the Council, as they are not part of the elective assembly for the election of the president of the section of judges, which is the president of the Superior Council of Magistracy, and the judges are excluded from the election procedure, by vote, of the Superior Council of Magistracy's vice-president. However, the Superior Council of Magistracy's president and vice-president represent the joint governing bodies that target the Superior Council of Magistracy as a unitary and unique entity, representing both judges and prosecutors.

However, we note that regardless of the role of the Public Ministry and its constitutional tasks, it is legally impossible for the Public Ministry and prosecutors to be considered part of the Judicial Power (they are part of the judicial authority, including the Judicial Power and the Public Ministry, as well as the Superior Council of Magistracy, but obviously it does not confuse with the courts, having different constitutional roles and legal statutes different from one point away).

The idea that the Public Ministry represents a fourth power in the state is also unacceptable because there is no constitutional text for such an interpretation, but also because there are only three powers in the constitutional democracy – Legislative, Executive and Judicial – to which some public authorities benefiting from a distinct constitutional consecration, stand alone, as is the case with the Public Ministry.

In this context, allowing the interpretation of article 133 paragraph 3 of the Constitution in order that a prosecutor of the elected may be president of the Superior Council of Magistracy means to allow as a matter of plan, one of the parties to the process in the sense delineated by the European Court of Human Rights' cases – that is the prosecutor – become the symbol of the independence of justice, clearly debasing the principle of the fair trial in article 21 paragraph 3 of the Constitution and article 6 of the European Convention on Human Rights.

The role and functions of the Public Ministry and, implicitly, of the prosecutors, therefore have in their turn, distinct, special regulations and, as we have seen above, no text in articles 131-132 (Section 2 – Public Ministry) to the independence of justice has an express, explicit, constitutional attribution of the Public Ministry. Moreover, in a very simple logic, since the Public Ministry, through its prosecuting offices, investigates criminal cases and sends the suspects to trial, the courts will decide whether or not there is guilt or justice within the meaning of article 126 paragraph 1 and to the contrary, attorneys ensure sui generis the protection of the persons brought to justice mean that it is absolutely natural for the Public Ministry to fight in such a way that the results of its activity are strengthened by condemning those sent in law, while lawyers, as a rule, try to convince courts of law to the contrary to the reasoning proposed by prosecutors.

So, who has here the essential role to ensure organically the independence of justice? Obviously and logically only the courts and the judges.

The simple question arises: Do prosecutors and judges have the same representation about the notion of the independence of justice? Are all the intrinsic and extrinsic signs of believing that article 6 (right to a fair trial) in the European Convention on Human Rights and article 21 paragraph 3 of the Constitution are properly respected when the president of the judicial council guaranteeing the independence of justice is a prosecutor? Obviously NOT because it is also illogical, not only contrary to the purpose for which the Superior Council of Magistracy is so regulated in the fundamental law.

Besides, it is difficult to answer affirmatively to the above mentioned question, because there are no solid arguments, as in the cases of the European Court of Human Rights and the Constitutional Court of Romania many principles and regulations are enshrined, one of these principles being to ensure credible and consistent public appearance of the impartiality and independence of the Judicial Power and the judges, the public trust that could be created through the entire functioning mechanism of the Council of Magistracy, the functioning of the courts considered separately, the behavior of judges as groups or individually.

It is clear that the Superior Council of Magistracy can unduly influence the judge's evolution in his career and, obviously, the decisions in the cases he solves. a judge may be marked by various forms of distraction or visible influence (i.e. dismissal from the profession as a disciplinary sanction) or diffused, especially in the concrete case where at the top of the hierarchy of the Council of Magistracy is a member chosen from the other profession belonging to magistrates, that is, a prosecutor whose statute is known from European Convention on Human Right cases as "part of the criminal trial."

In this reasoning one can at least observe that the appearance of impartiality that must first exist for justice has maximum deficiencies when the Superior Council of Magistracy president is a prosecutor because the expectations of the management that he can achieve with the greatest good faith may depart from the pattern of the basic profession of that president, namely the prosecutor, to whom other constitutional rules apply than for the Judicial Power and judges.

As such, at the level of abstract perception, in terms of independence, effectively enshrined in the fundamental laws, the necessary independence of the Judicial Power for the proper functioning of constitutional democracy, as specifically stipulated in the Romanian Constitution, the role of the Superior Council of Magistracy, it is absolutely natural that the explicit normative solution adopted the legislator in the law amending Law no. 317/2004, namely that the Superior Council of Magistracy president is always a judge of those elected by the general assemblies, especially since the position of Superior Council of Magistracy president is mostly symbolic, the decisions being made in the overwhelming majority of situations within the collective at either the Plenum or the Sections.

It should be noted that in the case law of the Constitutional Court there are situations in which, despite some seemingly clear constitutional texts regarding the functioning of the Superior Council of Magistracy and the jurisdictional competences of the Constitutional Court, the Constitutional Court rightly appreciated some principles constitutional defining for the rule of law, such as free access to justice and the supremacy of the Constitution (article 1 paragraph 5 and article 21 paragraph 3), when it had two constitutional problems. Thus, although article 133 paragraph 7 of the Constitution explicitly provides that the Superior Council of Magistracy judgments are final and irrevocable, except for those in disciplinary matters, however, by Decisions no. 143/2003 (regarding the constitutionality of the draft revision of the Constitution) and no. 433/2004, the Constitutional Court expressly states that, in principle, the Superior Council of Magistracy judgments may be appealed to the courts, that is to say, in justice as a reflection of the principle of free access to justice. Also, by Decision no. 799/2011 (on the Draft Constitutional Revision) the Constitutional Court resumed arguments from the Decision no. 143/2003 regarding the free access to justice and the possibility of the persons interested in attacking the Superior Council of Magistracy's decisions, this time being more transgressive, namely in the sense of abandoning the categorical expression of article 133 paragraph 7 of the Constitution and the replacement to the other paragraph, which expressly provides that judgments of the Superior Council of Magistracy as administrative acts may be challenged in the courts.

Therefore, the principle of free access to justice prevailed in the rationale and interpretation given by the Court in the above judgments, so that some constitutional texts that seemed to receive, *de plano*, a one-way interpretation (at first sight/reading), these were interpreted much more deeply, namely in correlation with the essential principles defining the rule of law and the constitutional democracy, reporting the way of interpretation to the basic rule of free access to justice.

*Similarly (mutatis mutandis) we consider that it is necessary to regard the independence of justice as an end in itself for the existence and functioning of the Superior Council of Magistracy so that the organization and functioning of the Superior Council of Magistracy effectively guarantees this independence of the Judicial Power, the courts and, implicitly, the judges, in order to effectively promote the principle of the separation of powers in the state under article 1 paragraph 4, as well as the entire set of rules for the performance of justice (the principle of lawfulness of judicial procedures, the fulfillment of the law in the name of the law and not in the name of any entity institutional or unipersonal character, the unique, impartial and equal character of justice, the independence of judges and their obedience to the law only) explicitly provided for in article 124 of the Constitution.*

Obviously, in this whole institutional picture created by Chapter VI on the Judicial Authority, there is no speculation about the superiority of any of the forensic professions – judge, prosecutor, lawyer – because such speculation of things would be unrealistic and childish.

In our opinion, it is exclusive to the constitutionally determined role assigned to each of these professions, in order to clarify how much and how it is permissible to interfere with each of these judicial professions in safeguarding and guaranteeing the independence of the judiciary as the essential purpose of the existence and functioning of the Superior Council of Magistracy.

We believe that the observation is that the functional independence of the Public Ministry must exist in real terms, and that the method of investigating criminal cases is not at all subjected to any form of interference outside the Judicial Authority and outside the express and clearly regulated criminal procedural framework. In this respect, it is desirable to devote an express legal provision on the functional and full

decision-making independence of prosecutors, obviously within the limits provided by the constitutional norms in force, regarding the way of investigating and solving the files that the Public Ministry has in their work , in such a way that the political factor can never interfere, whether we are talking about the Executive or the Legislative, as well as any other foreign entity of the Public Ministry.

In essence, it can be noticed that there are no notable differences between the status of the judge and the prosecutor, but only some rather declarative by the Constitution. However, with regard to the legal content of the functional independence for the two categories of magistrates, there is practically much similarity, except for the legal instrument of hierarchical control within the parquet units, where there are differences specific to this profession in the magistracy. In this respect, there is no solid argument that would lead to a possible reduction of the notion of magistrate/magistracy only to the judge/court.

On the contrary, the terminology of magistrate/magistracy itself would no longer be useful if it referred only to a professional category, that is to say the judge, as sometimes speculated. In reality, magistrates are related to the context of law enforcement by constitutional institutions (i.e. very important in the entire state building), i.e. circumscribed to the Judicial Authority and covering the two regulated professions there – judge and prosecutor. We have mentioned above that they have different constitutional and legal competences and must remain within the limits of these competences each and the interference between the two professions in the administrative and career development plan must be reduced to the minimum to guarantee the purpose and the essence of the Superior Council of Magistracy - the independence of justice – but also to ensure a proper consecration and functionality of the essential principle of the separation of powers in the state (where we only speak of judges and courts).

It is also widely recognized that the roles of the two components of the magistrate (judges and prosecutors) are different in the fundamental law of any state with real democratic standards, as well as in all international and regional legal instruments, the European Convention on Human Rights being the most eloquent example.

As a result, in the letter and spirit of the Romanian Constitution, as set out above, the Superior Council of Magistracy's president must always be a judge of those who are the result of the elections organized in the courts; and, logically, the vice-president elected only among the prosecutors resulting from the electoral process within the professional body of the prosecutors, the two elected persons thus becoming the right presidents of the Superior Council of Magistracy.

The solution proposed by the legislator that the president of the Judges Section is also the president of the Superior Council of Magistracy, namely the president of the Prosecutor's Section, to be vice-president of the Superior Council of Magistracy, based on the arguments set out above, we think is the most appropriate normative solution, since the aim of the fundamental law, and guarantee the independence of justice, it is much safer in this way.

## 4. Conclusions

In conclusion, let us make some observations on possible unconstitutional rules in the Law amending Law 317/2004, as follows:

I. Misunderstanding emerges from the reading of article 30, where some attributions are attributed either to the Plenum, or to the departments for the protection of justice, and especially to the defense of the independence, impartiality and reputation of judges and prosecutors. From the analysis of article 30 paragraphs 2 and 3 of the new law, it is not explicitly and predictably that the result of the inspections carried out by the Judicial Inspection is subject to the analysis of the sections and then the sections are pronounced by judgment.

The normative void left in the new law in this respect would lead to the abnormal situation that through internal regulations the Superior Council of Magistracy will legally legislate a segment that actually matters to the legislature. It is the legislator who must take steps to foresee and enforce the legal norm in the newly adopted law.

It is only understood from paragraph 6 that the corresponding section is pronounced by decision, but above, in paragraph 3 is used too categorical terminology, namely "in the situation where independence is affected ..." but there are no extra minimal explanations to make the text clear and precise (as the normative technique, the laws must be clear, precise, predictable, to be clear what their recipients are in the overall view, because the Nemo principle censuses ignoring the law to be able to produce effects in objectively and rationally).

Therefore, we believe that it is necessary to supplement or rephrase paragraph 3 where it is expressly stated that the report with the conclusions of the Judicial Inspection is submitted to the vote in the Plenum or, as the case may be, the appropriate section of the Superior Council of Magistracy.

II. Another set of questionable legal norms can be found in article 41 paragraph 2 of the new law, where it is given the competence of both sections to establish the territorial division for the courts (Judges section) and for the prosecutor's offices (Prosecutor's Section). These provisions of the new law are believed to conflict with article 131 paragraph 3 - the prosecutor's offices operate in the courts of law ... - since it is possible to decide different territorial districts in the two departments. The correct solution is that these territorial branches should be further established by the Ministry of Justice with the approval of the Superior Council of Magistracy – i.e. the Plenum

to have a unitary picture of the entire judicial system, given the provisions of article 131 paragraph 3 of the Constitution, which correlates the organization and functioning in administrative aspect of the courts and prosecutor's offices in the same territorial district and as a degree of jurisdiction.

The correct solution we believe is to give this task to the Plenum, with the consultation of each statement, i.e. the endorsement of the proposals and separate from the statements.

III. A text that we believe to have unconstitutionality is Article 41 letter c of the new law, as this text delegates practically to the Superior Council of Magistracy – the Section of Judges – attributions of the Parliament, namely to establish by law the competences of the courts – article 126 paragraph 2 of the Constitution. It is true that the text is somehow found in the law in vigor, but it does not cover the flaw of non-compliance with some provisions of the Constitution. Even Parliament cannot delegate its legislative powers to public authorities, in the absence of an express constitutional text that allows something. There is only one constitutional provision that establishes an exception to the rule of parliamentary monopoly on the law-making process, namely the legislative delegation granted to the Government under article 115 of the Constitution.

As such, the text of article 41 letter c) should be redrafted in such a way that the Superior Council of Magistracy acquires an advisory role for a draft law modifying or establishing such procedural powers in order to comply with the provisions of article 126 paragraph 2 – the jurisdiction of the judiciary and the court proceedings are provided only by law – the constitutional text being categorical in this regard.

IV. On the technical argumentation of drafting normative acts, the assignment of a normative symmetry where there is the same juridical decision on the substance and procedural rules (*Ubieadem est ratio, idem solutionessedebet*), it is worth mentioning a potential constitutionality of article 69 paragraph 4 of the new law, where there is no explicit separation of the Judicial Inspection on two sections – one for judges and another for prosecutors, just as the Superior Council of Magistracy is constantly working in the new law. Moreover, as the texts relating to the functions of president and vice-president are written, respectively covering the holiday situations of these functions, the confusion persists and basically the new law allows an inadmissible interference between the two professions in this sensitive area of disciplinary responsibility and defense of the independence and reputation of the two categories of magistrates.

Therefore, we believe that the law here is unclear, it generates confusions that will not help to apply judicious and compatible with the Constitution, on the contrary will probably generate chaos and confusion, leading very likely to inapplicable solutions and blockages in activity.

Starting from the model of regulation of the two sections of the Superior Council of Magistracy, introduced in the new law with clear boundaries of competences and much better correlated with the constitutional norms in force (and much closer to the letter and spirit of articles 5-6 of European Convention on Human Rights), in similarly, the Judicial Inspection matter should be regulated, with a clear separation between two sections, one for judges and another for prosecutors, as explicitly stated in article 134 paragraph 2 of the Constitution, where it is expressly stipulated that in disciplinary matters the units have attributions for each category of magistrates to which each section refers.

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# MANAGEMENT OF CLASSIFIED INFORMATION WITHIN THE ORGANISATION FOR INTERDICTION OF CHEMICAL WEAPONS

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**Abstract**

*In the relation with international bodies, the Romanian authorities must observe its own rules related to security of confidential information, and in the relations with other authorities, branches, companies from Romania, they have the obligation to observe the national legislation.*

*This work mechanism, with two different systems of information security, imposes, on level of competent Romanian authorities, some internal rules of equivalence of confidentiality levels, approved by ORNISS. As national authority in the field of security of classified information, ORNISS must know and hold a record of all equivalence regulations of confidentiality levels operated by different international bodies with those of internal legislation.*

**Keywords:** *classified information, national authorities, Organization for prohibition of chemical weapons, security systems.*

## 1. Introduction

The classified information[1] circulates in the relations of Romanian authorities with different international bodies: NATO, EU, European Central Bank, International Atomic Energy Agency (IAEA), Organisation for Prohibition of Chemical Weapons (OPCW) and others.

An interesting and highly rigorous system of protection of classified information has been implemented by the Convention for prohibition of development, production, storage and use of chemical weapons and destruction of it. On level of European Union, one has adopted the Decision (PESC) 2015/259[2] of Council dated 17th February 2015 on the support awarded to the activities of the Organisation for Prohibition of Chemical Weapons (OPCW) for the implementation of EU strategy against proliferation of weapons of mass destruction, article 1 par. (1) stipulating that „*For immediate and actual enforcement of certain elements of EU strategy, the Union supports the activities of* OPCW*, for the following objectives:*

- consolidation of capacity of member states to meet the obligations incumbent upon it in terms of CWC;
- increase of level of preparation of member states to prevent attacks involving toxic chemical products and to defeat it;
- intensification of international cooperation in the field of chemical activities;
- support of OPCW capacity to adjust to evolutions in the field of science and technology;
- promotion of universality by encouraging non-member states to adhere to the convention".

Romania has signed the Convention on the first day of opening for signing and ratified it on 9th December 1994, by Law no.125/1994[3].

In order to reach its objective, the Convention has instituted a rigorous regime of verification of non-production of chemical weapons in peaceful industry and destruction of existing inventories, by annual declarations and inspections on site.

The enforcement of verification system involves a high volume of information, contained in declarations or obtained by international inspectors.

The Convention pays special attention to the measures of protection of classified information, called confidential, with express disposals in „Annex of confidentiality", for a fair balance between security, freedom and private life[4], in the global context of influencing the international cooperation by a range of specific factors such as crises, conflicts and international tensions[5].

## 2. Organization for Prohibition of Chemical Weapons

This organization has the seat in Hague and includes three bodies: Conference of Member States; Executive Board; Technical Secretariat.

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[1] V. Păun, *Competitiveness by information*, Pideia Publishing House, Bucharest, 2006, p. 17; S. Petrescu, *Art and power of information*, Military Publishing House, Bucharest, 2003, p. 99

[2] Published in the Official Journal of European Union no. 43 dated 18.02.2015.

[3] Published in the Official Journal of Romania, Part I, nor. 356 dated 22nd December1994.

[4] D. C. Mîță, *National Security. Concept. Regulation. Means of protection*, Hamangiu Publishing House, Bucharest, 2016, p. 117.

[5] L. A. Ghica, M. Zulean, *Policy of National Security*, Polirom Publishing House, Iași, 2007, p.206.

The Conference of Member States[6] is the main body of the Organization for Prohibition of Chemical Weapons and includes the representatives of all member states, together with alternates and counsellors.

The Executive Board[7] is the executive body of OPCW, formed of 41 members, elected on 2-year term, fairly representing the 5 regional groups. It gathers 4-6 times per year in ordinary sessions, as well as on need, in extraordinary sessions. It presents reports in the Conference of Member States, it supervises the activity of Technical Secretariat and cooperates with national authorities of member states.

The Technical Secretariat [8] is liable for daily enforcement of Convention, supporting the Conference of Member States and the Executive Council in exercising its functions. It centralises and checks the information supplied by member states in the initial and annual declarations.

The Technical Secretariat is managed by a general manager elected by the Conference of Member States for 4 years, and includes operative divisions and other structures.

The 4 operative divisions with the component services are:

- Division verification with the following services: declarations, confidentiality, elaboration and analysis of politics, verification in industry and chemical demilitarisation;
- Inspectorate with the following services: operations and planning, inspection management, analysis of inspections and inspection staff;
- Division of external relations with the following services: relations with governments and political problems, public relations and protocol;
- Division of international cooperation and support with the following services: international cooperation, protection and emergency support.

Note the existence in the structure of the Division verification of Confidentiality Service. The subsidiary bodies includes the Board for settlement of disputes of confidentiality or, briefly, the Board for confidentiality. It includes 20 members elected for 2-year term by the Conference of Member States, on proposals of regional groups, based on competence, integrity and preparation.

## 3. Classification of information within the Organization for Prohibition of Chemical Weapons

In the system of Convention, information is defined based on its capacity and potential to supply, directly or indirectly, data and knowledge, regardless the composition or tangible or intangible nature[9].

The information includes all means which may be used for procurement, transmission or storage of data or knowledge obtained by a person or Organization during the process of enforcement of Convention.

The information may be documents with written data: graphics, schemas, numerical, symbolic, analogical, photographic; photo or video records on inspection; data stored or presented on electronic, magnetic or other physical support [10]. Also, the materials, objects, equipments and even personal objects may represent sources of information. For instance, if an operator within a chemical installation wears gas mask or other relevant protective equipment, the information concluded is that in the installation is present a toxic substance.

The convention related to interdiction of chemical weapons stipulates that all information obtained or communicated by the Organisation for Prohibition of Chemical Weapons (OPCW), deemed confidential, is classified in relevant categories based on sensitivity level.

In determining the sensitivity level of an information the following factors are considered:

- potential level of damages which may be caused by revealing the information to a member state, public institutions, companies or citizens;
- level of potential advantage which the reveal of information may bring to a state, body, company or person.

Related to such factors, the confidential information is classified in three categories:

OPCW – limited access (OPCW Restricted, engl., OPCW Restreinte, fr.);

OPCW – protected (OPCW Protected, engl., OPCW Protegee, fr.);

OPCW – highly protected (OPCW Highly Protected, engl., Hautement Protegee, fr.).

The information not included in any of the categories mentioned is deemed unclassified and properly marked: unclassified (English) and non classees (French).

The information supplied by member states is classified by the authorities within such states; if a state may communicate to the Organisation for Prohibition

[6] Art. VIII let. B point 9-22 of Convention for prohibition of development, production, storage and use of chemical weapons and destruction of it.

[7] Art. VIII lett. C point 23-36 of Convention for prohibition of development, production, storage and use of chemical weapons and destruction of it.

[8] Art. VIII lett. D point 37-47 of Convention for prohibition of development, production, storage and use of chemical weapons and destruction of it.

[9] S. Petrescu, *quoted work* pp. 79-94.

[10] M. Petrescu, N. Năbârjoiu, M. Braboveanu, *Information management, vol II – Information and security*, Bibliotheca Publishing House, Târgoviște 2008, p. 125.

of Chemical Weapons (OPCW) information which seem confidential, without mentioning the classification level, the general manager of OPCW has the obligation to classify provisionally, to manage it according to such classification and contact the state supplying the information to confirm, amend or change the provisional classification;

The confidential information generated by Technical Secretariat of OPCW is provisionally classified by the officers issuing it. The final classification is the responsibility of general manager or deputy general manager of OPCW.

During the inspection, the initial classification of data is dealt with by the representative of the member state inspected, classification observed as well by the team of inspectors of OPCW during the entire term of inspection. Note that each member state has full authority in determining the classification level of the information supplied.

Usually, the classification assigned to an information remains in force until it ends the validity term determined on issuance or when changed during a reclassification or declassification process.

When it supplies to OPCW confidential information, the member states must state as well the duration of validity of classification level. If not stated the duration of validity of classification, the information is deemed to maintain its nature on indefinite term.

For a viable and effective protection of confidential information and to remove from archives the materials with confidential information with expired validity, the member states and the Technical Secretariat review the confidentiality nature assigned, either to continue enforcing it, or to reduce the category of classification or for declassification. Therefore, periodically, the Confidentiality Service of Technical Secretariat elaborates and implements programs for destruction of information held by Organization. In this respect, it is required the written consent of member states supplying the information, as well as of the states mentioned in the information elaborated by OPCW.

The change of classification category may be done only by the authority classifying the information or with its written consent. This rule is enforced both to the documents submitted by member states, and that elaborated by Technical Secretariat.

The reclassification of an information issued by Technical Secretariat or by a member state may be required when reviewed and amended or completed so as to make a significant difference of confidentiality level

The declassification of confidential information represents passing it to a classification category in the position „unclassified", thus without a confidential nature.

In case of declassification of information, the principles presented are also enforced to change the classification category.

The declassification of confidential information does not entail implicitly the right to publish. This needs a separate process of consultation and approval.

## 4. Access and transmission of confidential information in OPCW system

The access and transmission of confidential information in OPCW system are ruled by two principles[11]:

- access to confidential information is ruled in conformity to the level of classification of it;
- the communication of confidential information is governed by the principle „need to know".

Such principles generate two practical issues related to treatment and protection of confidential information:

- the level of classification of confidential information is essential in determining the procedures of communication and measures of protection of data;
- the beneficiaries of confidential information are determined based on their proved need to enter in the possession of it, only for enforcement of Convention.

The communication of confidential information to member states is governed by a disposal of Convention, according to which OPCW must regularly communicate to member states the data necessary to make sure that all other states consequently enforce the disposals of this international legal instrument.

The method of transmission by OPCW to a member state will entail a permanent protection, on a relevant level with the classification of such information.

Each member state which is an addressee has the obligation to manage the confidential information received in conformity to classification level of it and to supply to OPCW, on demand, details related to management of the information received.

The Convention rules as well the access to confidential data of other persons or bodies beyond the Technical Secretariat. The selection of laboratories to analyse the samples, the determination of authorised experts etc. are done only against an authorisation issued by the general director or other officer appointed by it, pursuant to determining the level to know, and strictly limited to minimum necessary for accomplishment of a requisite imposed by the enforcement of Convention.

All confidential information is kept and shared recording the identity of each person accessing it, the date and time of access.

The highly protected documents are supervised permanently, so as to be known exactly, on any moment, who had or has in possession such documents.

[11] For principles of informative activity, see, Petrescu, *quoted work*, pp. 27-31.

Each material or document containing confidential information is marked with a classification level. The confidential documents have coloured covers, as follows:

red –OPCW HIGHLY PROTECTED;

purple - OPCW PROTECTED;

blue - OPCW RESTRICTED.

The multiplication of documents containing confidential information is done based on the fact that the need of number of copies corresponds to legitimate scope approved, so as to reduce it on minimum necessary, and the copies marked according to such level of confidentiality.

The number of copies is registered, and each copy is numbered. The copies are shared only to approved addressees, the operation being recorded in the special register. The additional copies or those no longer useful are handed over for archiving or destruction, this operation being recorded as well.

The operations of destruction, respectively of transmission of confidential information, both on paper, and electronically, have no distinct nature. It must be mentioned only that the performance procedures of such operations are ruled by norms approved by the general manager.

## 5. Conclusions

In conclusion, the systems of management of classified information experienced and long applied within NATO[12] and EU, as well as within the Organization for Prohibition of Chemical Weapons may represent models for all those called to provide for security of classified information in Romania.

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# THE MEANING OF NATIONAL COURT IN ARTICLE 267 TFEU AND THE IMPORTANCE OF THE COURT'S INDEPENDENCE

**Iuliana-Mădălina LARION**[*]

**Abstract**

*The notion of "court or tribunal of a Member State" in Article 267 of the Treaty on the Functioning of the European Union has been given an autonomous meaning by the Court of Justice of the European Union (CJEU), resulting from its rich case-law of preliminary rulings. One of the recent developments in the analysis of this notion concerns the importance of the independence of the judiciary, as an element of the rule of law, one of the key values of the European Union. The study presents the requirements a judicial body must fulfil in order to be allowed to request a preliminary ruling, with emphasis on the criterion of independence and focus on the latest jurisprudence. The goal is to draw conclusions on the effect that measures adopted by the European Union's institutions for the protection of the rule of law in some Member States might have on CJEU's jurisdiction to accept requests for preliminary rulings from the courts of the Member States in question..*

**Keywords:** *European Union; preliminary rulings procedure; national court; rule of law; independence of the judiciary.*

## 1. Introduction

Article 267 of the Treaty on the Functioning of the European Union (TFEU) is the legal basis for the Court of Justice of the European Union's[1] jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union (EU), at the request of a court or tribunal of a Member State.

The preliminary rulings procedure is a dialogue between the national court and the Court of Justice. It is meant to facilitate the national courts' mission to interpret and apply the EU law and the Court of Justice of the European Union's mission to ensure coherent and uniform application of EU law in all Member States.

This procedure does not establish a hierarchy between the reffering court and the responding court. National courts are EU courts and are the first called upon to interpret and apply EU law. Only if they face difficulties in fulfilling this task, which cannot be overcome by studying the case-law, if they consider that are grounds for a revision of the jurisprudence, if they have doubts about the validity of an EU rule or about its uniform interpretation in all the Member States, they may use this procedural instrument to obtain the opinion of the specialized supranational court, which has the legitimacy and the experience necessary to give rulings with binding effects in the Member States.

In the Court of Justice's own words[2]:

"In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law (…).

In that context, in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law (…).

In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties."

This system of cooperation is founded on the principle of mutual trust between Member States, a principle resulted from sharing the values enshrined in Article 2 of the Treaty on European Union (TEU)[3].

The study aims to clarify, with respect to the relevant case-law of the Court of Justice, the meaning of "national court or tribunal of a Member State", in order to focus on the most recent relevant cases and to determine the possible legal consequences on the application of Article 267 TFEU of the loss of mutual trust between Member States as to some of the Member State's ability to ensure and guarantee the

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[1] A system presently composed of the Court of Justice and the Tribunal.

[2] Judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraphs 35-37.

[3] Article 2 TEU reads: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

independence of the judiciary, a key element of the rule of law.

Since the subject-matter of the study focuses on recent case-law developments, there are few contributions in legal literature and many points open to debate.

## 2. National court or tribunal of a Member State within the meaning of Article 267 TFEU

The notion of court or tribunal, found in Article 267 TFEU is an autonomous notion in EU law[4]. The Court of Justice determined that its meaning is not limited to the judiciary system, but may include other bodies authorized to render rulings of a judicial nature.

The characteristics of such a body were defined by the Court of Justice in the *Broekmeulen*[5] case. The Appeals Committee for General Medicine raised a preliminary question in the context of an appeal lodged by doctor Broekmeulen, of Netherlands nationality, who obtained a diploma of doctor in Belgium and was refused authorization to practice medicine in the Netherlands by the Registration Committee. Both the Registration Committee and the Appeals Committee were private bodies, established by the Royal Netherlands Society for the Promotion of Medicine, a private association. The great majority of doctors in the Netherlands belonged to this society.

The Court noted that a study of the internal legislation revealed it was impossible for a doctor who intended to practise in the Netherlands to do so and to be recognized by the sickness insurance schemes, without being registered by the Registration Committee. If registration was denied, an appeal could be made to the Appeals Committee. This body was composed of medical practitioners, representatives of university medical faculties and government representatives, appointed for five years. Thus, it included a significant degree of involvement on the part of public authorities. Also, it determined disputes on the adversarial principle and its decisions could be challenged in the ordinary courts, but that had never happened before.

The Court observed that this body was acting under a degree of governmental supervision and, in conjunction with the public authorities, created appeal procedures which could affect the exercise of rights granted by Community law. Thus, the Court considered imperative, in order to ensure the proper functioning of Community law, that it should have the opportunity of ruling on issues of interpretation and validity arising out of such procedures.

The Court concluded that, as a result of the foregoing considerations and in the absence, in practice, of any right of appeal to the ordinary courts, the Appeals Committee, which operated with the consent of the public authorities and with their cooperation, and which, after an adversarial procedure, delivered decisions which were, in fact, recognized as final, must, in a matter involving the application of Community law, be considered as a court or tribunal of a Member State.

The solution of the Court of Justice was different in the *Borker*[6] case, in which another professional body, the Bar Council of the Paris Court, was not considered a judicial body able to ask for a preliminary ruling. The Court observed that it does not have jurisdiction to give a ruling, since it can only be requested to give judgments in proceedings intended to lead to a decision of a judicial nature. The Bar Council was not under the legal duty to try the case. It was only requested to give a declaration relating to a dispute between a member of the bar and the courts or tribunals of another member state.

The Court of Justice also had the task to establish, by way of interpretation, the territorial sphere of the notion of court from a Member State. Thus, in the *Bar and Montrose Holdings Ltd.* case[7], the Court held that its jurisdiction applied to the Isle of Man, which was not covered by the entire Treaty establishing the European Economic Community (TEEC), but to which a special Protocol annexed to the Treaty applied, since the Protocols have the same legal force as the Treaty itself.

The Court also declared its jurisdiction over French Polynesia, in joint cases *Kaefer and Procacci*[8]. The administrative tribunal was situated in French Polynesia. The Court noted that it was not disputed that the administrative tribunal was a French court and that part four of the TEEC empowers the institutions of the Community, in particular the Council, to lay down provisions relating to the overseas countries and territories on the basis of the principles set out in the Treaty. Since the preliminary reference concerned such a provision, the Court decided it had jurisdiction to answer the question raised by the administrative tribunal.

On the other hand, in the *Andersson*[9] case, the Court stated that, although it has, in principle, jurisdiction to give preliminary rulings concerning the interpretation of the Agreement on the European Economic Area (EEA) when a question arises before one of the national courts, since the provisions of that Agreement form an integral part of the Community legal system, that jurisdiction applies solely with regard to the Community, so that the Court has no jurisdiction to rule on the interpretation of the EEA Agreement as regards its application in the states belonging to the

[4] See Fuerea, 2016, 104, and, also, Broberg and Fenger, 2010, 211.
[5] Judgement of 6 October 1981, *Broekmeulen*, 246/80, EU:C:1981:218, paragraphs 16 and 17, quoted in Craig and De Búrca, 2017, 524-525.
[6] Order of 18 June 1980, *Borker*, 138/80, EU:C:1980:162, paragraphs 3-5.
[7] Judgment of 3 July 1991, *Bar and Montrose Holdings Ltd.*, C-355/89, EU:C:1991:287, paragraphs 6-10.
[8] Judgment of 12 December 1990, *Kaefer and Procacci*, C-100/89 and 101/89, EU:C:1990:456, paragraphs 6-10.
[9] Judgment of 15 June 1999, *Andersson*, C-321/97, EU:C:1999:307, paragraphs 23-33.

European Free Trade Association (EFTA). The fact that the EFTA state in question (Sweden) subsequently became a Member State of the European Union, so that the question emanates from a court or tribunal of one of the Member States, cannot have the effect of attributing to the Court of Justice jurisdiction to interpret the EEA Agreement as regards its application to situations which do not come within the Community legal order. Thus, the Court has no jurisdiction to rule on the effects of that Agreement within the national legal systems of the contracting states during the period prior to their accession to the European Communities.

Even a court that belongs to the judiciary system of more than one Member State may ask the Court of Justice to render a preliminary ruling. One example is the *Parfums Christin Dior*[10] case.

The preliminary reference was sent by the Benelux Court of Justice, a court common to the three Benelux Member States (Belgium, the Netherlands and Luxembourg). The Court concluded that, in order to ensure the uniform application of Community law, this common court, faced with the task of interpreting Community rules in the performance of its function, must be regarded as entitled to refer questions to the Court of Justice for a preliminary ruling.[11]

According to the settled case-law, the criteria used by the Court to determine if a body is a court or tribunal able to refer for a preliminary ruling are:

a) the body is established by law;
b) it is permanent;
c) its jurisdiction is compulsory;
d) its procedure is adversary (*inter partes)*;
e) it applies rules of law;
f) it is independent.[12]

The enumeration of these criteria is found, for example, in paragraph 23 of the judgment in the *Dorsch*[13] case.

The preliminary reference was made by the German Federal Public Procurement Awards Supervisory Board, on the interpretation of an article from a Directive, relating to the coordination of procedures for the award of public service contracts. The Court stated that the German Federal Public Procurement Awards Supervisory Board, which is established by law as the only body competent to determine, upon application of rules of law and after hearing the parties, whether lower review bodies have committed an infringement of the provisions applicable to procedures for the award of public contracts, whose decisions are binding and which carries out its task independently and under its own responsibility, satisfies the conditions necessary to be considered a national court.

The conclusion of the Court was the same in joint cases *Jokela and Pitkäranta*[14], with respect to the Finnish Rural Businesses Appeals Board, which was established by law and composed of members appointed by public authority and enjoying the same guarantees as judges against removal from office. The body had jurisdiction by law in respect of aid for rural activities, gave legal rulings in accordance with the applicable rules and the general rules of procedure, and, under certain conditions, an appeal could be lodged against its decision to the Supreme Administrative Court.

Another example is the *Abrahamsson and Anderson*[15] case. The Appeals Commission of the University of Göteborg was a permanent body, set up by law to examine appeals against certain decisions taken in relation to higher education, with members appointed by the government (three must be or must have been serving judges; at least three must be lawyers), the parties were given an opportunity to submit observations and to examine the information provided by the other parties, its decisions were binding and not subject to appeal. Although an administrative authority, it was vested with judicial functions, it applied rules of law and the procedure before it was *inter partes*. The judgement was given without receiving any instructions and in total impartiality.

On the contrary, in the *Syfait and others*[16] case, the Court held that the Greek Competition Commission did not satisfy the criteria because it was subject to the supervision of the Minister for Development, which implies that that minister was empowered, within certain limits, to review the lawfulness of its decisions. Even though its members enjoyed personal and operational independence, there were no particular safeguards in respect of their dismissal or the termination of their appointment, which was not an effective safeguard against undue intervention or pressure from the executive on those members.

In the judgment given in the *Corbiau*[17] case, the Court stated that the Director of the Direct Taxes and Excise Duties Directorate of the Grand Duchy of Luxembourg is not a court, because he answered complaints against the decisions of his subordinates and was himself under the direct authority of the Minister for Finance, so he could not be considered impartial. Furthermore, if his decision was challenged in court, he would be a party in the proceedings.

With regard to arbitral courts, in the *Vaassen-Goebbels*[18] case, the Court ruled that an arbitral tribunal

[10] Judgment of 4 November 1997, *Parfums Christin Dior*, C-337/95, EU:C:1997:517, paragraphs 15-31.
[11] See Hartley, 2010, 299-300.
[12] For a detailed analysis of these criteria, see Andreşan-Grigoriu, 2010, 72-143.
[13] Judgment of 17 September 1997, *Dorsch*, C-54/96, EU:C:1997:413, paragraph 23.
[14] Judgment of 22 October 1998, *Jokela and Pitkäranta*, C-9/97 and C-118/97, EU:C:1998:497, paragraphs 18-24.
[15] Judgment of 6 July 2000, *Abrahamsson and Anderson*, C-407/98, EU:C:2000:367, paragraphs 28-38.
[16] Judgment of 31 May 2005, *Syfait and others*, C-53/03, EU:C:2005:333, paragraphs 29-38.
[17] Judgment of 30 March 1993, *Corbiau*, C-24/92, EU:C:1993:118, paragraphs 14-17.
[18] Judgment of 30 June 1966, *Vaassen-Goebbels*, 61/65, EU:C:1966:39, paragraphs 272-273.

constituted under Netherlands' law, whose members were appointed by a minister, with permanent activity, bound by rules of adversary procedure similar to those used by ordinary courts of law and bound to apply rules of law, can be considered a national court.

However, in the *Nordsee*[19] case, the Court conclouded that an arbitrator who decides a dispute by virtue of a clause inserted in a contract between parties is not a national court, because the contracting parties are under no obligation, in law or in fact, to refer their dispute to arbitration and the public authorities in the Member State concerned are not involved in the decision to opt for arbitration and are not called upon to intervene automatically in the proceedings before the arbitrator. The Court stated that, if in the course of arbitration, questions of Community law are raised which the ordinary courts may be called upon to examine in the context of their collaboration with arbitration tribunals or in the course of a review of an arbitration award, it is for those courts to ascertain whether it is necessary for them to make a preliminary reference, in exercising such functions.

Also, in the order given in the *Greis Unterweger*[20] case, the preliminary reference was declared inadmissible, on the ground that the body asking the preliminary question, a Consultative Commission for currency offences, was not competent to resolve disputes (to give a ruling in proceedings which are intended to result in a judicial decision), but its task was to submit an opinion within the framework of an administrative procedure.

Even if a body may be considered a court or tribunal when it is exercising a judicial function, if the preliminary question is submitted to the Court when the body is exercising other functions, like administrative ones[21], the question shall be declared inadmissible.

As to courts, *stricto sensu*, their right to refer for a preliminary ruling is recognized irrespective of whether they decide in first or in last instance. Their right cannot be limited by provisions of national law.[22]

## 3. The independence criterion

In recent case-law of the Court of Justice, the *Margarit Panicello*[23] case raised the question whether a court clerk (a registrar), who had the exclusive competence to decide actions for the recovery of fees of agents and lawyers, can refer to the Court of Justice a request for a preliminary ruling. The Court decided it didn't have jurisdiction to answer, because the registrar is not a court, within the meaning of Article 267 TFEU. The proceedings were administrative in nature and the clerk could not be regarded as exercising a judicial function. Furthermore, it did not meet the criterion of independence.

As to this last condition, the Court stated: "the requirement for a body making a reference to be independent is comprised of two aspects. The first, external, aspect presumes that the court exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever (…), and is thus protected against external interventions or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them.

The second, internal, aspect is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law."

The Court decided that the registrar fulfils this criterion with regard to the internal aspect, but not with regard to the external aspect, "which requires there to be no hierarchical constraint or subordination to any other body that could give him orders or instructions", since Spanish law provided that the court clerk receives, and is required to comply with, instructions from his hierarchical superior.

The Court's assessment of this criterion was different in the *MT Højgaard and Züblin*[24] case. The reference for a preliminary ruling was made by the the Public Procurement Complaints Board from Denmark. The Court held that this Board is a third party in relation to the parties to the proceedings and has no functional link with the Danish Ministry for Business and Growth, but carries out its functions in an entirely independent manner. The Board does not occupy a hierarchical or subordinate position and does not take orders or instructions from any source whatsoever. Its members are bound to perform their duties in an independent manner. Most of them are members who come from the ranks of Danish judges and who have a decisive role in the decisions adopted by the Board.

Furthermore, the members of the Board who are members of the judiciary enjoy, in that capacity, the particular protection against dismissal, a protection which also extends to the performance of the tasks of a member of the presidency of the referring body.

Thus, the independence of the judges, who had a decisive role in adopting the decisions of the Board, led to the conclusion that the entire refering body, with judicial functions, is acting independently.

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[19] Judgment of 23 March 1982, *Nordsee*, 102/81, EU:C:1982:107, paragraphs 7-16.

[20] Order of 5 March 1986, *Greis Unterweger*, 318/85, EU:C:1986:106, paragraphs 2-5.

[21] See order of 26 November 1999, *RAI*, 440/98, EU:C:1999:590, paragraphs 5-16 and judgment of 15 January 2002, *Lutz and others*, C-182/00, EU:C:2002:19, paragraphs 11-17.

[22] See Foster, 2009, 192.

[23] Judgment of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraphs 34, 36-43.

[24] Judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraphs 25-32.

## 4. Independence of the judiciary

The rule of law is amongst the common values of the Member States of the European Union, values that are to be respected and promoted under Article 2 of the Treaty on European Union (TEU). The independence of the judiciary is a key element of the rule of law and one of the grounds for mutual trust between the Member States.

The Court of Justice has already analysed some of the factors which guarantee the independence of the judiciary. Amongst these factors are guarantees to protect the person who has the task of adjudicating in a dispute against removal from office[25] and the receipt by members of the judiciary of a level of remuneration commensurate with the importance of the functions they carry out[26].

Also, in the *TDC*[27] case, the Court emphasized the essential role in guaranteeing independence and impartiality of the existence of rules regarding the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.

In the last few years, the European Union's institutions have expressed concerns about the way in which some legislative measures adopted by some Member States might affect the independence of the judiciary in the Member States in question. The European Commission and the European Parliament have taken steps in triggering the procedure established by Article 7 TEU[28], simultaneously with infringement actions, on the basis of Articles 258-260 TFEU[29].

In this context, in the *LM*[30] case, the High Court in Ireland asked the Court of Justice to answer two preliminary questions, in order to decide on the execution of a European arrest warrant, issued by Polish authorities for the purpose of conducting criminal prosecutions for trafficking in narcotic drugs and psychotropic substances.

The person concerned, detained in Ireland, opposed to being surrendered to Polish authorities. The person argued before the reffering court that he would be exposed to a real risk of a flagrant denial of justice in contravention of Article 6 of the European Convention on Human Rights (ECHR)[31]. He contended that the recent legislative reforms of the system of justice in the Republic of Poland deny him his right to a fair trial, as those changes fundamentally undermine the basis of the mutual trust between the authority issuing the European arrest warrant and the executing authority and he relied on the Commission's reasoned proposal of 20 December 2017 submitted in accordance with Article 7 paragraph 1 of the Treaty on European Union regarding the rule of law in Poland.

In the reasoned proposal, the Commission sets out in detail the context and history of the legislative reforms and addresses two particular issues of concern: the lack of an independent and legitimate constitutional review and the threats to the independence of the ordinary judiciary. The Commission invites the Council to determine that there is a clear risk of a serious breach by the Republic of Poland of the values referred to in Article 2 TEU and to address to that Member State the necessary recommendations in that regard.

On the basis of this reasoned proposal the referring court concluded that, as a result of the cumulative impact of the legislative changes that have taken place in the Republic of Poland since 2015 concerning, in particular, the Constitutional Court, the Supreme Court, the National Council for the Judiciary, the organisation of the ordinary courts, the National

[25] Judgment of 19 September 2006, *Wilson*, C-506/04, ECLI:EU:C:2006:587, paragraph 51.

[26] Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 45.

[27] Judgment of 9 October 2014, *TDC*, C-222/13, EU:C:2014:2265, paragraph 32.

[28] Article 7 TUE reads: "On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union."

For a study on protecting EU values by the means provided by Article 7 TEU, see Larion, 160-176.

[29] See Order of 17 December 2018, *Commission/Poland*, C-619/18 R, EU:C:2018:1021. The Court has ordered the suspension of some provisions of Polish law that modified the laws of judicial organisation, which the Commission considered to represent a breach of the independence of the Polish Supreme Court. The case on the grounds of the matter is still pending.

[30] Judgment of 25 July 2018, *LM*, C-216/18 PPU, EU:C:2018:586, paragraphs 14-25,

[31] International treaty signed by the Member States of the Council of Europe, in Rome, on 4 November 1950. The Treaty entered into force on 3 September 1953. Romania ratified this treaty by Law no. 30/1994, published in the Official Monitor, Part I, no. 135 of 31 May 1994.

School of Judiciary and the Public Prosecutor's Office, the rule of law has been breached in that Member State.

The referring court explained that it has based its conclusion on changes found by it to be particularly significant, such as: the changes to the constitutional role of the National Council for the Judiciary in safeguarding independence of the judiciary, in combination with the Polish Government's invalid appointments to the Constitutional Tribunal and its refusal to publish certain judgments; the fact that the Minister for Justice is now the Public Prosecutor, that he is entitled to play an active role in prosecutions and that he has a disciplinary role in respect of presidents of courts, which has the potential for a chilling effect on those presidents, with consequential impact on the administration of justice; the fact that the Supreme Court is affected by compulsory retirement and future appointments, and that the new composition of the National Council for the Judiciary will be largely dominated by political appointees; and the fact that the integrity and effectiveness of the Constitutional Court have been greatly interfered with in that there is no guarantee that laws in Poland will comply with the Polish Constitution, which is sufficient in itself to have effects throughout the criminal justice system.

Following this conclusion, the reffering court considered that there is a real risk of the person concerned being subjected to arbitrary in the course of his trial in the issuing Member State, wich is sufficent ground, under Irish law, to refuse his surrender.

The preliminary questions refered to the Court of Justice concerned the interpretation of Article 1 paragraph 3 of Framework Decision 2002/584[32], relating to the circumstances in which the executing judicial authority may refrain from giving effect to a European arrest warrant on account of the risk of breach, if the requested person is surrendered to the issuing judicial authority, of the fundamental right to a fair trial before an independent tribunal, as enshrined in Article 6 paragraph 1 of the ECHR, a provision which corresponds to the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.

Thus, the referring court asked, in essence, if the executing judicial authority has information, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7 paragraph 1 TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, it must determine, specifically and precisely, whether there are substantial grounds for believing that the individual concerned will run such a risk if he is surrendered to that State and, if the answer is in the affirmative, what are the conditions which such a check must satisfy.

The Court of Justice decided to rule in the composition of the Grand Chamber, in urgent preliminary procedure and offered a detailed response. The Court's assessment on the grounds of the case began with recalling that EU law is based on the fundamental premiss that each Member State shares with all the other Member States a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected.

The Court emphasized that the European arrest warrant is the first concrete measure in the field of criminal law implementing the principle of mutual recognition, meant to facilitate and accelerate judicial cooperation in order to contribute to achieving EU's goal of being an area of freedom, security and justice, and is based on the high level of trust which must exist between the Member States. That is why Framework Decision 2002/584 sets the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition. Refusal to execute is intended to be an exception which must be interpreted strictly.

The Court underlined that the reasons for refusal are found in Articles 3, 4 and 4a of the Framework Decision 2002/584 and recognised that limitations may be placed on the principles of mutual recognition and mutual trust between Member States in exceptional circumstances. The Court held that, first of all, it must be determined whether a real risk of breach of the fundamental right of the individual concerned to an independent tribunal and, therefore, of his fundamental right to a fair trial, is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to a European arrest warrant, on the basis of Article 1 paragraph 3 of Framework Decision 2002/584.

The Court stated that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded. It recalled that, in accordance with Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and judicial protection of the rights of individuals under that law. Consequently, every Member State must ensure that the bodies which, as courts or tribunals within the meaning of EU law, come within its judicial system in the fields covered by

[32] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, published in the Official Journal of the European Union L 190 of 18 July 2002.

EU law, meet the requirements of effective judicial protection, including the criterion of independence.

The Court stated, in paragraph 54 of its judgment: "The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that, in accordance with the Court's settled case-law, that mechanism may be activated only by a body responsible for applying EU law which satisfies, *inter alia*, that criterion of independence."

Also, in paragraph 67, the Court noted: "The requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary."

The Court held that preserving the independence of judicial authorities is, also, primordial in the case of the European arrest warrant. The existence of a real risk that the individual concerned will suffer a breach of his fundamental right to an independent tribunal, and, thus, of his right to a fair trial, is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that European arrest warrant, on the basis of Article 1 paragraph 3 of Framework Decision 2002/584.

The Court of Justice offered the reffering court the necessary guidelines, stating that the executing judicial authority must, as a first step, assess, "on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State" (paragraph 61), whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached (having regard to the standard of protection guaranteed by Article 47 paragraph 2 of the Charter). Information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7 paragraph 1 TEU is particularly relevant for the purposes of that assessment.

The Court reiterated its findings regarding the criterion of independence in its judgements in cases *Wilson*, *Associação Sindical dos Juízes Portugueses* and *TDC* and noted that they represent a check point for the assessment in the fist stage, in order to determine the existence of a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts.

If the risk exists, the second step is to assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk.

An automatic refuse to execute a European arrest warrant could only be founded on a decision of the European Council determining, as provided for in Article 7 paragraph 2 TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent to the rule of law, and if the Council were then to suspend Framework Decision 2002/584 in respect of that Member State.

Accordingly, as long as such a decision has not been adopted by the European Council, the executing judicial authority may refrain, on the basis of Article 1 paragraph 3 of Framework Decision 2002/584, to give effect to a European arrest warrant issued by a Member State, which is the subject of a reasoned proposal as referred to in Article 7 paragraph 1 TEU, only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case, that there are substantial grounds for believing that the person in respect of whom that European arrest warrant has been issued will, following his surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial.

In the course of such an assessment, the executing judicial authority must, in particular, examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State's courts, to which the material available to it attests are liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person will be subject. The court must regard his personal situation, as well as the nature of the offence for which he is being prosecuted and the factual context that forms the basis of the European arrest warrant.

Also, it must, pursuant to Article 15 paragraph 2 of Framework Decision 2002/584, request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk. In the course of such a dialogue, the issuing judicial authority may, where appropriate, provide the executing judicial authority with any objective material on any changes concerning the conditions for protecting the guarantee of judicial independence in the issuing Member State, material which may rule out the existence of that risk for the individual concerned.

If all the information obtained does not lead to the conslusion that the person concerned shall not suffer

such a risk, then the executing judicial authority must refrain from giving effect to the European arrest warrant.

## 5. Conclusions

Recent case-law of the Court of Justice, with relevance to the notion of national court of a Member State of the European Union, within the meaning of art. 267 TFEU and, in particular, the considerations of the Court in cases where the criterion of the independence was analysed, pose, undoubtedly, innovative aspects.

The legal issues the Court has dealt with in the last few years have a pronounced character of novelty and are the product of the developments recorded in EU's recent history, in the context of the unprecedented challenges that the EU's institutions, as well as Member States, have had to manage. The concerns expressed by the European Commission and the European Parliament in relation to the existence of a clear risk of a serious breach by some Member State of the values referred to in Article 2 TEU, including systemic deficiencies in ensuring the independence of the judiciary and the steps taken to trigger Article 7 TEU, produce legal consequences upon the notion of court of a Member State in Article 267 TFEU, an autonomous notion in EU law.

From the grounds of the Court of Justice's judgment in the *LM* case, it results the idea that, even in the absence of a decision of the European Council, adopted on the basis of Article 7 paragraph 2 TEU, declaring the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 TEU, national courts have the competence to make their own assessment on the existence of a real risk of breach of the fundamental right to an independent tribunal in another Member State. This competence is derived from the principle of mutual trust between Member States, which is itself grounded on promoting and respecting common values.

Furthermore, another important idea derived form this judgment is that the independence of the national courts is also esenatial for the efficiency of the preliminary procedure machanism, since this procedure can only be initiated by a body that has the task to apply EU law and that fulfills, *inter alia*, the criterion of independence.

Thus, it is open to debate if one can deduce that, if the Europan Council determines the existence of a serious and persistent breach by a Member State of the value of rule of law, referred to in Article 2 TEU, by not ensuring and guaranteeing the independence of the judiciary, the Court of Justice would lose its jurisdiction to answer preliminary references made by the national courts of the Member State in question. It is also unclear, at this point, if such loss of jurisdiction would be automatic or would remain at the Court's discretion in each particular case, in the situation in which the Council would not decide to suspend the application of Article 267 TFEU for the Member State concerned.

The study intends to encourage debate on these legal points and other that may be identified, as further research topics could include the Court's judgements in other relevant pending cases and the evolution of the jurisprudence in assesing the notion of court of a Member State, for the purpose of appliying Article 267 TFEU.

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# PRINCIPLES REGARDING STATE JURISDICTION IN INTERNATIONAL LAW

**Oana – Adriana IACOB***

**Abstract**

*The concept of state jurisdiction in international law is based on the principle of sovereign equality, establishing that each state enjoys the exclusive right to exercise authority (with the obligation of non-interference for other members of the international community) over a given territory, its population and its goods, as well as over events and acts committed within its territorial boundaries. The central focus of the present paper is jurisdiction, regarded as a manifestation of sovereignty, referring to the state competence to legislate and apply law to particular events, persons and property. Traditionaly, jurisdiction has been tightly connected to the concept of territory. However, of particular interest is what happens in situations that involve elements of extraneity, when several states claim jurisdiction over a certain event. In this sense, the five principles governing the exercise of state jurisdiction in criminal law matters will be analysed.*

**Keywords:** *jurisdiction, sovereignty, principle of territoriality, principle of nationality, principle of universality*

## 1. Introduction

In an international community characterized by polyarchy and, at the same time, by the interdependence between its members, there are two types of interests and concerns in balance - international concerns of the general community and states' particular interests. In the doctrinal analyses of authority in the international order two perspectives on the allocation of authority[1] have been described: on one hand, a vertical allocation of authority between the general community and the particular states – focusing on addressing international concerns – and, on the other hand, a horizontal allocation of authority between the different states in a (still) very state-centered world, governed by the principle of sovereignty.

According to the principle of sovereign equality – basic principle of international law and fundamental pillar of the existing international order – all states, regardless of their differences and asymetries in areas such as military power, geographical and population size, levels of industrialisation and economic development, have equal rights when it comes to the exercise of sovereignty, at international level, as independent entities in relation to other states, and at internal, domestic level, as authorities solely endowed with the competence of exercising power over a particular territory, as well as population, property and events within their territorial boundaries.

Although the concept of jurisdiction may seem rather technical, referring to procedural applications of domestic law and practical delimitations of competences between states, it is, actually much more than that.[2] The concept of state jurisdiction refers to the allocation of power between the members of the international community, being rooted in the principle of sovereignty of states.

Although the actual term is quite generic and has been used in a variety of senses in the literature of international law, there are, basically, three (interrelated) types of jurisdiction that a state can exercise:

- Legislative/ prescriptive jurisdiction – to elaborate laws applicable to everyone and everything within its territorial boundaries;
- Enforcement jurisdiction – to enforce its laws and regulations against those who breach them;
- Adjudicatory jurisdiction – to exercise judicial authority within its territory.[3]

Traditionally, the concept of jurisdiction was tightly and inevitably related to the concept of territory ("jurisdiction as a mist above the swamp of territory")[4], revolving around the power of states. In this classical view, jurisdiction became a matter of international law only when it involved elements of extraneity (for instance, activities taking place abroad), having to do with another state's territorial authority. The major concern was that such extraterritorial elements could lead to conflicts between states. So, in matters of jurisdiction, territoriality was seen as the valid rule, while extraterritoriality was considered suspicious (if not unlawful).[5] This has been the most widely accepted view on jurisdiction for a very long time. However, the increasing interdependence between states has

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[1] Lung-Chu Chen, *An introduction to contemporary international law. A policy oriented perspective,* Third Edition, Oxford University Press, 2015, pp. 269 – 277.

[2] Cedric Ryngaert, *Jurisdiction*, available at https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/Jurisdiction.pdf, accessed 12.04.2019.

[3] Ademola Abass, *International law. Text, cases and materials,* Second Edition, Oxford University Press, 2014, p. 239.

[4] Cedric Ryngaert, *op. cit.*, p. 1.

[5] Ibidem, p. 2.

generated a shift in the conception on jurisdiction in international law.

In some instances, it occurred that the exercise of jurisdiction by a particular state came in conflict with the right invoked by another state to exercise jurisdiction on the same issue. Therefore, between the respective states arose a jurisdictional difference. Over the years, international law evolved towards establishing means of resolution for such differences (either conventional or accepted as customary).[6]

The analysis contained in the present paper focuses on this type of situations, on the rules applicable for their resolution and the controversies that they arise in the practice of states.

## 2. Principles of jurisdiction

Jurisdictional differences in civil law matters are, usually, resolved in accordance with rules of private international law, elaborated and implemented by the state.

On the other hand, criminal law matters are tied to a greater extent to the public sphere and, thus, jurisdictional conflicts of such type lead to specific effects in international law.

A major turning point in the law of jurisdiction (that has influenced international law's approach on the matter ever since) was the 1935 *Harvard Research Draft Convention on Jurisdiction with Respect to Crime*, published in the American Journal of International Law.[7] The Harvard Draft enunciates a series of principles of jurisdiction: territoriality, nationality, protection – security and universality.[8] The "star" of the Harvard Convention remains, of course, territoriality, extraterritorial jurisdiction being considered (still) an anomaly in need of strong justification.

In practice, over time, the principles enunciated by the Harvard Convention have been contested and subjected to a variety of interpretations. Of course, the most widely accepted and applied among states has been the principle of territoriality, according to which a state is authorized to legislate and apply its laws to all events taking place within their borders, regardless whether these events involve nationals or non-nationals of the respective state. Nevertheless, the principle of territoriality sometimes clashed with other jurisdictional principles.

For instance, in the 1988 Lockerbie incident, in which an US airliner was bombed by two Libyan nationals in Lockerbie, Scotland, UK, leading to the deaths of 270 people of different nationalities, there were several claims of jurisdiction over the event: UK claimed jurisdiction because the incident took place on its territory; US did the same, based on the fact that an US registered aircraft was bombed and many of the victims were US citizens; also Libya expressed its intention to prosecute the two suspects, under its domestic law, based on their Libyan nationality.[9] Such intricate jurisdictional differences create many controversies in international practice and doctrine.

### 2.1. The principle of territoriality

As showen above, according to the principle of territoriality, a state can exercise jurisdiction over everything and everyone within its territorial borders, with some notable exceptions provided by customary or conventional international law (such as, for instance, the case of diplomatic missions premises, under the provisions of the 1961 Vienna Convention on diplomatic relations). Thus, the state exerts comprehensive and continuing authority over its territory (including internal waters, territorial sea and airspace). The wide preference of states for this principle reflects the importance of territoriality in the present-day state system.[10] Actually, the exercise of territorial jurisdiction seems to be an essential and very visible way of manifesting state sovereignty.

However, in practice, the implementation of the principle is often not so easy and clear-cut. What happens, for example, if the crime is initiated on the territory of a state and completed on the territory of another state? In the Lockerbie incident mentioned above, for example, it was believed that the bombs which exploded in the airliner were loaded in Malta, although the explosion took place in UK.[11] Could Malta have had the right to claim jurisdiction, based on the fact that part of the crime was committed on its territory, also violating its domestic norms?

In such cases, the doctrine and practice of international law does not offer a generally agreed answer. There are two theories suggesting two types of jurisdiction tests to be applied in this kind of situations: the objective test theory and the subjective test theory.

According to the objective test, also known as the "terminatory theory", if a crime was completed on the territory of a state, the latter has the right to exercise its jurisdiction, regardless of where the crime was initiated. It is probably the most favoured theory of the two. An argument formulated in the specialized literature to sustain the terminatory theory is the fact

[6] Ademola Abass, *op. cit.*, p. 239.

[7] Dan Jerker B. Svantesson, *A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft*, AJIL Unbound, vol. 109, 2015, p. 1, available at https://www.asil.org/sites/default/files/Svantesson%2C%20A%20New%20Jurisprudential% 20Framework%20for %20Jurisdiction%2C%20Beyond%20the%20Harvard%20Draft_print.pdf, accessed 12.04.2019.

[8] *Draft Convention on Jurisdiction with Respect to Crime*, The American Journal of International Law, Vol. 29, Supplement: Research in International Law (1935), pp. 439-442.

[9] Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Intersentia, Antwerpen – Oxford, 2005, p. 165.

[10] Lung-Chu Chen, *op. cit.*, p. 281.

[11] Ademola Abass, *op. cit.*, p. 241.

that "the state where the last element of the crime occurs is presumably the sufferer from it, and therefore has the greatest interest in prosecuting it".[12]

The subjective test or the "initiatory theory" suggests that a state can claim the exercise of its jurisdiction if the crime was initiated on its territory, regardless of where it was actually completed. The subjective test proved to have an important practical utility, especially in cases of transborder crimes (terrorism or money laundering).[13]

Another variation on the principle of territoriality is the "effect doctrine", according to which a state has jurisdiction over a crime if its effects are felt on its territory, regardless of the fact that it was not initiated, planned or executed in that respective state. Also, according to the effect doctrine, it is irrelevant whether that particular conduct was lawful in the state in which it was executed.[14] In *LICRA v. Yahoo! (The Yahoo! Auctions Case, 2000),* for instance, two non-profit human rights groups – LICRA (Ligue contre le Racisme et l'Antisemitisme) and UEJF (Union des Etudiants Juifs de France) – filed a lawsuit against Yahoo! in a French court in Paris, because it allowed the auction of Nazi memorabilia on its website, which was accessible to French citizens. The two organizations claimed it violated the French law that incriminates the offering, wearing or public exhibition of Nazi related items under the French Penal Code. Given the fact that Yahoo! is based on the US territory and the acts were not committed in France, the company contesteted the jurisdiction of the French court. Nevertheless, the court rejected Yahoo!'s contestation, finding it had jurisdiction, because the company's conduct caused damage that was suffered in France.[15] Naturally, the effect doctrine sparked some controversies, leading to efforts to limit its application only in cases in which the primary effect or a substantial effect of a crime is felt in a particular state.[16]

### 2.2. The principle of nationality

The principle of nationality allows a state to impose its jurisdiction on its nationals, wherever they may be: on the the territory of their state, outside the territory of their state and any other states (high seas and airspace over high sea, for instance) or on the territory of another state (with permission). According to this principle, the fact that a state's nationals have the duty to obey its laws even when they are outside its territory entitles that state to regulate their conduct anywhere.

The principle of nationality regards not only natural persons – human beings (based on their relation of citizenship with the respective state), but also juristic persons – corporations, ships, aircraft, spacecraft (based on a relation of nationality).

Concerning the nationality of ships, it has been recognized as that of the flag state – the country of registration (although it is most often related to the fiction of territoriality[17]).

The nationality of aircraft, as regulated by the 1944 Chicago Convention on International Civil Aviation, is the state of registration. According to the 1963 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, the state of registration has exclusive competence to legislate and enforce its laws on acts committed on board of their ships.[18]

Regarding objects launched into space, the 1967 Outer Space Treaty does not regulate their nationality, but it stipulates that the control and jurisdiction over these objects and the personnel thereof are exercised by the state of registration.[19]

Referring to crimes or offences committed by individuals or corporations on the territory of another state, the principle of nationality proved to be particularly useful when the state where the act was committed refused to prosecute it because, for instance, it was not incriminated according to its domestic laws or, although it was incriminated, the respective state was simply unwilling or uninterested to do it (for example, in child trafficking cases, in some countries where these crimes are either not properly regulated or their prosecution is generally lax).[20] In such cases, the application of the nationality principle allowed the prosecution of the offenders in their countries of citizenship.

The nationality principle has also been very usefully employed in issues of private international law, in cases of evasion of the law, when a state's domestic legislation forbids certain acts and, in order to avoid these provisions, its national simply commits the acts in another state where the legislation does not contain such legal restrictions (for instance, to circumvent legal conditions related the conclusion of a marriage or divorce). In this type of situations, the nationality principle allows a state to enforce its legislation on its nationals wherever the acts are committed (in such cases, a divorce or a marriage concluded abroad may not be recognised by the state of nationality if they breach its legal restrictions).

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[12] Glanville Williams, "Venue and the Ambit of Criminal Law" (1965) 81 Law Quarterly Review *apud* Ademola Abass, *op. cit.,* p. 242.
[13] *Ibidem,* pp. 243 – 245.
[14] *Ibidem,* p. 248.
[15] Marc H. Greenberg, *A Return to Lilliput: The LICRA v. Yahoo - Case and the Regulation of Online Content in the World Market,* „Berkeley Technology Law Journal", vol. 18, no 4, September 2003, available at https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi ?article=1435&context=btlj, accessed 10 April 2019.
[16] Ademola Abass, *op. cit.,* p. 248.
[17] Lung-Chu Chen, *op. cit.,* p. 282.
[18] *Ibidem.*
[19] *Ibidem.*
[20] Ademola Abass, *op. cit.,*pp. 248 – 250.

### 2.3. The protective principle

According to the protective principle, a state can exercise its jurisdiction over acts committed abroad by their nationals or by foreign citizens, if those acts threaten the interests, security or functioning of the respective state. Although the protective principle bears some similarities with the effect doctrine mentioned above, the main difference is that the former contains no requirement that the effect of the offence should be felt on the territory of the state that claims to exert jurisdiction.[21]

Articles 7 and 8 of the Harvard Draft Convention refer to the protective jurisdiction of states in cases of crimes against "the security, territorial integrity or political independence" of states or acts of "falsification or counterfeiting, or uttering of falsified copies or counterfeits of the seals, currency, instruments of credit, stamps, passports or public documents, issued by the state or under its authority."[22]

There was an initial reluctance towards invoking this principle, but, in the 1960s, it became more popular (especially for the USA). For instance, in 1985, Alfred Zehe, an East German citizen was prosecuted under US jurisdiction for acts of espionage against the USA, committed in Mexico and in the German Democratic Republic.[23]

The protective principle proved its usefulness in highly sensitive issues. Nevertheless, there were instances in which the invocation of the principle was rather dubious, potentially undermining its integrity.[24]

### 2.4. The principle of passive personality

The principle of passive personality is the most controversial of all. It was not included among the principles of jurisdiction in the Harvard Draft Convention, one of the reasons being that it could be partially included in the principle of universality.

The principle of passive personality allows a state to exercise its jurisdiction over an act committed abroad by a foreigner, if the respective act injures a national of that state. It is linked to the principle of nationality, but in a somehow reverse manner: while in the case of the principle of nationality, the national is the perpetrator, in the principle of passive personality, the national is the victim. It also resembles to some extent the protective principle, but while in the latter's case the interests and security of the state are affected, in the former's case the interests of the nationals of that state are injured.

There were some early and notable assertions of this principle. One case that is considered the *locus classicus* of the passive personality principle is the *Cutting Case* (1866). In this case, Mr. Cutting, an American citizen, published in a Texan newspaper, some offensive materials about Mr. Barayd, a Mexican national, an act which was a breach of the Mexican Penal Code. Mr. Cutting was subsequently arrested, while entering Mexico, and charged with breaching the Mexican law. Mexico claimed it had jurisdiction over the case, based on the principle of passive personality. Of course, the United States strongly opposed Mexico's claim and the case caused some frictions between the two states. Mr. Cutting was later released, because the injured party withdrew the charges. So the case was inconclusive in regard to the application of the principle.

Perhaps the most notable assertion of the passive personality was in the *Lotus Case* (1927), brought before the Permanent Court of International Justice (PCIJ). The case referred to an incident that took place on August, the 2nd, 1926, in which S.S.Lotus, a French steamer, collided with S.S. Bozkurt, a Turkish steamer, in the high seas (north of the Greek city of Mytilene), causing the sinking of the Turkish vessel and the deaths of eight Turkish nationals. Turkey claimed jurisdiction over the event, based on the nationality of the victims (passive personality principle), and wanted to prosecute the French officer who was thought to be at fault for the collision. France opposed Turkey's claim, contending that, as flag state, it had jurisdiction over the matter (the principle regarding the jurisdiction of the flag state in such cases was later stipulated in the 1958 Geneva Convention on the High Seas). The case was brought before the PCIJ and the Court decided that there was no rule of international law, at the time, stipulating that criminal proceedings regarding collisions at sea are exclusively within the jurisdiction of the flag state and, therefore, because there was no such prohibitory rule, Turkey had not violated international law by instituting criminal proceedings against the French officer (Lotus principle - states can act as they wish unless the conduct is explicitly prohibited in international law).[25] However, the majority of the PCIJ judges rejected Turkey's justifications, which were based on the principle of passive personality, considering that Turkey had other grounds for holding the French officer liable (effect doctrine or impact territoriality). So, the court's decision was not conclusive on the passive personality principle issue.

Spain had an interesting approach on the passive personality principle in the *Guatemala Genocide Case*. In 1999, an action was brought before a Spanish court concerning acts committed by certain officials of Guatemala, between 1978 and 1990, in Guatemala, against the Mayan indigenous population. The acts constituted the crime of genocide. During the course of

[21] *Ibidem*, p. 250.

[22] *Draft Convention on Jurisdiction with Respect to Crime*, The American Journal of International Law, Vol. 29, Supplement: Research in International Law (1935), pp. 439-442.

[23] Ademola Abass, *op. cit.*, p. 251.

[24] For instance, protective jurisdiction invoked by the USA and Germany in cases involving selling and importing of cannabis (Ademola Abass, *ibidem).*

[25] https://intlaw.co.uk/lotus, accessed 14.04.2019.

events, some Spanish nationals were also tortured and killed. The Spanish court refused to exercise jurisdiction based on the principle of passive nationality, arguing that the nationality of the victims can not be the sole foundation for the jurisdiction claim. Another essential criterion must be met: the crime invoked before the Spanish court must be the same as the one that forms the basis of the jurisdiction – genocide. The latter criterion was not met in the case, since the Spanish nationals had not been victims of genocide.[26]

As mentioned above, it was considered that there was an overlapping between the passive personality principle and the principle of universality. Thus, the former was seen as somehow redundant. In the *Eichmann Case*, Adolf Eichmann, one of the major organizers of Hitler's final solution, was captured by the national intelligence agency of Israel (the Mossad) in Argentina, and prosecuted under Israeli jurisdiction. He was found guilty of the commission of war crimes and subsequently executed by hanging (1962). Israel invoked the universality principle as basis for its jurisdiction, but, nevertheless, the District Court of Jerusalem later justified its competence on the ground that the main victims of the defendant's crimes were Jews.[27]

A case in which the passive personality principle was asserted alongside the universality principle was *Yunis Case*. In this case, Mr. Yunis, a Lebanese citizen, and several accomplices, hijacked a Jordanian airplane in Beirut, in June 1985. The airplane was flown to some locations in the Mediterranean Sea and, eventually back to Beirut were it was blown up. Several victims were American citizens (this was the only actual, direct connection between the event and the United States). The United States went on to prosecute Mr. Yunis, invoking as basis for its jurisdiction the principle of universality (given the international provisions that condemn these sort of heinous acts) and (contrary to their earlier reluctance towards it) the principle of passive personality.[28]

In the practice of states, it was observed that the principle of passive personality can, unfortunately, lead to more jurisdictional differences, especially if the acts are also incriminated in the state where they were committed and/or in the state of nationality of the perpetrator. However, it can be particularly useful in case the latter states are unwilling or unable to exercise jurisdiction.

### 2.5. The principle of universality

A state is entitled to exercise universal jurisdiction over crimes that constitute a threat to the common interests of mankind, regardless of who committed the crimes, where they were committed and who were the victims. These are acts that, because of their gravity, affecting vital interests of the international community, can be prosecuted by any state, which apprehends or exercises effective control over the perpetrator. No conditions regarding nationality or territoriality are imposed in these cases. What matters is the nature of the crime, that causes universal concern.[29]

The universality principle has a special character that differentiates it from other bases of jurisdiction. The other principles of jurisdiction analysed above derive from national entitlements to legislate and implement law (for instance, entitlements based on a link of territoriality or nationality). Meanwhile, universal jurisdiction is based on an entitlement shared with other states, to implement and enforce international provisions that incriminate universal crimes. So the state exercising universal jurisdiction is simply an enforcer of legal international commitments, without any power of its own to decide which conduct falls under universal jurisdiction and in what conditions.[30]

Moreover, the universality principle goes beyond the classical dichomoty territorial-extraterritorial. Universal jurisdiction is neither territorial, in the traditional sense, nor extraterritorial. It is more of a "comprehensive territorial jurisdiction", based on international proscriptions that are universally applicable.[31]

The category of universal crimes is not new *per se*, although the number of offenses included in this category has always been rather low. The first (and, until relatively recently, the only) crime of universal jurisdiction was piracy. Acts of piracy occurring in the high seas – a space that does not fall under the jurisdiction of any state – were considered to pose a threat to all states. Prosecuting crimes of piracy was, basically, left to the state that apprehended the perpetrator. Although, initially, the incrimination had a customary nature, piracy was later regulated through conventional norms – the 1958 Convention on the High Seas and the 1982 Law of the Sea Convention.

After the Second World War, the category of universal crimes expanded, with the creation of the first international criminal tribunals in Nurenberg and Tokyo, and it is now considered to include the most serious breaches of human rights and humanitarian law, such as crimes against humanity, war crimes, genocide, apartheid, and certain crimes of terrorism. Most of these are nowadays incriminated through conventional norms, although some of them have had a prior

[26] Ademola Abass, *op. cit.*,pp. 258-259.
[27] Lung-Chu Chen, *op. cit.*, p. 284.
[28] https://www.casebriefs.com/blog/law/conflicts/conflicts-keyed-to-currie/international-conflicts/united-states-v-yunis/, accessed 14.04.2019.
[29] Ademola Abass, *op. cit.*,pp. 252.
[30] Anthony J. Colangelo, *Universal Jurisdiction as an International "False Conflict" of Laws*, Michigan Journal of International Law, vol. 30, issue 3, 2009, p. 882.
[31] *Ibidem*, p. 883.

customary reglementation. For instance, after the war, the principles of the Nurenberg Charter and Judgement defined crimes against peace, war crimes and crimes against humanity (at the time, the latter were only considered as such if they were committed in relation to a war). In 1948, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted, and, in 1973, the International Convention on the Suppression and Punishment of the Crime of Apartheid. The Statute of Rome of the International Criminal Court came into force in 2002, incriminating the crime of genocide, crimes against humanity (this time, with no requirement of any relation to a war), war crimes and (without a clear definition) the crime of aggression. Terrorism is considered an international crime, falling under the universal jurisdiction. However, there is no generally accepted definition of terrorism, but only various international proscriptions incriminating different terrorist acts. A resolution adopted by the UN General Assembly in 1985 (GA Res. 40/61), "unequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed".[32] Terrorist acts have also been included in the Draft Code of Crimes against Peace and Security of Mankind, elaborated by the International Law Commission, in 1996.[33]

Such crimes can, thus, be prosecuted by any state, according to the universality principle, based on states' recognized, shared competence to impose criminal or civil sanctions with respect to what is proscribed by the international law.

Given its specificity, the universality principle should not lead to jurisdictional conflicts between states (as mentioned above, in universal jurisdiction, states are merely enforcers of international law). Nevertheless, its implementation was not without controversy, especially since the category of universal crimes is quite dynamic and in continuous evolution.

For instance, more recently universal jurisdiction has been invoked in respect of human rights violations, based on the argument that "some human rights have become *erga omnes* obligations. One important precedent of universal jurisdiction in this field, with an enormous impact in international law, was the *Filartiga v. Pena-Irala Case*, brought before an American court. In 1978, Dolly Filartiga, a citizen of Paraguay, resident in the United States, lodged a civil complaint before an US court against Americo Norberto Pena-Irala, also a national of Paraguay, former Inspector General of Police in Asuncion. Pena-Irala was, at the time, in the USA, waiting for deportation, after remaining on the American territory past the expiration of his visitor's visa. Filartiga contended before the court that, in 1976, her seventeen year old brother, Joelito Filartiga, was kidnapped and tortured to death by Pena-Irala, as retaliation for the political activities of their father. Initially, the complaint was dismissed, but, in 1980, the US Court of Appeals for the Second Circuit ruled in favor of Filartiga, considering that "freedom from torture is protected under customary international law, which forms a part of the law of the land in the United States."[34] The court declared:

*"Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind."*[35]

Thus, the ruling in the Filartiga case was an endorsement that torture is considered an international crime, subject to universal jurisdiction.

Another case with a huge impact, which marked a watershed in international law was the *Pinochet Case.* General Augusto Pinochet, former Chilean head of state between 1973 and 1990, was arrested in 1998 in London, based on an international arrest warrant issued by a Spanish Court (*Audiencia National)* for human rights violations committed in Chile. Pinochet invoked before the Law Lords of the House of Lords (that was then the highest British Court) immunity from prosecution as a former head of state. However, the British court rejected Pinochet's claim, reasoning that crimes such as hostage taking and torture could not be protected by immunity. This was the first time the principle of universal jurisdiction was applied in such a manner, against a former head of state.

## 3. Conclusions

The rules regarding state jurisdiction in international law, traditionally, seek to establish the allocation of competences between sovereign states, based on legitimate jurisdictional links (like territoriality or nationality), ultimately aiming to prevent normative conflicts. The five identified principles of jurisdiction brought some order and predictability in international relations[36], but they are, nevertheless, dynamic, unstable and open to interpretations and controversies.

Among the principles of jurisdiction, territoriality remains the most important and widely accepted in a world that is still state-centered, governed

[32] GA Res. 40/61 available at https://www.un.org/documents/ga/res/40/a40r061.htm, accessed 16.04.2019.

[33] *Draft Code of Crimes against Peace and Security of Mankind*, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf, accessed 16.04.2019.

[34] Lung-Chu Chen, *op. cit.*, p. 287.

[35] *Dolly M. E. FILARTIGA and Joel Filartiga, Plaintiffs-Appellants, v. Americo Norberto PENA-IRALA, Defendant-Appellee., No. 191, United States Court of Appeals, Second Circuit., Argued Oct. 16, 1979, Decided June 30, 1980*, available at https://openjurist.org/630/f2d/876/filartiga-v-pena-irala, accessed 17.04.2019.

[36] Cedric Ryngaert, *Jurisdiction*, available at https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/Jurisdiction.pdf, accessed 17.04.2019.

by the principle of equal sovereignty. However, jurisdiction refers to the exercise of power, reflecting the preferred model of governance of a certain time. In a polyarchic, sovereignty-centered international society, it is no wonder that territoriality remains the preferred principle of jurisdiction. But the increasing interdependence between the members of the international community, the advances in technology and communication, that create a more and more interconnected world, could lead to a shift in the way the exercise of power is perceived and, subsequently, to a shift in the law of jurisdiction.

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# CONTROL ACTIVITY CARRIED OUT BY THE PREFECT. ROLE, MISSION, PERSPECTIVES

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**Abstract**

*The prerogative of the control constitutes an efficient instrument in achieving managerial objectives at all levels and in all fields of activity and, by virtue of the professional experience that I have acquired, I have chosen to tackle one of these components, namely the control activity carried out by the prefect.*

*Bearing in mind the professional interest sparked by this theme, I have elaborated this article starting from the premise that the manner in which one deals with the subjected relating to the control activity carried out by the prefect will contribute, on the one hand, to a better understanding of the general control prerogatives of the prefect and, on the other hand, to raising awareness of the role held and/or to be acquired by the Prefect's Supervisory Body – as a structure specialised in implementing this attribute of an institution management.*

*Therefore, I have dedicated a section of this article to a concise presentation of the types of control exerted by the prefect, while in another section I will analyse this structure in detail. I consider that this analysis is useful both in terms of its applied character and for a better knowledge of the role of the Prefect's Supervisory Body.*

*The relevance of the subjected chosen for this article as well as the manner in which I have decided to approach it reside, in particular, in the relating conclusions which, once transposed in new normative acts/additions to the current legislative framework, will certainly trigger a better efficiency of the control activity carried out by the prefect.*

**Keywords:** *control activity, Supervisory Body, managerial objectives, administrative instruments, efficiency.*

## 1. Evolution of Regulations on the Prefecture and the Control Exerted by the Prefect

### 1.1. Introductory Considerations. Identification and presentation of the main legal provisions regulating the prefect and the Prefecture

The prefect's position is regulated in the Constitution of Romania, republished, in Chapter V, Section II, dedicated to local public administration, article 123, entitled the "The Prefect": "(1) The government appoints a prefect in each county and the municipality of Bucharest. (2) The prefect is the local representative of the Government and manages the deconcentrated public services of the ministries and other bodies of the central public administration in the administrative territorial units. (3) The prefect's tasks are set by organic law. (4) The prefects, on the one side, the local councils and the mayors as well as the county councils and their presidents, on the other side, are not in a subordinate relationship. (5) The prefect may bring before a contentious-administrative court all and any act of the county council, local council or mayor in case the former deems such act to be illegal. The act challenged is rightfully suspended."

We can note that the "prefect" is defined in the section on local public administration. Nevertheless, the fact that the prefect is regulated in the section on local public administration, alongside with the mayor, the local council and the city council, does not mean that the former represents an authority of the local public administration.

The prefect and the prefecture form part of the central public administration, conducting activities at local level, notion which includes, according to par 2 article 123 of the Constitution, the deconcentrated services of the ministries and other bodies of the central public administration in local administrative units.

In Law no. 215/2001- Law regarding Local Public Administration, initial version, the "prefect" and "the prefecture" are defined as part of the ensemble of the public authorities carrying out local activities. Some changes were introduced by Law no. 188/1999, as amended by Law 161/2003, in the sense that it includes the prefect in the category of the high officials. Law no. 340/2004 regarding the prefect and the prefecture, by article $9^1$, article $17^2$, article $22^3$, acknowledges the

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[1] Art. 9 (1) In performing tasks and exerting prerogatives set by the law for this position, the prefect is helped by 2 subperfects. The prefect of the municipality of Bucharest is helped by 3 subprefects.

(2) The subprefect's tasks are set by Government decision.

[2] Art. 17 According to the law, the prefect and the subprefect cannot be members of a political party or organisation falling under the same legal regime as political parties, under the sanction of their dismissal from such public positions.

[3] Art. 22 (1) In each county there is a prefectural college composed of the prefect, subprefects and heads of the deconcentrated public services of the ministries and other bodies of the central public administration under the Government, of which headquarters are in the respective county.

(2) Other persons whose presence is deemed to be necessary may be invited to the works of the prefectural college.

(3) The prefectural college is convened by the prefect, minimum one time a month and at any time necessary.

tendency to depoliticise the position of the prefect. Therefore, the prefect becomes a career public servant, subject to the general legislation on public servants and specific legislation on high officials.[4] In accordance with provisions of Law no. 340/2004 regarding the prefect and the prefecture, article 1"(1) The Prefect is the local representative of the Government. (2) The Government appoints one prefect in each county and the municipality of Bucharest, upon proposal of the Minister of Internal Affairs and Administrative Reform. (3) The Prefect is the guarantor of the respect for the law and order at local level. (4) The ministers and the heads of the other bodies of the central public administration under the Government may delegate the prefect some of their managing and controlling responsibilities in relation to the activity of the deconcentrated public services under them. (5) The responsibilities which may be delegated according to par (4) are set by Government decision [5].

In reference to the need of professionalizing the category of prefects and subprefects, one may see that it is currently difficult to do so, due to frequent replacements of the people holding this position. In fact, this reflects a profound instability in exerting positions (contrary to the legal provisions which require application of the principle of stability), the administrative incapacity to support continuity in exerting the position of local Government representatives and also lack of appropriate use of the skills and expertise of the persons appointed in such positions. It is important to respect the statute of the high official in correlation with application of the principle of mobility laid down by the Government Decision no. 341/2007 regarding inclusion in the category of high officials, career management and mobility of the public servants.

The body of high officials represents a means towards ensuring continuity and coherence of the administrative decisions required to implement the public policies, and the existence of a clear and constant will at superior levels of public service.[6]

Professionalisation of the functions of prefect and subprefect was promoted and endorsed as part of the commitments to modernising the public administration and depoliticising the public positions[7]. Due to the complex tasks set in the Constitution and the legislation and as a consequence of the important role played by a prefect in representing the executive power at local level, it was necessary to amend the statute and to integrate the prefect into the category of high officials, with implications on all criteria of access, in line and compliance with a series of technical prerequisites which should qualify these persons to fill in such an important position.

We may conclude that, in terms of the prefect's career management, there has been no unitary strategy. Arguments exist both for politicisation and depoliticisation of this position.

As a personal opinion and taking into consideration that the degree of accountability and responsibility is higher for the career prefect, who lacks political endorsement, than for the political prefect, we may state that the career prefect will be able to get involved in long-term projects and will find it easier to gain the trust of the institution's own apparatus. On a long-term, the potential changes of the Government should not lead to replacement of the prefects, who, in their capacity of professionals, should not have to face up to issues relating local monitoring and implementation of the governing programmes of various Governments. This is undoubtedly possible providing that the prefect, as High Official, has a sound professional background required to achieve the tasks laid down by the law as efficiently as possible and will prove to be beyond any suspicion in relation to potential political likes or preferences.

However, the reform of the Prefecture does not rely only on the attempts to depoliticise it. It also relies on the scope of responsibilities which are or will be included in the jurisdiction of this body of public administration. In terms of territorial jurisdiction, we may see that there is no overall model in the European Union states. Therefore, in Italy, for instance, the Government appoints a prefect as their representative in each large city, whereas in France, the territorial jurisdiction of the prefect is wider and circumscribed to a region. In addition, there are essential differences in reference to material jurisdiction. While some European Union states limit the prefect's prerogatives to monitoring the compliance of the acts of the local public administration, others, for example France, grant the Prefect extremely generous powers.[8]

Returning to the politicisation of the position, by the Draft Bill regarding the Administrative Code,

(4) The tasks of the prefectural college focus on the harmonisation of the activities of the deconcentrated public services located in the respective county, as well as the implementation of the programmes, policies, strategies and action plans of the Government at the level of the county and its localities and shall be regulated by Government decision.

[4] At present, the prefect and the prefecture are regulated by Law no. 340/2004, as amended by Government Emergency Ordinance no. 340/2004 regarding the prefecture. Government Emergency Ordinance no. 179/2005 was approved by Law no. 181/2006 and amended by Law no. 262/2007.

[5] No. 460 of April 5 2006 to enforce some provisions of Law no. 340/2004 regarding the prefect and the prefecture.

[6] Postelnicu, R.P., Proposals on Professionalizing the Position of Prefect, in Local Public Economy and Administration, no. 12/2002, page 30.

[7] An important step in the professionalisation of the prefect's position was taken in 2006, when, according to Article II of Government Emergency Ordinance 179 of 14 December 2005, "the prefects in office upon entry into force of the present emergency ordinance and also the ones who are to fill in vacancies after entry into force of the present emergency ordinance, but no later than 31 December 2005, may be appointed as prefects providing they sit for and pass an examination to attest this public function".

[8] Munteanu, C., Considerations on Organising and Developing the Prefecture in Romania, Transylvania Magazine for Administrative Law, no. 16/2006, pages 88-90

declared unconstitutional[9], the legislator intends to return to the politicisation of these two positions (prefect and subprefect), while the continuity of the activity within the Prefectures should be provided by the Secretary-General of the Prefect's Office. Nevertheless, the Draft Bill regarding the Administrative Code maintains the obligation of the prefect/subprefect to belong to the category of High Officials.

### 1.2. Control activity exerted by prefects in other European Union member states

In most European Union countries, there are state representatives at local level. They primarily hold positions of administrative police, general administration and monitoring compliance of local authorities' acts.[10]

In ***Belgium,*** the governor of the province is an organ of both the federal government and the province; he/she is appointed and revoked by the king, represents the federal government and chairs the meetings of the permanent delegations and the works of the interministerial commission which coordinates the deconcentrated services of the ministries. The governor is responsible for enforcing the federal, community and regional normative acts. It is generally admitted that he/she shall follow the instructions of the federal government and the governments of the communities and regions, within the limits of his/her powers. In this respect, he/she is supported by a clerk who is somehow the secretary-general of the province and therefore the highest official. As to conclude, in Belgium we can speak of a politicisation of the position of province governor.

In ***Germany,*** the president of the district is a public servant, politically elected, with a dual capacity: president of the district Assembly and head of the administrative apparatus in the district. As head of the administrative apparatus in the district, the president accounts for carrying out relating tasks. In terms of hierarchy, he/she is superior to district public servants and area state public servants at district level, considered as administrative constituency in charge of their activity. The administrative monitoring of the compliance of district acts is exerted by a deconcentrated intermediary body of the area state under the Minister of Internal Affairs of the Area State. In general, the compliance monitoring in Germany focuses on the compatibility of the municipalities' acts with the hierarchy of the legal norms arising from the federal state or the area state. This means a stricto sensu monitoring of compliance, which is concerned neither with the expediency nor with the discretionary power of the local authority acts.

In ***Luxemburg,*** the district commissioner is a state servant appointed by the Great Duke and reports to the minister of Internal Affairs. The district commissioners shall follow the instructions outlined by the members of the government. All commune administrations, except the city of Luxemburg, which is under the minister of Internal Affairs and the Government, are controlled by the district commissioners. Their tasks are varied and multiple. Thus, they pursue enforcement of laws and general and commune regulations and maintenance of order, safety and public peace.

In ***Portugal***, the civil district governor is appointed by the government within the council of ministers; he/she represents the government and exerts powers delegated by the minister of Internal Affairs. It is a tutelage authority and holds police and regulating positions.

In ***Denmark***, there is a surveillance office operating in each region. This office is composed of a prefect, the government's representative, and four members of the regional council, appointed by the former, and exerts a general administrative control, a posteriori, over the municipalities' acts.

In ***Finland***, there are six provinces organised at regional level as administrative and territorial constituencies of the state. Every province has a deconcentrated body entitled the provincial state office, managed by a governor who is appointed by the president of the republic. The governor manages the state services in the province and exerts administrative control over local communities, in accordance with the legislation in force. The provincial state office represents the most important executive and police authority of the province. It is in charge of maintaining law and order, in general, and enforces administrative decisions and court decisions. The provincial state office forms part of the state administration hierarchy, seeks to inform the local administration with regard to the central government's policies and supervises the impact that the implementation of such policies has at local level.

In ***France***, the prefect is categorised as commissioner of the republic and is appointed by decree of the council of ministers signed by the president of the Republic. In the French doctrine[11], it is considered that the prefect holds the following positions: representative of the state; representative of the government; general administration authority and head of the state services in the department. In their capacity of government representatives, "the prefects are expected to be politically loyal to a higher degree than other categories of public servants. This does not mean that they are recruited on political bases. If the government often takes into consideration the elective

[9] Decision no. 681/06.11.2018 sentenced by the Constitutional Court of Romania unpublished in the Official Gazette.

[10] Apostol Tofan, D., "Jurisdictional Control over the Romanian Public Administration. Comparative Analysis with Other European States (II)", 2009, Studies on Romanian Law, vol. 4, pages 351-381.

[11] J. Rivero, Droit administratif (ed. a XII-a), Paris, Dalloz, 1987, p.431-434. 101 J. Rivero, J. Waline, Droit administratif (16th edition), Paris, Dalloz, 1996, page 318 and following

affinities when assigning them to different positions, the prefectural body is, above all, a body of public servants[12]. The dual nature of the position of prefect, i.e. political and administrative, who is both "government's representative" and in charge of large administrative issues, imposed, in terms of its statute, an initial option: either the government could decide to keep such representatives at their "discretion", which would have implied refusal of all and any guarantee in terms of career; or, inversely, the government could choose to consider such representatives as experts in administration, which would have implied a certain professional background and guarantees for stability.

In ***Austria*** **-** federal state, at the district level – an administrative-territorial constituency which represents a level of deconcentration for both the area state and the federation, there is a prefecture, body of the area state and the federation, which performs their administrative tasks and supervises the activity of the commune administrations. Appointed by the head of the area state government, the prefect represents the area state and the federation and exerts administrative monitoring of compliance, a posteriori, over the acts of the commune authorities.

As to conclude, there is no unitary policy in the European Union states either, while the politicisation/depoliticisation of the prefect's position/relating similar bodies in various states resides in the administrative stability/instability.

### 1.3. The Prefecture in the context of Romania's integration into the European Union

After the integration into the European Union, on 1 January 2007, Romania entered a new stage of institutional development, as the European Union generated a certain type of institutional and administrative relationships for which the Romanian state was forced to create new procedures and even new institutions. Romania became part of a political and economic union of which member states were built in compliance with some firm principles regarding: existence of a democratic framework, compliance with the common legislation, underpinning of some autonomy principles and the principle of subsidiarity. Romania had to build institutions and amend regulations so that the time of the integration should not catch the state institutions unprepared. [13]

The reforms in the public administration, improving the relating rights, responsibilities and jurisdiction, may be deemed as key elements in the efforts made to increase the degree of performance of public administration and to harmonise them with the requirements imposed to Romania by its status of member state of the European Union. Special attention has been attached to the process of implementing the legal norms, initially abstract and included in various regulations. The measures to prepare, organise enforcement and actually enforce the law, which are obligations incumbent on the public administration, have therefore been enhanced.[14]

To achieve a modern system of public sector management and to accelerate the reform process, the reform of the public position was also required, and implicitly reform of all public positions managing the public administration at higher levels, including the prefect and the subprefect, towards increasing their role and refining harmonisation of such role with other constitutional and legal constraints: the relationship between the government and the local authorities, i.e. relationships which emerge in exerting governmental functions, the manner in which the prefect perform his/her control of compliance by challenging the administrative acts of local public authorities in courts of law. Within this framework of preparation for the adhesion to the European Union, it became urgent to update the norms regarding the prefect and the prefecture. By 2004, the prefect was a high official of the Romanian state, political position intended to locally represent the Government. Turning the position of prefect into a career public servant was initiated by amendments and supplements brought to Law no.188/1999 regarding the Statute of the Public Servant, which materialises the provisions of Law no. 161/2003 regarding some measures to provide transparency in exerting public offices, public positions and in the business environment, prevent and sanction corruption. They refer to setting forth a new category of public servants, i.e. high officials. Therefore, Law no. 161/2003 set forth in article 11 letters d), e) and f) that the prefect, the subprefect and the secretary general of the prefecture were considered to be as of that time high officials of the state. This category of public position was to be regulated at a later date, and, effective 2006, the persons were to be appointed in the positions abovementioned. The amendment focused on the substance and the need to turn the prefect into a career public servant.

It should be noted that, in reality, the status of high official has never materialised to its real value set forth in normative acts. The status was rather a formal one. The access to the category of high officials, though regulated by law, was steadily obstructed by governments between 2016 and 2018, when the National Institute of Administration was re-established. In addition, the arguments and the criteria considered by the legislator in relation to accessing the body of high officials stopped representing a standard to those interested in having access to the highest category of

[12] Vedinaș, V., Cristea, S., Structure of the Public Position in Romania. Comparative Study with France, in "Public Law Magazine", no. 1, 2003, page 34.

[13] Analysis on the Legislative Framework Regulating the Prefecture in Romania in the light of the Tasks, Administrative Instruments Held, Incompatibilities, ANFP, January 2013, page 4, available at www.anfp.gov.ro

[14] Manda, C.C., Implementation of the Acquis Communautaire – Essential Coordinate for Implementing the Criterion of Administrative Capacity in the Process of Romania's Integration into Europe, Legislative Newsletter, no. 1, 2005, page 8.

public servants, precisely due to the instability of such positions. Irrespective of the position we refer to, namely secretary general, deputy secretary general, prefect, subprefect or governmental inspector[15], the capacity of high official was only a requirement for appointment, the criterion being in fact political.

Still in relation to the position of prefect, we enumerate below some relevant situations for a better understanding of the fact that appointment in or dismissal from this position has always been related to politics, whether the governments at power admitted it or not. In 2009, the Boc Cabinet brings back an older practice of the governments: tens of prefects, heads of deconcentrated institutions, managers of state-owned companies and employees of ministries, are replaced on political criteria. Although these positions had been depoliticised by PD-L in 2006, in accordance with a law furthered by Vasile Blaga, Prime Minister Emil Boc publicly declared that the prefect should be a politician, a person that the party could trust. The second wave of replacements aimed at management positions within deconcentrated institutions.

In 2016, the Cioloș government reviewed the activity of the prefects and conducted an analysis of their behaviour, both in terms of their capacity to react and their desire not to get involved in political campaigns. Following this assessment, a significant number of prefects were replaced. The spokesperson of the Cioloș government, Dan Suciu, explained that "Considering the short timeframe, the Government will not be able to prepare a contest-based employing procedure. Therefore, the new prefects will be appointed based on a selection from among the high representatives of the Government or the persons who have had good results in their activity as managers in public administration and who will not be politically active in the future. Thus, in the shortest timeframe possible, a significant number of prefects will be replaced".

We may conclude that, even though part of the European Union, Romania has continued, through the governments in power, to make an assessment based rather on political criteria and in line with the best interests of their local representatives, and developed a "chaotic" reform of the public administration.

In the context of Romania's holding the rotating presidency of the Council of the European Union, January - June 2019, as well as through the adoption of the Administrative Code assumed in the Governing Programme, the reform will certainly continue its course. Some changes with regard to the prefect and the prefecture as part of the central public administration are already visible.

## 2. Role and Mission of the Control Activity Carried out by the Prefect. Theoretical and Practical Aspects

### 2.1. Presentation of organisational structure of the prefecture in terms of control-related tasks

In accordance with the provisions of the Constitution of Romania, Law no. 340/2004 regarding the prefect and the prefecture, republished, as amended and supplemented by Government Decision no. 460/2006 for enforcement of some provisions of Law no. 340/2004 regarding the prefect and the prefecture, as amended and supplemented**, the Prefecture is organised and functions, in each county, as a public institution with legal personality, intended to carry out duties and prerogatives legally-established for the position of prefect.**

The activity of the institution is managed countywide by a managerial team composed of the County's Prefect and Subprefect. In this exercise of his/her duties, the prefect has a specialised apparatus organised by prefect's order into services and departments broken down by activities.

The staff of the institution is represented by public servants, public servants with special status and contract staff. The Prefecture's services/departments conducting control activities are:

**Contentious Department, Compliance Monitoring, Apostile** which exert control over:

- enforcing and observing the Constitution, laws and other normative acts,
- compliance of administrative acts adopted by the local public administration authorities,
- compliance with measures taken by the mayor and the president of the County Council, as state representatives in local administrative units.

Governmental Programme Service, Management of Deconcentrated Services which exert control of:

- compliance with measures taken by the mayor and the President of the City Council, as state representatives in local administrative units,
- implementation of measures taken to prevent emergency situations or adoption of some emergency measures in case of occurrence of emergency situations.

Additionally, this structure conducts thematic and unannounced checks within deconcentrated institutions of the county.

**Public Relations, Secretariat and Land Registry** which checks compliance with measures taken by mayors or secretaries of the local administrative units with regard to compliance with and enforcement of the legal provisions on land issues.

**The Prefect's Supervisory Body.** The control activity carried out by the Prefect's Supervisory Body

[15] This category of high officials has been massively developed due to the mobility of the function of prefect. The category of governmental inspectors has proven inefficient in the light of the administrative needs; their activity was formal within the General Secretariat of the Government. As former prefects and subprefects replaced from their functions, they had been assigned doubtful tasks, being difficult to be trusted by the government.

will be enlarged upon in Chapter III of the present paper.

**2.2. Types of control exerted by the prefect**

**2.2.1. Control regarding enforcement and compliance with the Constitution, laws and other normative acts**

With regard to control of enforcement and compliance with the Constitution, laws and other normative acts, it should be stated that the prefect carries out this activity by virtue of provisions laid down in article 19 par 1 letter a) of Law no. 340/2004, according to which the prefect seeks enforcement and compliance with the Constitution, laws, Government ordinances and decisions and other normative acts, as well as maintenance of law and order at county level. The monitoring procedure is carried out both through monitoring of compliance of administrative acts submitted to the prefecture and checks at the headquarters of the local public administration authorities.

**2.2.2. Control regarding implementation of Government Programme objectives at county level**

As local Government representatives, the prefects shall ensure compliance with policies included in the Governing Programme and appoint control commissions to check how such Government-assumed objectives are implemented countywide.

In partnership with the deconcentrated public services and structures of other bodies of the central public administration, autonomous administrations and national companies represented in the county, the Prefect draws up and approves, on an annual basis, the County Action Plan to implement the objectives included in the Governing Programme.

The action plan prepared by the Prefecture comprises chapters and actions for the following sectors of activity: Taxation, Budget, Consumer Protection, European Funds, Tourism, Work and Social Justice, Education, Health, Public Administration, Agriculture and Rural Development, Environment, Waters and Forest Protection, Internal Affairs, Culture, Youth and Sport, Miscellaneous. The Prefecture undertakes some control activities with a view to implementing the objectives included in the Action Plan. The Prefecture reports to the Ministry of Internal Affairs, on a quarterly basis, the performance ratios applicable to this Plan, which, due to its public nature, is posted on the website pages of the Prefecture.

**2.2.3. Control regarding the monitoring of compliance of administrative acts adopted by local public authorities**

The control exerted by the prefect over local communities is closely related to the already-established principle of local autonomy:

a) At European level, in article 8 point 2 thesis I of European Charter of Local Self-Government, ratified by Romania in Law no. 199/1997, which provides that:

*"1. Any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute. 2 Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities. 3 Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect"*[16]

b) At national level, it is regulated in article 123 (5) of the Romanian Constitution[17], as republished and defined in article 3 (1) of Local Public Administration Law no. 215/2001, as republished and supplemented, as being *"the right and the actual capacity of local public administration authorities to settle and manage, on behalf of and to the best interests of the local communities which they represent, the public affairs, in compliance with the legislation in force"*. The autonomy of the local authorities is contingent on the legal framework in which they evolve, namely the skills and resources they have, as well as the control mechanism applicable to them.

Furthermore, the administrative tutelage exerted by the prefect is regulated in: article 115 (7) of Law no. 215/2001– Local Public Administration Law[18], republished, as amended and further supplemented, article 19 (1) letter e) of Law no. 340/2004[19], article 3 (1) of Contentious-Administrative Law no. 554/2004[20], as amended and supplemented. The subjected matter of the legal action grounded on provisions of article 3 (1) of Law no. 554/2004, refers to the type of juridical acts subjected to the monitoring of compliance exerted by the prefect, on the one hand, and, annulment, in full or in part, of the act deemed illegal and forcing performance of tasks as provided by the law, on the other hand. The prefect may not claim damages, as the

[16] The European Charter of Local Self-Government, ratified by Romania in Law no. 199/1997

[17] Constitution of Romania, revised in 2003, republished in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003.

[18] Local Public Administration Law no. 215/2001, republished in the Official Gazette of Romania, Part I, no. 123 of 20 February 2007, as amended and supplemented.

[19] Law no. 340/2004 regarding the prefect and the prefecture, republished in the Official Gazette of Romania, Part I, no. 225 of 24 March 2008, as amended and supplemented.

[20] Contentious-Administrative Law no. 554/2004, republished in the Official Gazette of Romania, Part I, no. 1154 of 7 December 2004, as amended and supplemented.

law - article 8 (1), grants this right only to natural or legal persons.

In the Romanian regulations, monitoring compliance of the administrative acts is seen as a liberal form of supervising the local communities, in which the tutelage authorities are not entitled to annul the act; they may only challenge it before Contentious-Administrative Courts, which are the only institutions which may apply such sanction. The local self-government may not be interpreted as representative of sovereignty and independence, whereas the local communities are neither outside nor independent from the state, which continues to fully exert its sovereignty over local territorial communities. Although the purely administrative nature of the local autonomy is visible in our country, in reality, this is regulated as a counterweight of the central autonomy, representing the key, direct link between the citizen and the state.[21]

The Constitutional Court has constantly stated[22] that the principle of local self-government does not imply a full independence and an exclusive jurisdiction of the public authorities in the local administrative units, which are further forced to comply with general regulations, applicable throughout the country, and legal provisions adopted in order to protect the national interests, as the legal framework is generally mandatory. If local autonomy represents a right, the administrative decentralisation represents a system implying such autonomy. The administrative decentralisation cannot exist in unitary states without an oversight by the state, oversight which the doctrine denominated as "administrative tutelage". This regards only compliance with the administrative acts, and not their expediency.[23] In the organisational and functioning system of the local public administration authorities applicable to Romania, the administrative tutelage materialises in the correlative right and obligation of the prefect, as local Government representative, to challenge in contentious-administrative courts the acts deemed illegal.

The subjected matter of the legal action grounded on provisions of article 3 (1) of Law no. 554/2004, as amended and supplemented, refers to the type of legal acts subjected to the monitoring of compliance exerted by the prefect, on the one hand, and, annulment, in full or in part, of the act deemed illegal and forcing performance of tasks as provided by the law, on the other hand. The prefect may not claim damages, as Law no. 554/2004 – article 8 (1), as amended and supplemented, grants this right only to natural or legal persons.

With regard to the category of acts appealed by the prefect in contentious-administrative courts as part of his/her right to exert administrative tutelage, the jurisprudence of courts in this matter has been different for a long time, despite the fact that, as early as 2008, the Constitutional Court had ruled in this respect[24]. In a first jurisprudential sense, the courts acknowledged that the prefect may appeal before contentious-administrative courts only the acts falling under the scope of those regulated by article 2 letter c) of Law no. 554/2004, as amended and supplemented, grounded on the fact that the prefect may not appeal administrative acts concluded by public local administration authorities with other subjects of law, which entail some civil rights and obligations, without exercise of public power. In another jurisprudential sense, the courts considered that the prefect is entitled to challenge before contentious-administrative courts all and any illegal acts issued by local public administrative authorities such as decisions made by the mayor with regard to waging of the contractual staff, remunerated from public funds. The issue was settled by the High Court of Cassation and Justice, which had been addressed on grounds of article 519 of Civil Procedure Code, which ruled that "in accordance with article 3 of Contentious-Administrative Law no. 554/2004, as amended and supplemented, corroborated with provisions of article 63 (5) letter e) and article 115 (2) of Local Public Administration Law no. 215/2001, republished, as amended and supplemented, and of article 19 (1) letter a) and letter e) of Law no. 340/2004 regarding the prefect and the prefecture, republished, as amended and supplemented, and of article 123 (5) of Constitution, the prefect is acknowledged to have the right to appeal before contentious-administrative courts all administrative acts issued by local public administration authorities, within the meaning of provisions of article 2 (1) letter c) of Contentious-Administrative Law no. 554/2004, as amended and supplemented"[25]. In ruling so and by virtue of the jurisprudence of the constitutional contentious court[26], the High Court acknowledged that, pursuant to article 1 (3) of Law no. 340/2004, republished, as amended and supplemented, the prefect is the guarantor of the respect for the law and order at local level. In addition, only the administrative acts may be issued as public power, which gives them the attribute of being appealed by the prefect, providing that the latter deems them to be illegal; if the act relates to civil law, commercial law or labour law, it will be impossible to censor it in contentious-administrative court; in this case, the act

[21] Voicu, B., Șuța, Șt., Subsidiarity and Local Self-Government – Principles of Administrative Organisation, Transylvania Magazine for Administrative Sciences no. 14/2000, page 99.

[22] Constitutional Court, Decision no. 573/04.05.2010, Official Gazette of Romania, no. 410/21.06.2010, Constitutional Court, Decision no. 558/24.05.2012, Official Gazette of Romania, no. 382/07.06.2012

[23] Dragoș, D. C., "Debates on Annulment of an Administrative Act due to Lack of Expediency", 2004, Transylvania Magazine for Administrative Sciences, no. 1(10), pages 30-33.

[24] Constitutional Court, Decision no. 1353/2008, Official Gazette of Romania, no. 884/29.12.2008

[25] High Court of Cassation and Justice – Panel for settling some law issues, Decision no. 11/2015, Official Gazette of Romania, no. 501/08.07.2015

[26] Constitutional Court, Decision no. 1353/2008, Official Gazette of Romania, no. 884/29.12.2008

may be challenged only before courts with jurisdiction in these matters. The court also stated that article 123 (5) of the Constitution refers to "an act of the county council (the case under discussion), local council or mayor", without referring to such acts as falling under a certain category. Nevertheless, the text may not be read or interpreted in a truncated manner, namely without taking account of the fact that it also provides that "the prefect may appeal an act in a contentious-administrative court, (the case under discussion) (…)". As a consequence, the administrative tutelage exerted by the prefect relates to the contentious-administrative, as laid down in Law no. 554/2004, as amended and supplemented. Or, the provisions of law no. 554/2004, as amended and supplemented, limit the oversight exerted by contentious-administrative courts in relation to the administrative act, as it is defined in article 2 (1) letter c) of this normative act. Therefore, one may unequivocally conclude that the prefect may appeal in contentious-administrative courts, by virtue of article 3 (1) of Law no. 554/2004, as amended and supplemented, only the acts issued by public administration authorities, as these are the only acts issued on grounds of exerting a public power, in order to meet a public legitimate interest, within the meaning of article 2 (1) letter b) of Law no. 554/2004, in performing the administrative jurisdiction for which a public authority is responsible.

A first analysis could help us to conclude that only the prefect had the active capacity to stand trial in the legal action filed pursuant to article 3 (1) of Law no. 554/2004, as amended and supplemented. However, in the court practice, there were some attempts to enlarge the scope of the plaintiff's capacity in relation to a certain legal action, with the main reference to the mayor of the administrative-territorial unit. In 2002, the Constitutional Court ruled in relation to the fact that, according to article 123 (5) of Constitution, only the prefect, and not the mayor, has the standing to appeal the acts of the local council which he/she considers to be illegal. Moreover, according to the law, "the mayor is authorised to represent the administrative-territorial unit in court, but this provision aims only at relationships between local communities and third parties, and not the ones with the local council, which is a body of the administrative-territorial unit, as the mayor is, and has the same legitimacy as the mayor"[27]. Nevertheless, the courts required to settle such litigations have ruled differently, which determined the High Court of Cassation and Justice, addressed in accordance with article 519 Civil Procedure Code, to set that "pursuant to Local Public Administration Law no. 215/2001, republished, as amended and supplemented, and Contentious-Administrative Law no. 554/2004, as amended and supplemented, the administrative-territorial unit, by virtue of its executive authority, respectively the mayor, is not entitled to challenge before the contentious-administrative courts the decisions adopted by its deliberative authority, i.e. the local council or, where appropriate, the General Council of the Municipality of Bucharest"[28] . The High Court has also ruled that it is presumed that both the deliberative authority (local council) and the executive authority (mayor) aim at the pre-eminence of the public interest and the compliance with the local community's needs, a purpose which is presumed to be served by exercising the exclusive and shared jurisdictions of the two local public authorities, as regulated by Law no. 215/2001, republished, as amended and supplemented. The compliance of the acts issued by the two public authorities is ensured through performance of the tasks of the secretary of the local administrative unit and the monitoring of administrative tutelage exerted y the prefect. As already asserted in the jurisprudence of the supreme court, "the acts issued by the local council and the mayor have an independent nature, neither of these two authorities being allowed to directly file an appeal against the other symmetric authority; the only public authority authorised to do so is the prefect"[29]

As the administrative tutelage control is set forth to be express and limitative, as a prerogative of the prefect, the court does not however have the possibility to interpret and therefore assign some public authorities prerogatives which were not laid down by the legislator. The Constitutional Court considered that, in case a litigating party criticises the manner in which the contentious-administration court interpreted and enforced the law which entitles the prefect to exert control of administrative tutelage in relation to the legal action taken to court, the latter is "to analyse and assess, depending on the nature of the administrative act subjected to compliance, as well as other concrete circumstances, whether the prefect has a an active legal standing in the respective situation or not". [30]

In its jurisprudence, the Constitutional Court has steadily asserted that the action of the prefect, regulated by article 123 (5) of the fundamental Law, is constitutionally subjected to no conditionality or limitation, and is therefore essentially different from the legal action in contentious-administrative court

[27] Constitutional Court, Decision no. 66/2004, published in Official Gazette of Romania, no. 235/17.03.2004; Constitutional Court, Decision no. 356/2002, published in Official Gazette of Romania, no. /03.03.2003.

[28] High Court of Cassation and Justice - Panel for settling some law issues, Decision no. 11/2015. In the litigation which led to this decision by the High Court, the plaintiff Municipality of Bucharest, by general mayor, requested annulment of a decision made by the General Council of Municipality of Bucharest. In the grounds of the decision, the supreme court acknowledged that, although the mayor is entitled to act and may be summoned to court as representative of the public law entity, namely the administrative-territorial unit, on the one side, neither the provisions of Law no. 215/2001, republished, as amended and supplemented, nor the ones of Law no. 554/2004, as amended and supplemented, set forth expressis verbis the right of the administrative-territorial unit to challenge before the contentious-administrative court the resolutions adopted by its deliberative authority, and the acknowledgment of such right may not be concluded by way of interpretation, on the other side.

[29] Supreme Court of Justice – Mixed Departments, Decision no. IV/2003.

[30] Constitutional Court, Decision no. 1369/2011, published in the Official Gazette of Romania no. 14/09.01.2012.

initiated by an aggrieved citizen or a legal person, in which case the organic law may set forth exercising conditions and limits [31].

According to the law and in relation to the legal action taken to court by the prefect, the preliminary complaint is not mandatory, as regulated by article 7 (1) of Law no. 554/2004, as amended and supplemented. Moreover, this is exempted from the stamp tax. In line with the opinions expressed in the doctrine, we consider that, for the legal action to be admitted by the court, the prefect should provide evidence of a legal interest in the matter as, for instance, the former would have no interest in having an administrative act which is no longer enforceable (such as a demolition permit) annulled[32]. In terms of the timeframe within which the prefect may challenge the administrative acts which he/she deems illegal, article 3 (1) of Law no. 554/2004, as amended and supplemented, makes references to a six-month timeframe set forth in article 11 (1) of the same normative act, without outlining a distinction between individual administrative acts and normative acts. We mention that we acquiesce to the statements expressed by several specialists[33], according to which the time limits for filing a complaint is six months or, where appropriate, one year from acknowledging the act as illegal, in case of some individual administrative acts. The provisions of article 11 (1) are to apply to normative acts as well, given that the law includes an exclusive reference to this paragraph, which is thus different from the option of any entity whose legitimate rights and interests were aggrieved to appeal the normative administrative act at any time, by virtue of article 11 (4) of Law no. 554/2004, as amended and supplemented.[34]

Bearing in mind that an important component of the prefect's control activity is represented by the compliance monitoring, on a half-year basis, the Prefectures remit the Ministry of Internal Affairs – General Department for the Relations with the Prefectures, the report on the monitoring of compliance of acts issued by local public administration authorities.

**2.2.4. Monitoring of compliance with measures taken by mayors and presidents of the County Council, as representatives of the state in local administrative units**

When monitoring the administrative measures issued by local public administrative authorities, the prefect seeks:

- compliance with procedures and deadlines for convocation of the local council (in writing, minimum 5 days in advance, in case of ordinary meetings, and minimum 3 days in advance, in case of extraordinary meetings) according to provisions of Law. 215/2001, as amended, prerequisites of Law no. 52/2003 and provisions of Government Ordinance no. 35/2002, as amended;
- compliance with legal provisions on quorum provided by the law for adoption of resolutions, as follows:
- majority of counsellors in office in case of adopting resolutions regarding the local budget and local taxes, resolutions on contracting loans, in accordance with the law, resolutions on taking part to county or regional development programmes or cross-border cooperation programmes, resolutions on urban organising and developing of localities and urban planning or cooperation with other public authorities, Romanian or foreign legal persons.
- duly majority (2/3 of counsellor in office) when adopting resolutions regarding patrimony;
- provided the resolutions adopted by the local council are countersigned, for compliance, by the secretary of the local administrative unit, and when the secretary considers that the resolutions made are not legal he/she shall submit written resolutions;
- communication of the administrative acts adopted by the local council and the mayor to the prefecture: the resolutions adopted shall be promptly remitted to the prefect, within maximum 10 working days of adoption. Should the secretary deem the resolutions to be illegal, remittance shall be supported by his/her written objections. The mayor's decisions endorsed for compliance shall be remitted within maximum 5 working days of the day the prefect signs them. In the event that decisions are deemed illegal, the remittance shall be supported by the secretary's written objection.

The secretaries of the local administrative units will be assisted by Supporting Commissions established within Prefectures so that they should ensure compliance with legal provisions concerning all administrative actions taken by the mayor and the president of the County Council, as representatives of the state in the local administrative units.

**2.2.5. Monitoring implementation of prevention measures relating to emergency situations or adoption of emergency measures in the event of occurrence of such emergency situations**

The County Committee for Emergency Situations is a supporting interinstitutional body of emergency situations management at county level.

The County Committee reports to the National Committee for Special Emergency Situations, is the head of municipal, town/city/village committees for Emergency Situations and cooperates with the Crisis Action Teams established by companies which are exposed to hazard in case of disasters.

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[31] Constitutional Court, Decision no. 314/2005, published in the Official Gazette of Romania no. 694/02.08.2005; Constitutional Court, Decision no. 74/1995, published in the Official Gazette of Romania no. 220/16.03.2005; Constitutional Court, Decision no. 137/1994, published in the Official Gazette of Romania no. 23/02.021995.

[32] Dragoș, D.C., Contentious-Administrative Law. Comments and Explanations, 2nd edition, Bucharest: C.H. Beck, 2009, page 149.

[33] Apostol Tofan, D., Administrative Law, 1st vol., 3rd edition, Bucharest: C.H. Beck, 2014, page 368; Dragoș, D.C., Contentious-Administrative Law. Comments and Explanations, 2nd edition, Bucharest: C.H. Beck, 2009, page 143; Iorgovan, Treaty on Administrative Law, 2nd vol., Bucharest: Nemira, 2006, page 158

[34] High Court of Cassation and Justice – Contentious-Administrative and Fiscal Department, Decision no. 3836/2010.

The County Committee for Emergency Situations is set up and operates in accordance with the legislation in force, under the direct coordination of the prefect, as president, and two vice-presidents, i.e. the president of the County Council and the Chief Inspector of the Inspectorate for Emergency Situations of the county. [35]

## 3. The Prefect's Supervisory Body

### 3.1. Legal Framework

With regard to the legal framework applicable to the activity carried out by the Prefect's Supervisory Body, we have taken into consideration as relevant the prerequisites of the article 1 par 2 which establish, by way of example, the tasks relating to management and supervision which, according to article 1 par 4 of Law no. 340/2006, the ministers and heads of the other central public administration bodies under the Government may delegate to the prefect. Therefore, the prefect may be delegated tasks and responsibilities pertaining to verification of how public funds allocated to deconcentrated public services are used or implementation of objectives comprised in the sectoral strategies.

Following analysis of the provisions of Government Decision no. 460/2006 and comparing them to provisions of Government Decision no. 1019/2003 regarding organisation and functioning of the prefectures, normative act in force until the publication of the norms set forth in Law no. 340/2004, we can see that they no longer enlarge on the activities carried out by the specialised structures in performing the prefect's tasks.

At present, the enumeration of the tasks of the specialised structures within the Prefectures is not explicit when referring to the tasks of the Prefect's Supervisory Body. These tasks may be generically found in article 6 par 1:

1. in terms of enforcement of and respect for the Constitution, laws and other normative acts:

a) they participate, alongside representatives of deconcentrated public services, to actions of verification, in line with their prerogatives, of how normative acts are enforced and complied with at county level, respectively the Municipality of Bucharest, within some joint commissions established by prefect's order;(...)

2. in terms of compliance of administrative acts adopted or issued by local public administration authorities and contentious administrative:

a) they conduct, in accordance with the law, verifications on implementation of the measures taken by the mayor and the presidents of the country council, respectively the president of the General Council of the Municipality of Bucharest, as representatives of the state in the local administrative, including verifications at the headquarters of the local public administration, and submit the prefect, where appropriate, proposals on referrals to competent bodies;
b) they conduct activities intended to guide mayors in relation to performance of the tasks delegated to and executed by them on behalf of the state."

Additionally, article 7 stipulates that "the prefect may order further tasks intended to the specialised structures of the prefecture."

Pursuant to provisions of Government Decision no. 416/2007 regarding organisational structure and the resources of the Ministry of Internal Affairs, as amended and supplemented, the prefecture is an institution reporting to the Ministry of Internal Affairs.

As a consequence, it should be noted that the provisions of Order no. 138/2016 apply to all categories of staff within the Ministry of Internal Affairs, including the Prefect's Supervisory Body. This normative act sets forth general rules regarding the jurisdiction and stipulates norms regarding organisation and conduct of controls.

The Prefect's Supervisory Body within the Prefecture of Dâmbovița County, equipped with two public execution functions, is constituted as a structure under the direct subordination of the Prefect, with a view to exercising the prefect's prerogatives laid down in the normative acts.

Chapter III of the Internal Rules and Regulations entitled "Supervisory Body" presents the main responsibilities of this department:

a) conducts in accordance with the law, activities of verification, support and guidance relating to the sphere of competence of the prefect;
b) cooperates with the local public authorities and competent public institutions;
c) checks the referrals remitted to the prefect in relation to which the settlement of the matters referred imply a high degree of difficulty;[36]
d) prepares reports to inform the prefect on the actions taken;
e) carries out all and any other tasks assigned by the prefect.

[35] By way of example, in 2018, the County Committee for Emergency Situations within the Dambovița Prefecture was convened in 20 meetings (2 extraordinary and 18 ordinary) with a view to discussion prevention and management of emergency situations. As a consequence, 18 actions were adopted. In relation to management of emergency situations and as president of the County Committee for Emergency Situations, the prefect issued 3 orders and approved 2 action plans.

[36] In 2018, the Prefect's Supervisory Body - Dâmbovița conducted checks which may be grouped as follows:

- Checks focused on aspects regarding the activity of the local administrative unit de control. They checked measures taken by the mayor, as representative of the state in the local administrative unit. They also sought to guide the mayor in performing his/her tasks delegated and executed on behalf of the state and to check aspects regarding petitions.
- Checks focused on aspects of the activity of the deconcentrated institutions in Dâmbovița County.
- Checks focused on aspects regarding activity of some economic operators in Dâmbovița County, as a result of some issues petitioned.

Following an overall analysis of Law no. 340/2004 and Government Decision no. 460/2006, we may conclude that the current normative acts no longer regulate the activity of the Prefect's Supervisory Body in a distinct manner. His/her prerogatives are established by comparison to the general norms which we have outlined above.

### 3.2. Activity of the Supervisory Body

In conducting their activities, the Prefect's Supervisory Body shall comply with the Order of the Ministry of Internal Affairs no. 138/2016 regarding organisation and conduct of monitoring within the Ministry of Internal Affairs, as amended and supplemented, normative act which lays down general rules on the jurisdiction and sets forth norms on organisation and conduct of checks. This leads us to a detailed approach of such rules and norms. It is equally important and opportune to pinpoint the relevant aspects arising from the current activity of such supervisory structure.

To begin with, it is important to bear in mind the types of checks which may be organised and conducted. Therefore, according to article 4 par 2 of the order, these are:

a) inspection – which means the general check ordered, at a higher level, by the minister of internal affairs which seeks a complex, multidisciplinary examination of the activity carried out by the entity under the Ministry of Internal Affairs, with a view to assessing how the tasks outlined by strategic or own plans are performed and how the objectives planned are implemented. In addition, it seeks to evaluate the skills and the capacity of the leader of the entity under the Ministry of Internal Affairs or other persons in leadership positions, who are directly appointed by the management of the Ministry of Internal Affairs or by persons at higher levels, and to identify and correct all and any deficiencies, dysfunctions or irregularities found;
b) background check – which means the check ordered by the leader of the entity under the Ministry of Internal Affairs, with a view to assessing the activity of the reporting structures or the structures coordinated and controlled in accordance with the methodology, the skills and the capacity of the persons in leadership positions within such structures, identifying and correcting deficiencies, dysfunctions and irregularities found;
c) thematic check – which means the verification seeking to find, analyse, evaluate, guide and/or support a certain activity/certain activities;
d) unannounced check – which means the fully operational verification aiming at identifying some potential deficiencies in relation to compliance, accuracy and correctness of tasks performed at the level of an entity under the Ministry of Internal Affairs"

#### 3.2.1. Jurisdiction

In terms of jurisdiction, we mention that the monitoring structures, defined as "direction, service, office or department with control tasks, established at the level of an entity under the Ministry of Internal Affairs, except the Minister's Supervisory Body" – art. 3, letter c) – are structures of which jurisdiction is to conduct checks at the level of both an entity under the Ministry of Internal Affairs within which they are organised and the structures reporting to, coordinated and controlled by them, in line with methodologies in force. By virtue of provision of article 8 par 2, "the monitoring structures conduct background checks, thematic checks and unannounced checks at the headquarters of the entity under the Ministry of Internal Affairs to which they belong and the ones reporting to them."

#### 3.2.2. Procedure

In reference to the procedural aspects, in accordance with provisions in Chapter IV – "Organisation and conduct of checks" of Ministerial Order no. 138/2016, we highlight the following:

- The checks are conducted in line with a plan entitled **Plan for background checks and thematic checks**, approved by the prefect, on an annual basis, by January 31. Some unplanned checks may also be conducted providing that unforeseen events occurred require such checks.
- Each check is conducted in line with a plan which is approved by the prefect and is generically entitled **control plan**. The structure of this plan is the following:

a) aim and objectives of the check;
b) activity timeframe taken into consideration for checks;
c) structure of the control commission and sub-commissions;
d) estimate time for completion of check.

An exception is represented by the **unannounced check** which may be initiated without a control plan, according to the **order of the head of the entity under the Ministry of Internal Affairs**. In this case, there is no structure of the control plan and no estimate time for completion.

- The check is conducted by a control commission composed of staff of the control structure, and, where appropriate, specialists of other structures. The members of the control commission are set by the control plan or, in case of an unannounced check, by written order of the person requesting such check. In any of these situations, the control commission is chaired by a president.

The order stipulates that the president of the control commission notifies the head of the entity under the Ministry of Internal Affairs taken into consideration for a check with regard to this action, minimum 5 days prior to suck check. In his/her turn, the head of the entity notified starts preparing the staff for this check and draws up a status report covering the timeframe prior to initiation of the check.

By exception to this rule, the **unannounced thematic check** and the **unannounced check** may be conducted without notification of the head of the entity subjected to such checks.

- At the beginning of the check, the head of the entity under the Ministry of Internal Affairs which is subjected to the check provides the commission with the status report. This report is a document bearing the letterhead of the entity and is presented in the structure comprised in Annex 2 to this paper.
- Throughout the check, the members of the control commission prepare statements of findings. They include the main conclusions drawn by the members of the commission after checking each field of activity, each structure of the entity under the Ministry of Internal Affairs subjected to such check. The structure of the statement of findings is presented in Annex 3 to this paper.

The statements of findings are signed and remitted to the heads of the entity under the Ministry of Internal Affairs subjected to the check and the employees directly involved in the field of activity where the deficiencies were found. In addition, the commission prepares an official report on potential observations, objections and standpoints of these employees.

The report and the objections made in writing are enclosed to the inspection report and form part thereof.

- The findings made throughout the check, the conclusions and measures proposed by the control commission are included in an inspection report prepared by this commission and subjected to approval by the person who requested the check, within 30 days from completion of such check.

**The inspection report** will contain: a) main accomplishments; b) deficiencies, dysfunctions and measures of organisational, administrative and disciplinary nature; c) conclusions of the control commission in relation to the observations, objections and standpoints expressed on the content of the statements of findings; d) other aspects which may improve efficiency and efficacy of the activities carried out.

The Action Plan to remedy the deficiencies and improve activities will be enclosed to the inspection report.

The inspection report approved will be remitted to the president of the control commission, within 5 days from approval, i.e.:

a) the person to whom the head of the entity under the Ministry of Internal Affairs subjected to check reports to, with a view to taking necessary measures towards remedy of the negative aspects found and disseminating the positive aspects – good practices;
b) the head of the entity under the Ministry of Internal Affairs subjected to check, with a view to implementing the measures ordered.

The control structures within the entities under the Ministry of Internal Affairs may check how such measures are implemented within 6 months from submitting the inspection report.

The analysis of these general rules on jurisdiction and main procedural aspects regarding organisation and conduct of checks leads us to the conclusion that the order represents at least an imperfect normative framework and, therefore inefficient. in comparison with all aspects specific to this control activity carried out by a specialised structure within the Prefecture.

In support of this statement, we present the following two arguments:

A. In fact, the control activity carried out by the Prefect's Supervisory Body may aim at any aspect and law matter in relation to which the Prefecture was notified and is not limited only to monitoring the accuracy of some referrals and petitions of which settlement involve a higher degree of difficulty. It also focuses on thematic checks of the activities carried out by deconcentrated institutions of the ministries and other central public administration bodies or mayors. To provide further information and therefore better understand the framework of their activity, one should note that the control teams may be composed of both staff of specialised structures and employees of other departments/divisions and other institutions, which are set up in joint commissions.

B. Throughout its content, the normative act refers to entities under the Ministry of Internal Affairs which conduct checks or are checked, implicitly excluding therefore from its scope the checks conducted by the Prefectures at the headquarters of the deconcentrated institutions, city/town/village halls or other legal persons. Consequently, in order to initiate, conduct and complete such checks, the Prefect's Supervisory Body should provide further legal grounds than just the Ministerial Order no. 138/2016. On the other hand, when conducting such checks, all control structures within the entities under the Ministry of Internal Affairs shall abide by provisions of this order, shall remit the Minister's Supervisory Body all and any inspection reports prepared and shall also remit the synoptic list of all checks conducted in the previous year and the ones planned for the current year.

As a consequence, we may see that there is no *erga omnes* opposable legal framework regulating such checks in terms of limits of powers and procedures to follow, which in practice entails a genuine challenge, mainly starting from the potential lack of knowledge/acknowledgment of the mandate granted for controlling purposes and ending with the possible ways to exploit findings and measures ordered as a result of conducting such checks. Such regulation is all the more important as, in many cases, the results of such checks lead to identification of some acts which caused damage to some entities' patrimony and may be deemed as crimes. In addition, the regulation would be important in cases when an entity subjected to a check is not satisfied with the measures imposed as a result of the check and intends to contest them, as there is no procedure in this respect.

In order to ensure the legal framework and in the absence of such a regulation, the procedure to follow may be summarised as follows:

- The prefect shall take the initiative and order a check whenever the issues brought to his/her attention are serious and require a thorough check. The prefect shall also order checks to control and analyse the current activity carried out by deconcentrated institutions of the ministries or other bodies at the level of central public administration. The proposal to start a check may also be presented by the Supervisory Body in case they are assigned a complex petition which require such a check in order to understand and settle it.
- The decision to execute such control action is in particular transposed when constituting a joint commission composed of representatives of other structures or experts from other institutions, in issuing by the prefect of an order setting forth both the structure of the commission and, where appropriate, the themes and/or the goals of the check, as well as certain elements of procedure and deadlines.
- Upon completion of a check the control commission prepares a report on the findings, conclusions and, where appropriate, and depending on how serious the acts are, proposals, recommendations, measures, deadlines for implementation. This report is subjected to the prefect's approval.
- The inspection report or an excerpt of it, in particular when it includes measures and deadlines for implementation by the entity subjected to check, will be remitted to the latter and/or to the criminal prosecution authorities.

**3.2.3. Administrative instruments in exerting control. Goal of checks**

As presented in the previous section, according to provisions of article 22 of Ministerial Order no. 138/2016, the findings, conclusions and measures proposed by the control commission are included in an inspection report. This report is elaborated by the control commission and is subjected to the approval of the person who ordered the check, within 30 days from completion.

The inspection report consists of:

a) main accomplishments;
b) deficiencies, dysfunctions, irregularities and measure of organisational, administrative and disciplinary nature;
c) the commission's conclusions on the observations, objections and standpoints expressed in relation to the content of the statements of findings;
d) other aspects which may contribute to enhancing the efficiency and efficacy of the activities assessed.

The Action Plan to remedy the deficiencies and improve activities will be enclosed to the inspection report.

- the inspection report approved will be remitted to the president of the control commission within 5 days from approval, as follows:

a) the person to whom the head of the entity under the Ministry of Internal Affairs subjected to check reports to, with a view to taking necessary measures towards remedy of the negative aspects found and disseminating the positive aspects – good practices;
b) the head of the entity under the Ministry of Internal Affairs subjected to check, with a view to implementing the measures ordered.

In reference to the nature of the inspection report, we understand that this may be considered an administrative act as it is a "technical – legal act" (it is therefore a legal act which takes legal effects), which includes the measures to implement. In other words, this report sets the obligations (legal effects) for the legal persons subjected to check. By virtue of this qualification, we think that the inspection report may be challenged as any other administrative act, in accordance with Contentious-Administrative Law no. 554/2004. As there is no unitary opinion in the current doctrine as to including the inspection report in the sphere of the administrative acts, we believe, *de lege ferenda*, that it is necessary to have an express and unambiguous regulation on the legal nature of the inspection report and implicitly, the appeal which may be exerted against it.

## 4. Perspectives on Improving the Control Activity of the Prefect in the context of the New Administrative Code and Other Normative Acts. De Lege Ferenda Proposals.

With a view to streamlining the control activity of the prefect, we will present a short analysis of the causes which reduce the prefect's control prerogatives and will formulate some lege ferenda proposals.

One issue which relates to the compliance of the administrative acts is represented by the capacity to check of the specialised structures, which, according to Government Decision no. 460/2006, article 6, shall keep records of all administrative acts, shall check the compliance of the contracts concluded and shall make the prefect proposals on notifying, where appropriate, the issuing authorities with a view to reanalysing the act deemed illegal, or referring to contentious-administrative courts, providing them with grounded reasons thereof. In addition, they shall prepare the documentation, draw up the statement to refer to court and present the statement filed before the court. This activity is therefore multiple and requires a lifelong professional training. Consequently, it would be appropriate that the state should support, through specialised bodies, the training and improvement programmes intended for public servants within prefectures.

Another issue refers to the fact that, effective 2006, another human resource involved in the process of supervising the compliance of acts – the secretary general within the prefecture, was lost as a result of

turning this function into the function of subprefect, public office for which it is not mandatorily required to have a legal background, as it was the case of the secretary general. By amendments to the Local Public Administrative Law no. 215/2001 and Law no. 393/2004 regarding local elected representatives, the secretary of the local administrative unit was therefore taken out of the authority of the secretary general of the prefecture and implicitly of the prefect. This is how one of the institutional mechanisms which would have enabled an enhanced efficiency of the control, even by the potential refusal of the secretary to countersign the administrative act issued by local and county public administration authorities, was eliminated. Therefore, the subprefect becomes a methodological guide attending the secretaries of the local administrative units. Nevertheless, the subprefect does not have direct responsibilities in the process of monitoring the compliance of the acts, as he/she is only responsible for organising the activity of the prefecture so that the tasks may be carried out appropriately.

The causes for the lack of direct communication are: a. The subprefect is forced to apply the principle of mobility and may not implicitly build long-term communication institutional relationships; b. There are no obligations in terms of specific requirements regarding filling in the public office of subprefect (position which falls under the category of high officials) in the sense of holding a long-term law education degree; c. Correlated with the previous statement and with the fact that the monitoring the compliance of acts falls under the prefect's scope of responsibilities, the methodological assistance of the secretaries may prove to be rather difficult; d. The impact of turning the secretary general of the prefecture into subprefect was not minimised by other measures so as to ensure institutional capacity, at least in relation with the task of compliance monitoring.

As de lege ferenda proposals[37] concerning the activity of the Prefect's Supervisory Body, we may enunciate: (1) setting exclusive prerogatives – reserved to the Prefect's Supervisory Body, as well as the ones shared with other services/departments within the Prefecture, (2) control of the enforcement of and the respect for the Constitution, the laws and other normative acts should be included in the scope of exclusive prerogatives of the Supervisory Body, being by far the most comprehensive and full prerogative, in harmony with the tasks set forth for the Prime Minister's Supervisory Body, (3) regulating the entities which may be the subject matter of a check and the objectives considered by such a check, (4) clearly setting the legal nature of the inspection report, the ways to exploit the conclusions and the measures resulting from the check conducted, the ways to contest way as well as the sanctions in case of failure to implement such measures.

To improve the control activity carried out by the prefect and to enhance the authority of this institution at local level, these conclusions and de lege ferenda proposals should be taken into account by members of the parliament in reviewing the provisions of the Administrative Code, given that the Constitutional Court of Romania declared it unconstitutional by Decision no. 681/06.11.2018.

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# PATRIMONIAL LIABILITY OF FORESTRY PERSONNEL IN LIGHT OF EMERGENCY ORDINANCE NO. 59/2000 REGARDING THE STATUS OF THE FORESTRY PERSONNEL AND THE JUDICIAL PRACTICE IN THE MATTER

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**Abstract**

*The present article aims at carrying out a brief analysis of the patrimonial liability of the forestry personnel, regarding the payment of the value of illegally cut shrubs from the forest fund under their guard, taking into account both the jurisprudence in the matter and the provisions of Emergency Ordinance no. 59/2000 regarding the status of forestry personnel.*

**Keywords:** *forestry personnel, liability, E.O. no. 59/2000, payment, illegal cuts, shrubs*

## 1. Introduction

The concept of patrimonial liability has been extensively analyzed, both by the doctrine, and by the courts, in the application of various legislation. However, in this article we are considering a patrimonial lisbility that is less common. This is because it represents a smaller percentage than the patrimonial liabilities that we have already been accustomed to. Therefore, the article attempts to deal with the way this concept is applied in reality to the forestry personnel managing districts.

## 2. Applicable law and forestry offenses.

The forestry personnel benefits from a special regulation, namely Government Emergency Ordinance no. 59 of May 26th 2000[1] on the Status of forestry personnel. The Ordinance is a normative act from which all actions directed against forestry personnel must be initiated. It is a special regulation, which, in certain situations, can be supplemented by other acts.

Thus, the Ordinance sends to the content of article 58 of Law no. 188/1999 on the Status of civil servants[2], the provisions of the latter act being applied to the extent that the emergency ordinance does not stipulate otherwise.

By the Decision of the High Court of Cassation and Justice no. 3/2014[3], pronounced by the panel regarding the referrals in the interests of the law, the court[4] established that "*the actions of patrimonial liability against forestry personnel responsible for forest protection and damages caused on the guarded forest districts, under the conditions of art. 1 lit. a) of the Government Emergency Ordinance no. 85/2006, are within the material competence of the labor courts*".

Such a judicial approach was necessary, in consideration of the fact that there were cases in which actions regarding the patrimonial liability of forestry personnel were dismissed as inadmissible. For instance, we are referring to Decision no. 697 of February 12th, 2013[5], pronounced by the High Court of Cassation and Justice, stating that: "the reparation of the damages caused by the civil liability of the civil servant to the public authority or institution, shall be set by issuing the head of the authority or the public institution with an order or provision of imputation within 30 days from the discovery of the damage". This particular decision was referring to an action engaged by the employer against a forester, regarding the concept of patrimonial liability.

Consequently, it was appreciated that since the forester also has the status of a civil servant, his liability could have been achieved only through a payment commitment. Thus, considering that there was no such payment commitment, which could have been challenged under the Law no. 554/2004 on administrative litigation[6], it was appreciated at that time that the employer does not have the possibility to follow the classical path of patrimonial liability.

Such an approach could not be tolerated indefinitely, because the forester is also an employee with an individual labor contract, so it is only natural that he should respond to the extent to which he causes damage to his employer regarding his work.

Any patrimonial liability against the forester will have to meet the classical conditions for engaging such

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[1] Hereinafter referred to as the Ordinance, normative act republished in Official Journal of Romania no. 238 of May 30th, 2000, as further amended and supplemented.

[2] Published in Official Journal of Romania no. 365 of May 29th, 2007, as further amended and supplemented.

[3] Published in Official Journal of Romania no. 445 of June 18th, 2014, as further amended and supplemented.

[4] The referrals in the interests of the law were initiated by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice and the Board of Management of the Bacau Court of Appeal.

[5] Available on the website www.scj.ro, accessed on March 18th, 2019.

[6] Published in Official Journal of Romania no. 1154 of December 7th, 2004, as further amended and supplemented.

an approach, namely: the forester must be an employee who caused the damage, the existence of an illicit deed committed by the person concerned, in connection with his work, the existence of an injury to the employer and the causality connection between the unlawful act committed and both the injury and the guilt of the employee. In the event that one of the conditions mentioned above is not fulfilled, it will not be possible to undertake the patrimonial liability against the forestry personnel.

As a consequence, following Decision no. 3/2014 issued by the High Court of Cassation and Justice, the concept of the liability of the forestry staff was clarified with the motivation that such actions were to be engaged on the field of labor law, as it is also stated in the Decision no. 5372 of November 11th, 2015, pronounced by the Craiova Court of Appeal[7].

However, it should be mentioned that, in relation to the patrimonial liability of the forestry personnel, the general labor law conditions will still have to be slightly adjusted, as the High Court of Cassation and Justice even stated by resolving the referral in the interest of the law, namely: "the existence of damage caused to forest vegetation by illegal tree cuts; the damage is detected and evaluated by the assigned forestry personnel; the guarding of the forest vegetation in respect of which the damage was caused is an attribution of the forestry personnel having the professional degree of forester, as stipulated in the individual labor contract; the damage found and evaluated occurred as a result of the failure to guard the forest vegetation; in order to recover the damages found and assessed the injured party will engage an action regarding the patrimonial liability against the guilty person (the person having guard duties), under art. 6 par. (1) of Government Emergency Ordinance no. 85/2006[8]".

Therefore, in order to successfully carry out a patrimonial action against a forester guarding a district, it is necessary that all the above conditions be met cumulatively.

In addition to the Ordinance, the provisions of the Government Decision no. 1076/2009 for the approval of the Forest Fund Guard Regulation[9], which details the organization of the guard duties and obligations of the forestry staff, should also be considered.

Given the issues already exposed, however, in reality we encounter another situation that can ultimately lead to the patrimonial liability of the forestry personnel, namely when a criminal case is opened when forestry offenses are encountered.

The related regulation is mainly found in the provisions of the Forestry Code - Law no. 46/2008[10], more precisely Title VI - Responsibilities and sanctions, art. 104 being more than clear regarding the purpose of this title, namely: the violation of the provisions of this Code attracts, as the case may be, disciplinary, material, civil, contraventional or criminal liability, according to the law.

In a relatively recent article, a difficulty in considering a certain deed either as a forestry contravention or as a forestry offense has been noticed. The whole situation was due to the lack of regulations regarding the value of cubic meters of wood. Thus, it was concluded that "*in the given situation, based on the special legislation in the matter, it is simply not possible to distinguish between criminal liability and contraventional liability*"[11]. Even the judicial bodies noted that there was a real problem regarding "*how to determine the damage caused following the marking, cutting and tree exploitation in unlawful conditions*"[12].

Thus, there are a number of regulated deeds, some of which sanctioned as forestry crimes and punished as such.

For example, reading art. 107 of the Forestry Code, we observe some of the deeds the legislators ruled against: "*cutting, breaking, destruction, degradation or removal of trees, saplings or undergrowths from the national forest fund and the forest vegetation outside it, without any right, regardless of the form of ownership*". These deeds are punished differentially, depending on the amount of damage caused.

Therefore, two situations can be encountered: either the damage is not at least 5 times the average price of one cubic meter of wood at the time of the offense, at which point we will not consider the deed as a forestry offense but a forestry contravention; either the damage exceeds the value at which it could be considered a contravention and thus turns into an offense.

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[7] The Decision of the Craiova Court of Appeal can be read on the website https://www.avocatura.com/speta/596919/actiune-in-raspundere-patrimoniala-curtea-de-apel-craiova.html#ixzz5dKIxRmbk, accessed on March 18th, 2019.

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[11] See in this respect, Valerian CIOCLEI, „*Situația infracțiunilor de tăiere fără drept de arbori și furt de arbori din domeniul forestier național prevăzute de Codul silvic. Chestiune de drept*", article published on February 2nd, 2015, on the following website https://www.juridice.ro/362462/situatia-infractiunilor-de-taiere-fara-drept-de-arbori-si-furt-de-arbori-din-domeniul-forestier-national-prevazute-de-codul-silvic-chestiune-de-drept.html, accessed on March 18th, 2019.

[12] See in this respect, Augustin LAZĂR, Elena Giorgiana HOSU, „*Analiza cauzelor având ca obiect infracțiunile silvice, în care s-au pronunțat hotărâri judecătorești rămase definitive*", available on the website http://revistaprolege.ro/analiza-cauzelor-avand-ca-obiect-infractiunile-silvice-care-s-au-pronuntat-hotarari-judecatoresti-ramase-definitive/, accessed on march 18th, 2019. The study was published in the volume of the conference named „*Apărarea mediului și a fondului forestier prin dreptul penal*", by A. Lazăr (coordinator), M. Duțu (coordinator), E.G. Hosu, A. Duțu, Academia Romana Publishing House and Universul Juridic Publishing House, Bucharest, 2016, p. 105-221.

Punishments begin at 6 months and reach up to 7 years, with the indication that, in some cases[13], the special limits of the punishment increase by half when the act is committed:

a) by a person having a weapon or narcotic or paralytic substance on him;
b) during the night;
c) in the forest situated in natural areas, protected areas of national interest;
d) by forestry personnel.

This increase of the punishment is fully justified as it addresses situations that denote more dangerous behavior than just the regular illegal tree cutting activity, which can cause serious environmental consequences. For this reason, the legislator considered it an appropriate approach to increase by half the special limits of the punishment.

Therefore, if a deed fulfilling the conditions to be classified as a forestry offense is committed, the forester, having the status of a verifying organ, will record the event in a report and the competent bodies will be announced thereafter. There are also situations in which the perpetrators are surprised flagrantly, which makes the work of the judiciary bodies substantially clearer.

Thus, if the missing timber is reported by the forester, he will notify the competent police bodies to investigate and find the perpetrator. This can take a long time, depending on the extent of the damages and the presence or lack of evidence.

Once the competent bodies are legally notified of the situation, the prosecutor, along with the judiciary bodies, will most likely send a closing ordinance, mainly based on the "*in dubio pro reo*" principle. The employer, wishing to recover the damages, will probably complain to the first prosecutor against the closing ordinance, according to art. 339 par. (1) Criminal Procedure Code[14].

Assuming that the first prosecutor communicates to the employer unit an ordinance rejecting the complaint against the closing ordinance, we appreciate that the rational steps will be followed, namely the provisions of art. 340 Code of Criminal Procedure.

Consequently, the situation moves to the next procedural step, meaning the preliminary chamber court, that will analyze the complaint against the closing ordinance. Precisely at this moment, there are two possibilities that the court has: either reject the complaint of the employer or admit it.

In the first case, therefore, when the complaint is rejected, the employer unit gains the certainty that the perpetrator shown in the forester's report did not commit the forestry offense. In this particular situation, the employer can address the court with a patrimonial liability action against the forester.

In the second case, however, by admitting the complaint against the closing ordinance of the prosecutor, the case will be referred back to the prosecutor in order to continue the investigations in the case. Therefore, the entire procedural cycle described earlier will likely be resumed: the closing ordinance, the complaint of the employer to the First Prosecutor, the rejection ordinance and the employer's complaint to the preliminary chamber of the court.

We would like to draw attention to the fact that illegal cuts do not always relate to large amounts, but on the contrary. The perpetrators usually cut timber illegally in order to heat their own home, therefore for personal use. Consequently, the employer unit can end up spending more than it can actually be recovered, since for every closing ordinance the prosecutors give, additional costs can be added.

An act of particular importance is the Government Decision no. 1076/2009 for the approval of the Forest Protection Regulation, which brings more light to the notion of patrimonial liability, as a follow-up to the closing of a criminal case.

Consequently, in accordance with the provisions of the Regulation, the forester is responsible for the way in which he carries out the guarding activity of the district, one of his obligations being to defend "the integrity of the forest fund against the illegal occupation or use of land, illegal cutting of trees and the removal of wood or other forestry products, the destruction of buildings, installations, terminals, crops, degradation of trees, seedlings and undergrowths, as well as any illegal acts"[15].

Therefore, one could consider two situations:

On the one hand, when the persons who committed the forestry offenses are convicted, meaning that the recovery of the damages is left to their responsibility. Usually the forestry units are already a civil party in the dispute. From this perspective, the forester has no cause for concern, as the responsible persons will be held accountable accordingly.

On the other hand, there are complaints about forestry offenses that are not followed by a conviction, for a multitude of reasons. We are especially referring to the "*in dubio pro reo*" principle. The criminal case ends when the preliminary chamber court rejects the complaint against the prosecutor's closing ordinance.

Thus, in the second situation, the next step will be the introduction of a patrimonial liability action against the forester who has managed the forest area from which the trees were illegally cut.

It is an unusual situation, and maybe even unfair, for at least two reasons: a) Foresters are the ones who immediately announce the committing of forestry offenses, they also have the status of a verifying organ, drawing up a report in this respect; b) the fact that the persons mentioned in the report as those who committed the offense were not convicted, it does not automatically mean that the forester would have a fault

[13] Art. 107 par. (2) Forestry Code.
[14] Law no. 135/2010, published in Official Journal of Romania no. 486 of July 15th, 2010, as further amended and supplemented.
[15] According to art. 6 of the Regulation.

in this respect. Besides, the work schedule of a forester should fit within the 8 hours / day.

However, a request for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union by the Dâmboviţa County Court is particularly relevant. It states that "*under the applicable national rules, a forester has to carry out his duties 24 hours out of 24, seven days out of seven, without receiving any remuneration other than that of a working schedule of eight hours per day, and this is because his liability is permanently and continuously approached*"[16]. It is obvious that it's not possible for a single person to guard the whole forest fund, especially since the areas are hardly accessible and difficult.

On the other hand, the National Forestry Office - Romsilva, in paragraph 34 of the same preliminary ruling, held that "a forester such as the appellant in the main proceedings enjoys a flexible program and can therefore carry out his tasks during one day without exceeding eight working hours and not being held to a fixed schedule between 8 a.m. and 4 p.m.".

The Court of Justice of the European Union stated in paragraphs 54 to 55 that "*according to the information submitted to the Court, a flexible contract such as that at issue in the main proceedings seeks to allow, depending on the characteristics of the unit in which the worker is employed or on the work performed, a free distribution of working time, provided that it is respected for a normal period of 40 hours a week. Nontheless, in a situation such as that at issue in the main proceedings, it may also be relevant, as the Commission has rightly pointed out, the fact that the forester is the only one responsible for the guarding of a forest district, with no possibility of working in shifts and no other means of fulfilling the permanent security requirement*".

As it has already been mentioned above, the prosecutors usually give closing ordinances, incorporating the "*in dubio pro reo*" principle. Considering that the offenses we have in mind were committed on a surface of a forest fund, we reiterate that the roads are not easily accessible, which is why, when it comes to understand that a deed was comitted, it may have already passed a few days. As the Court has also emphasized, there is no practice of working in shifts, so that the permanent guarding of the forestry fund might actually benefit from a minimum chance of succeeding.

At this point, it is quite difficult for the judicial bodies to find the perpetrators, mainly because we are talking about offenses regarding timber, which is relatively easy to transport and transform, so that the traces may be lost in a short amount of time. Moreover, except the situations where the perpetrators are caught in flagrante circumstances, it is very likely that they will again be able to rely on the principle above, since the means of proof remaining at the disposal of the judicial authorities are, basically, the shrubs of the illegally cut trees. In consequence, having no access to audio-video samples nor to testimonies of other people, it is usually not possible to establish the certain guilt of a person.

## 3. Conclusions

In view of the above-mentioned issues, we appreciate that a change in legislation may be beneficial, maybe in the sense of explicitly regulating that illegal tree cuts that rise to a certain already established value will be passed on costs. Another possibility could be the exclusion of the patrimonial liability of the forester, if the personnel drafts the report and complies with all the legal conditions, but the judicial bodies, respectively the preliminary chamber, conclude that there is insufficient evidence to establish with certainty the guilt of a certain person, suspected of illegally cutting trees.

However, if the legislator withdraws the foresters from full responsibility, we might reach a point where they may even cause the criminal phenomenon. Thus, they could cut and sell the timber themselves, knowing they can cover simply by completing a report containing the so-called losses.

In any case, the Romanian legislator should find in the future a way in which neither the employer nor the foresters do not abuse such regulations. At the present moment, we find ourselves in the situation where foresters are fully responsible for all damages caused to a forest fund, if no other responsible persons are found, regardless of the fact that it is impossible for a forester to secure the complete guard of a forest fund, at any time, day or night.

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- http://curia.europa.eu/;
- www.scj.ro;
- https://www.juridice.ro/;
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# PUBLIC SERVICE – MEANS OF ACHIEVING THE PUBLIC ADMINISTRATION MISSION

**Vasilica NEGRUŢ***

**Abstract**

*The role of public administration is to satisfy citizens' interests, respecting their rights and freedoms. This goal is achieved by high standards for public services. In this article, using the logical interpretation and the comparative analysis, we intend to investigate the public service as a means of achieving the public administration mission, highlighting aspects related to the need to organize public services, their definition, the features and principles of organization and functioning, establishment, managing and dissolution of public services. Over time, the notion of public service has been extensively analyzed, starting from the notion of belonging to the state, which is organized to meet the general interests of society. At present, there is no normative act regulating the organization and functioning of public services, as also mentioned in the explanatory memorandum of the Draft Law on the Administrative Code adopted by the Parliament on 9 July 2018 declared unconstitutional in November 2018 by the Constitutional Court of Romania. The European Union's policy in this area is based on the principle of free competition necessary to create a single market. In this regard, the European Commission has pursued a policy of liberalization of services of general economic interest, covering transport, postal and telecommunications services as well as the energy sector. It is a public service approach from an exclusively economic perspective, not taking into account the social dimension of the public service. In conclusion, the notion of public service has historical content, representing the "quintessence of public administration", a component with a fundamental role in fulfilling its mission.*

**Keywords:** *public service, public administration, principles of organization, establishment and abolition*

## 1. Introduction

The notion of *public service* has historical content, representing the "*quintessence of public administration*"[1], a component with a fundamental role in the construction of administrative law.

In the current French doctrine, after a long period when the notion of public service became "obsolete"[2], even speaking of its decline, the public service is today regarded as a *real key to the construction of the state*.[3]

The essence of administrative action, as shown in the French legal literature, is to ensure the functioning of public services, which is the reason for being part of the administration.[4]

The expression *public service* evokes simultaneously three meanings, namely: *institutional*, *juridical* and *ideological*[5].

At European Union level, the expression "*public service"* is replaced by other forms. The Treaty of Rome, for example, contains the expression "*service of general economic interest"* (article 86 becomes article 106 of the TFEU) and the Treaty on the Functioning of the European Union recognizes the "*place occupied by services of general economic interest within the common values of the Union*", as well as *"their role in promoting the social and territorial cohesion of the Union"* (article 14 TFEU, ex-article 16 of TEC). The European Union's policy in this area is based on the principle of free competition necessary to create a single market. In this regard, the European Commission has pursued a policy of liberalization of services of general economic interest, covering transport, postal and telecommunications services as well as the energy

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[1] I. Alexandru, M. Cărăuşan, S. Bucur, *Drept administrativ*, ed. a III-a, revizuită şi adăugită, Ed. Universul Juridic, 2009, p. 144 and the next.

[2] Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, ed. 4, Ed. All Beck, Bucharest, 2005, p. 182.

[3] Dana Apostol Tofan, *Drept administrativ*, vol. I, ed. 3, Ed. C.H. Beck, Bucharest, 2014, p. 10. The current French literature shows that public service is the most politically sensitive object of administrative law, occupying an important place in the public debate. For many, it symbolizes the historical economic and social model of France. The public service has experienced many doctrinal and practical crises, but it is always present and indispensable from a social point of view. For details see Didier Truchet, *Droit administratif*, 3 édition mise à jour, Thémis droit, Presses Universitaires de France, Paris, 2010, p. 324.

[4] Marie-Christine Rouault, *Droit administratif*, Gualino éditeur, Paris, 2005, p. 375.

[5] J. Chevallier, *Le Service Public*, Presses Universitaires de Frace, Paris, 1994, pp. 3-6. In an article dedicated to this topic, it is shown that by combining the three meanings of the public service, *a state capable of responding to all public issues emerges.* For more details see Ana Dâmbu, *Aspecte privind noţiunea serviciului public în contextul actual*, Revista Transilvană de Ştiinţe Administrative, VIII, 2002, pp. 51-60.

sector[6]. It is, therefore, an approach of public service from an exclusively economic perspective, not taking into account the social dimension of the public service.[7]

In our country, in the specialized doctrine, the importance of public service is supported in this period of achieving reform in public administration. Professor Antonie Iorgovan stressed that public services "*are strictly necessary in our constitutional system*", as they "*evoke obligations of the state towards the fundamental rights of the citizen*"[8].

## 2. The Public Service - Means of Achieving the Public Administration Mission

### 2.1. Definition of Public Service

The public service is defined by the Administrative Contentious Law no. 554/2004 by reference to two fundamental notions of administrative law, namely the notion of *public authority* and the notion of *public interest*. According to art. 2 par. (1) letter m), the public service represents "*the activity organized or, as the case may be, authorized by a public authority, in order to satisfy a public legitimate interest*".

According to art. 5, letter t) of the Administrative Code[9], the public service represents "*the activity or the set of activities organized by a public administration authority or by a public institution or authorized or delegated by it, to meet a general or public interest need, on a regular and continuous basis*".

The notion of public service has acquired constitutional valences by including it in the constitution texts[10]. The Constitution expressly or implicitly refers to the idea of a public service, either as an activity or as an ensemble of means[11] in: art. 6 (the state's guarantee of the right to identity); art. 7 (for the support of the state to strengthen the Romanians' foreign relations in Romania); art. 21 (to ensure free access to justice); art. 22 and 23 (to guarantee life, physical and mental integrity, and individual freedom); art. 26, 27, 28 (to protect intimate life to ensure inviolability of domicile and correspondence); art. 31 (right to information); art. 39 (to guarantee freedom of assembly); art. 50 (for the protection of persons with disabilities), art. 52 (for the exercise of administrative litigation); art. 79 (for systematization, unification and coordination of legislation); art. 118 (to ensure national defense, public order and national security); art. 120 (to achieve the principles of local government); art. 124 (for the performance of justice) and so on.

### 2.2. Principles of Organization and Operation of Public Services

The administrative code, in art. 587, regulates the principles underlying the establishment[12], organization and functioning of public services: the principle of transparency; the principle of equal treatment; the principle of continuity; the principle of adaptability of

[6] Vasilica Negruț, *Regimul juridic al serviciilor comunitare de utilități publice*, Revista Transilvană de Ştiinţe Administrative, 1 (21)/2008, pp. 99-104. See also the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Accompanying the Communication on A Single Market for 21st Century Europe Services of general interest, including social services of general interest: a new European commitment (http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A52007DC0725), and also Directive 2006/123 / EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, published in the Special Edition of the Official Journal No 0 of 1 January 2007.

[7] Didier Truchet, *op. cit*., p. 328.

[8] *Ibidem*, p. 185

[9] Adopted on 09.07.2018 by the Chamber of Deputies, the Administrative Code was declared unconstitutional by the C.C.R. No. 681 / 2019 of 6 November 2018

[10] O. Puie, *Serviciile de utilitate publică*, Ed. Universul Juridic, Bucharest, 2012, p. 16.

[11] See Antonie Iorgovan, *op. cit*., 2005, vol. II, p. 185; V. Vedinaş, *Drept administrativ*, Ediţia a X-a, revizuită şi actualizată, Ed. Universul Juridic, Bucharest, 2017, p. 524. The author carries out a grouping in several categories of the constitutional provisions applicable to the public service: a) regulations laying down general principles established by the Romanian constituent legislator at the basis of the functioning of all public authorities (article 16, paragraphs (1) and (1) equality of rights, article 32 (6) - guaranteeing university autonomy, etc.); b) regulations laying down principles governing the organization and functioning of public administration in general or expressly of public services (article 120 - the principles underlying the organization and functioning of local public administration, namely the principles of decentralization, local autonomy and the deconcentration of public services); c) regulations for the public authorities with competence in the provision of public services (article 122, par. 1), for example, according to which the county council is the authority of the public administration for the coordination of the activity of the communal councils and the town councils in order to carry out the public services of the county interest or article 123 paragraph (2), which establishes that the prefect is the representative of the Government at the local level and manages the deconcentrated public services of the ministries and of the other central public administration bodies in the administrative-territorial units); (d) regulations contained in Chapters II and III on fundamental rights, freedoms and duties.

[12] The public service feature of an activity or a set of activities is recognized by normative acts (article 593 of the Administrative Code). The regulatory act regulating a public service must contain at least the following elements:

a) the activity or activities constituting the respective public service;
b) the objectives of the public service;
c) type of public service;
d) public service obligations, where appropriate;
e) the structure responsible for the provision of the public service;
f) management arrangements;
g) sources of financing;
h) modalities for monitoring, evaluation and control of the provision of public service;
i) sanctions;
j) quality and cost standards, if they are established by law;
k) other elements established by law.

the public service; the principle of accessibility; the principle of providing high quality public services; the principle of ensuring public service responsibility.

Regarding the principle of transparency, the public administration authorities are required to provide information on "*the ways of establishing the component activities and objectives, the ways of regulating, organizing, operating, financing, delivering and evaluating public services, and also protection measures and complaint and litigation mechanisms*".

The principle of equal treatment in conducting public services presupposes the "*abolition of any discrimination of the beneficiaries of public services based on ethnic or racial origin, religion, age, gender, sexual orientation, disability, as well as the enforcement of rules, requirements and identical criteria for all public service authorities and bodies, including in the process of delegating the public service*."

*The principle of continuity* is defined in article 12 of the Administrative Code and it is intended to carry out the activity of the public administration without interruption, in compliance with the legal provisions[13].

*The principle of adaptability* implies the obligation of the public administration to meet the needs of society through the organization of public services.

In order to respect the *principle of accessibility*, which presupposes the provision of access to public services for all beneficiaries, especially those services that meet their basic needs, the public authorities must take into account, from the foundation of the public service, aspects regarding costs, availability, adaptation, proximity. Also, public authorities must comply with both the quality standards[14] and the cost standards[15] used to deliver public services.

*The principle of responsibility* for ensuring public service involves the existence of an authority of the competent public administration for ensuring the public service, independent of the way it is managed and provided/delivered to the beneficiary.

The principles of organization and functioning of public services are also found in normative acts of special nature. For example, the Community Public Utilities Act no. 51/2006[16], republished[17], amended and completed, in art. 7 establishes the requirements for the organization and functioning of these services: universality; continuity in qualitative and quantitative terms; adaptability to user requirements[18]; equal and non-discriminatory access to public service; decisional transparency and user protection. Law no. 51/2006 establishes, in art. 1 par. (3), the following features of public utility services: a) have economic and social feature; b) respond to requirements and needs of public interest and utility; c) have technical-municipal feature; d) have permanent feature and continuous operation regime; e) the operating regime may have monopoly characteristics; f) they presuppose the existence of adequate technical infrastructure; g) the coverage area has local dimensions: communal, urban, municipal or county; h) they are the responsibility of the local public administration authorities; i) are organized on economic and efficiency principles in conditions that enable them to fulfill their specific public service missions and obligations; j) the management way is determined by decisions of the deliberative authorities of the local public administration; k) are provided / rendered on the basis of the "beneficiary pays" principle; (l) the recovery of operating and investment

[13] The Administrative Code does not specify what these provisions are, but we take into account the provisions of the Social Dialogue Law no. 61/2011, regarding the obligation to provide certain public services in case of strike organization. We exemplify the provisions of art. 205, according to which "in the sanitary and social assistance, telecommunications, public radio and television stations, in railway transport, in the units providing the joint transport and sanitation of the localities, as well as the population supply with gas, electricity, heat and water, the strike is allowed provided the strike organizers provide the services, but not less than one-third of normal activity." Law no. 61/2011 was published in the Official Monitor of Romania, Part I, no. 322 of May 10, 2011, republished on the basis of art. 80 of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Civil Procedure Code, published in the Official Monitor of Romania, Part I, no. 365 of 30 May 2012, giving the texts a new numbering.

[14] "*The set of quality norms in the provision of a public service and / or public utility, established by normative acts*" (article 5, letter xx) of the Administrative Code).

[15] "*The normative costs used to determine the amount of resources allocated to the local budgets of the administrative-territorial units in order to provide a public service and / or public service to the quality standard established by normative acts*" (article 5, letter yy) of the Administrative Code).

[16] Public utility services are defined as all the activities regulated by law and special laws, which ensure the satisfaction of the essential needs of general utility and social interest of local communities with regard to: water supply; sewage treatment; collecting, channeling and evacuating rainwater; centralized heat supply; sanitation of localities; public lighting; local public passenger transport (art. 1 par. (2)].

[17] Published in the Official Monitor of Romania, Part I, no. 254 of 21 March 2006, as subsequently amended and supplemented, republished on the basis of Art. III of Government Emergency Ordinance no. 13/2008 for amending and completing the Law on community services of public utilities no. 51/2006 and the Law of the Water Supply and Sewerage Service no. 241/2006, published in the Official Monitor of Romania, Part I, no. 145 of February 26, 2008, approved with amendments and completions by Law no. 204/2012, published in the Official Monitor of Romania, Part I, no. 791 of 26 November 2012, giving the texts a new numbering.

[18] The requirement of adaptability expresses the characteristic of the public service being permanently in line with the dynamic requirements of social life. V. Negruţ, *Regimul juridic al serviciilor comunitare de utilităţi publice*, Revista Transilvană de Ştiinţe Administrative, 1 (21)/2008, pp. 99-104. Simplifying administrative procedures in the delivery of public services is an example of the application of the principle of adaptability. See Emergency Ordinance no. 41 of June 28, 2016 on the establishment of simplification measures at central public administration level and on amending and completing some normative acts. According to art. 1 of this normative act, "*public institutions and specialized bodies of the central public administration have the obligation to publish, ex officio, information and models of forms or requests related to all public services provided in electronic format on their own website, as well as on the unique electronic contact point defined by the Government Decision no. 922/2010 on the organization and functioning of the Single Electronic Contact Point in its up-to-date version and in a technical format allowing for downloading and editing for the purpose of completing the computer on the beneficiary.*"

costs shall be made through prices and tariffs or fees and, where appropriate, budgetary allocations. The measure may involve elements of the nature of the state aid, in which case the local public administration authorities request the opinion of the Competition Council.

The community services of public utilities ensure the fulfillment of the essential needs of general social utility and public interest of the local communities with regard to: water supply; sewage and sewage treatment; collecting, channeling and evacuating rainwater; centralized heat supply; sanitation of localities; public lighting; natural gas supply; local public passenger transport (article 1, par. (4) of Law No 51/2006).[19]

### 2.3. Management of Public Services

Regarding the organization and management of public services, the following are distinguished: management through an autonomous administration or a public institution; a concession contract for the valuation of a public property, either for the performance of public works or for the satisfaction of other collective needs; lease; location in management; civil contract; the commercial contract[20].

Recent forms of public service management are mentioned in the recent literature[21]: direct management[22]; delegated management[23]; semi-direct management. They are also listed as forms of organization and management of public services, joint venture[24] and public-private partnership[25].

According to art. 597 of the Administrative Code, the management modalities of a public service are direct management and delegated management[26]. Direct management means "*the manner in which an authority of the public administration assumes / exercises its direct competence in relation to the provision of a public service under the law or regulation of the public service*" (article 598, par. (1) of the Administrative Code).

Direct management may be carried out by a public administration authority, by the structures with or without legal personality, by the companies governed by the Company Law no. 31/1990, republished, with the subsequent amendments and

[19] In November 2018, the draft Government Decision for the approval of the Preliminary Theses of the draft Community Services Code for Public Utilities was publicly debated. As stated in the Fundamental Note, the necessity of adopting such a code is justified by: the lack of legislative coherence in the field, determined by the multitude of existing normative acts; overlaps between provisions aimed at establishing, operating and developing a Community utility of public utilities and provisions in the field of public administration; the lack of clarity of the normative acts in the field and the limitation of accessibility, determined by the successive modifications of the specific legislation; the lack of systematization of the rules governing the activity in the field of community services of public utilities, so that the normative system is understood by all and therefore easy to apply; lack of unitary terminology. It is also considered that "*the development of a Community Utilities Code of Practice is an effort to facilitate the implementation of the Strategy for Strengthening Public Administration 2014-2020, approved by the Government Decision no. 909/2014, as subsequently amended, since it is intended to create a framework that provides the most efficient and responsive public services to the needs of society."*

[20] A. Iorgovan, *op. cit.*, vol. II, 2005, p. 187.

[21] L. Cătană, *Drept administrativ*, Editura C. H. Beck, Bucharest, 2017, p. 213.

[22] Direct management is the way in which the local or state collectivity ensures the achievement of the public service through specialized structures. According to art. 22 par. (1) of the Community Public Utilities Act no. 51/2006, "*the local public administration authorities are free to decide how to manage the public utility services under their responsibility. Public administration authorities have the possibility to directly manage public utility services on the basis of a management decision or to entrust their management, i.e. all or only a part of their own competences and responsibilities regarding the provision of a public utility service or one or more activities within the scope of that public utility service under a management delegation contract*".

Art. 28 para. (1) of the Law no. 51/2006 defines direct management as "*the manner of management in which the deliberative and executive authorities, on behalf of the administrative-territorial units they represent, assume and exercise directly all their powers and responsibilities under the law regarding the provision / provision of public utilities, respectively, to the management, operation and operation of the public utility systems related to them*".

[23] In the case of the delegated management, the public authority resorts to a commercial company for the achievement of public service, while retaining its public responsibility (article 2 paragraph (1) letters g) and f), for example, from Law no. 100/2016 on concessions of works and concessions of services, defining the works concession contract, respectively the service concession contract). According to art. 2 of the Law no. 51/2006 "*the delegation of the management of a public utility services represent the action by which a territorial-administrative unit assigns to one or more operators, under the law, the provision of a service or activity in the sphere of public utility services, its responsibility. The delegation of the management of a public utility service / activity involves the actual operation of the service / activity, the provision of the public utility system related to the delegated service / activity as well as the operator's right and obligation to manage and operate the public utility system. Delegation of management may also be carried out by intercommunity development associations with the purpose of public utility services in the name and on behalf of the member-administrative territorial units, on the basis of a special mandate granted by them*."

[24] Article 1949 of the Civil Code defines joint venture as "*a contract by which a person grants one or more persons a share in the profits and losses of one or more operations it undertakes*."

[25] The legal framework of the public-private partnership is established by the Emergency Ordinance no. 39/2018. The public-private partnership has as object, according to art. 1 par. (2) "*the achievement or, as the case may be, the rehabilitation and / or extension of a good or property belonging to the public partner's patrimony and / or the operation of a public service*", under the conditions established by this normative act. Art. 4 of the Emergency Ordinance no. 39/2018 establishes the following forms of public-private partnership: the public-private partnership contract - the public-private partnership under a contract between the public partner, the private partner and a new company whose share capital is wholly owned by the private partner act as a project company; institutional public-private partnership - a public-private partnership based on a contract between the public partner and the private partner, through which a new company is set up by the public partner and the private partner to act as a project company and, after registration in the company register, acquires the capacity as a party to the respective public-private partnership contract. Emergency Ordinance no. 39/2018 was published in the Official Monitor no. 427 of May 18, 2018.

[26] Dan Răzvan Grigorescu, *Reglementarea serviciului public în Codul administrativ*, Revista de Drept Public, nr. 3/2018, pp. 59-66.

completions[27], with full social capital of the state or of the administrative-territorial unit established by the public administration authorities or other legal entities of private law, as the case may be, in compliance with the legal provisions [art. 598 par. (2)].

Unlike direct management, *delegated management* is the management way through which the provision of public service is carried out on the basis of a delegation act and / or authorization by the competent public administration authority, in compliance with the provisions of the legislation on public procurement, sector procurement and the concession of services, by the bodies providing public services other than those provided by art. 598 par. (2).

The Administrative Code establishes the legal nature of the act of delegation to an economic operator for providing the service of general economic interest, this being an administrative act, which must include at least the following elements, unless otherwise provided by special laws:

(a) the content of public service obligations, (b) the body providing the public service (s) and, where applicable, the territory it provides, (c) the duration of the service, (d) the nature of any special entitlements granted to the public service provider by the legislator or by the competent public administration authority e) a description of the compensation mechanism and the parameters for calculating, controlling and reviewing the compensation[28] granted for the provision of the public service f) the ways to avoid overcompensation and to recover any overcompensation; g) exclusive rights granted, under the law, to the provider of public services by the legislator or by the competent public administration authority; h) cases and situations of termination of the delegation act; i) rights and obligations of the parties involved; j) performance indicators and efficiency of the service [art. 600 paragraph (1)]. Regardless of how public services are managed, the public administration authorities have the obligation to monitor, evaluate and control the provision of public services within their competence, within the limits set by the legislation applicable to each type of public service (article 601).

According to the provisions of art. 590 of the Administrative Code, the establishment of the constituent activities, the mission, the assigning procedure, the compensation, as the case may be, as well as the provision of the public services shall be carried out in accordance with the standards and requirements established by the specific EU legislation applicable in the Member States.

### 2.4. The Dissolution of Public Services

Public services may be dissolved at the initiative of the competent public administration authority and following public consultation, if a public service no longer responds to a need in the public interest. The establishment of public services shall be ordered by an act of the same level as the one with which it was established (article 602 of the Administrative Code).

The competence to dismantle or dissolve the structure responsible for the provision of public services belongs to the competent central public administration authority in the case of public services of national interest or the local public administration authority in the case of public services of local interest (article 603 of the Administrative Code).

## 3. Conclusions

In conclusion, the public service, as a dimension of public administration, has a historical content, representing the "*quintessence of public administration*", a component with a fundamental role in fulfilling its mission. Therefore, public services "*are strictly necessary in our constitutional system*" as they "*evoke the obligations of the state towards the fundamental rights of the citizen*".

[27] Republished on the basis of art. XII of Title II of Book II of Law no. 161/2003 on certain measures for ensuring transparency in the exercise of public dignities, public functions and business environment, prevention and sanctioning of corruption, published in the Official Monitor of Romania, Part I, no. 279 of April 21, 2003, with subsequent amendments, giving the texts a new numbering.

[28] At European Union level, the notion of compensation is clarified in the Commission Notice on the application of the European Union State aid rules to compensation for services of general economic interest [2012 / C 8/02]. The Commission Communication 2012 / C8 / 03 establishes the European Union Framework for State Aid in the form of Compensation for the Public Service Obligation (2011).

The Court of Justice of the European Union in the judgment in Altmark's case further clarified the conditions under which public service compensation does not constitute State aid due to the absence of any advantage (Case C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg/Nahverkehrsgesellschaft Altmark GmbH). According to the Court of Justice of the European Union, in order for such compensation in a particular case not to qualify as State aid, a number of conditions must be fulfilled: "the beneficiary's undertaking must be in fact entrusted with the execution public service obligations and these obligations must be clearly defined; the parameters on the basis of which the compensation is calculated must be established in advance, in an objective and transparent manner, in order to avoid conferring an economic advantage which may favor the recipient undertaking compared to competing undertakings; compensation may not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the revenue generated by that activity and a reasonable profit; where the choice of the undertaking to be entrusted with the performance of public service obligations in a particular case is not made in the context of a public procurement procedure which enables the tenderer to be able to provide those services at the lowest price for the community, the level of compensation required must be determined on the basis of a cost analysis that a typical, well-run and appropriately-equipped undertaking to meet the public service requirements it would have incurred in discharging those obligations, taking into account the revenue generated by that activity, as well as a reasonable profit for the performance of these obligations".

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# THE LEGITIMACY OF LAW IN DEMOCRATIC SOCIETIES

**Oana Andra NIȚĂ***

**Abstract**

*The legitimacy of the state power identifies an interactive relation of balance and cooperation between branches of power in the state, under the condition of a contemporary democratic political regime. The rule of law is based on the legitimacy of the Constitution itself and this quality preconditions can only be achieved by applying and respecting the principle of the legitimacy of state power and the ethical bodies directly involved in the complex process of establishing, mantaining and exercising state power.*

*Legitimacy is the form of thinking and managing society within a predominant political order, around which a social consensus is built through different processes and at different times.*

*In this paper we will try to produce an argument showing that the state has a legitimate authority and we need – as we can see – two aspects. On the one hand, the validity of the state's claim to have authority (to order, to issue laws etc.) and on the other hand, the correlated obligation to obey.*

*People are responsible for what they are doing. They are free to choose, to judge about the choices they are going to make, they take responsibility for their actions and their consequences. As philosopher I. Kant argued, the human person gives these moral norms to itself: to have personal autonomy means to obey the norms you give yourself. By definition, the idea of autonomy opposes the idea of obedience under the will of another. The person's autonomy is incompatible with accepting to act according to the will of another. Sure, the autonomy does not mean that the person always refuses to take into account other people.*

**Keywords:** *legal order, civil society, moral principles, democracy*

## 1. Introduction

The central concept of politics, legitimacy, has a long intellectual history. Starting with ancient Greece, passing through the Roman Empire, the Middle Ages and modernity, legitimacy has been constantly disputed between the elites and society in order to identify the most appropriate form of government in a certain historical context.

"Legitimacy" is a complex category with multiple meanings and also the topic of research for the general theory of law, philosophy of law, sociology and other disciplines. There are multiple meanings of this concept. We mention a few: legitimacy of power; the legitimacy of the political regime; legitimacy of governance; the legitimacy of the political system, etc. The term "legitimacy" designates the feature which enables an entity to the power to order or prohibit something without resorting to physical violence or even successfully use coercion if necessary, in the last instance, an option recognized as normal. The concept of legitimacy can also be applied to legal acts issued by public authorities, linked to the margin of appreciation to which they are entitled in the exercise of their duties.

In *Economy and Society*, Max Weber defines the dominance as "the likelihood that certain specific orders will be heard by a certain group of people." At the same time, he states that any form of domination involves a minimum of voluntary compliance, submission. In a political system based on traditional authority, legitimacy is conferred by faith in the validity and sanctity of the old rules, traditions and customs. "In such a system, the ruler is chosen on the basis of traditions, his authority being based on unwritten laws, considered sacred."[1] People owe their leadership for their tradition, their obedience being based, more cases, personal loyalty, or simply ideas shared by each individual.

In this paper we will try to consider the meaning and measurement of trust and legitimacy of law in the context of democratic regimes. We aim to make three contributions. The first is to draw conceptual distinctions between trust and legitimacy, while also clarifying the ground on which these the two concepts are based. The second is to review the content coverage of the existing legislative controls of the legitimacy of law. The third is to consider how trust and legitimacy may variously motivate law-related society behavior.

## 2. Conceptions of democratic legitimacy

Although in contemporary political philosophy there is a general convergence on the idea that a certain form of democracy is superior to any feasible political regime so far, different approaches to its normative justification (which are sometimes incompatible) were proposed. The common question these approaches are therefore trying to answer is if the policy of the authority established by a democratic regime is legitimate or on what the "permissiveness of a state to

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[1] Max Weber, *Economy and Society*, (University of California Press, 1978), 227

issue and impose order" is morally based.[2] Most generally, conceptions of democratic legitimacy are divided into two categories, called democratic proceduralism and democratic instrumentalism.[3]

Democratic proceduralism is the position stating that democratic legitimacy derives from the intrinsic characteristics of the process by which democratic decisions are taken. In its turn, democratic proceduralism can involve two dimensions, even if some of the theories that are part of this family mainly (or even absolutely) focus on one. These two dimensions are: (1) the aggregrative one, which refers to the fairness[4] of the electoral mechanisms, most often operationalized in the form of the principle "one man, one vote"[5] and (2) the deliberative one, linked to the importance of the public debate before voting, being "anchored in the intuitive ideal of a democratic association in which the justification of the terms and conditions of association derives from public argumentation and reasoning among equal citizens."[6] Perhaps the most important proceduralist view of democracy belongs to Robert Dahl. It proposes a series of 5 criteria, the maximum satisfaction of which is the idea of perfect democracy: (1) the effective participation, according to which citizens should have adequate and equal opportunities to express their preferences on the priorities of the public agenda and on the results (2) equality of vote at the decisive stage, according to which citizens must have equal opportunities in collective decisions to express options equal to those of others, (3) an enlightened understanding that citizens must have equal opportunities and appropriate to find out which of the electoral alternatives best serve their own interest, (4) control over the agenda, according to which the demo should have the exclusive opportunity to decide which issues will be prioritized on the public agenda and (5), which implies that all citizens of a state must be included in the demos.[7]

Democratic instrumentalism opposes the procedural approach. This is, according to Richard Arneson, "the combination of two ideas. One is instrumentalism in political arrangements: the form of government that should be established and sustained in a political society is one whose consequences would be better than any feasible alternative. The second idea is that under modern conditions, democratic political institutions would be the best in terms of the instrumentalist norm and should therefore be implemented."[8] This approach may also include several types of distinct theories, depending on how we interpret the idea of good consequences. An intuitive version of this approach assumes that the notion of good consequence is strictly related to the facts produced through the democratic process, considering that they are on average morally superior to those produced by any other political regime. As stated by Joshua Cohen, this epistemic conception of democracy implies three elements: (1) an independent standard (against the outcome of the vote) of what is a right decision, (2) a cognitive perspective on the vote, according to which the vote expresses beliefs about what are the right decisions, not the personal preferences of the voter, and (3) a view of decision-making as a process in which individuals adjust their beliefs about the correctness of a decision based on the available evidence.[9]

Another version, preferred by Arneson, argues that epistemic aspects are not all that matter in the evaluation of the political regime, arguing that "a decision is morally legitimate only if, in the long run, it consists in results that are morally superior to those that would provide any feasible alternative procedure."[10] According to this view, even if democracy did not produce moral decisions superior to any other regime, it could still be preferable due, for example, to the civic culture that it builds in a particular community. It is important to note, however, two common aspects of the two instrumentalist approaches. First, both require the identification of an independent standard of good consequences, which is not derived from the outcome of the vote. Secondly, both allow partial "limitation" of the will of the majority in certain situations, as this limitation will lead to better moral results.

## 3. The concept of *Legality*

Legality, as a feature that must characterize the legal acts of public authorities, has as central element the concept of "law", which could be defined as a written general rule established by the public powers after deliberation, entailing direct or indirect acceptance of the governors. Ion Deleanu defines it as "an act containing general and mandatory rules sanctioned by the State's coercive force when its application is not realized by conviction and is susceptible to application whenever the conditions laid down in its hypothesis arises."[11] In a broader meaning, the concept of law includes all legal acts that contain legal norms. The law in its restricted sense is the legal

[2] David Estlund, *Democratic Authority: A Philosophical Framework*, (Princeton: Princeton University Press, 2008), 2
[3] Steven Wall, *Democracy and Equality*, (Philosophical Quarterly, 2007), 416-438
[4] Miroiu Adrian, *Teorii ale dreptății*, (București: Alternative, 1996), 274
[5] Jason Brennan, Lisa Hill, *Compulsory Voting: For and Against*, (Cambridge: Cambridge University Press, 2014), 54-59
[6] Joshua Cohen, *Deliberation and Democratic Legitimacy* in J. Bohman și W. Rehg, *Deliberative Democracy*, (Cambridge: MIT Press, 1997), 72
[7] Robert Dahl, *Democrația și criticii ei*, trans. by P. Iamandi, (Iași: Institutul European[2002] 1989), 151-160
[8] Richard Arneson, *The Supposed Right to a Democratic Say*, in T. Christiano and J. Christman (eds.), *Contemporary Debates in Political Philosophy*, (Malden-Oxford: Wiley-Blackwell, 2009), 197
[9] Joshua Cohen, *An Epistemic Conception of Democracy*, *Ethics*, Vol. 97, (The University of Chicago Press, 1986), 34
[10] Richard Arneson, *Defending the Purely Instrumental Account of Democratic Legitimacy*, (Journal of Political Philosophy, 11 (1), 2003), 123
[11] Ion Deleanu, *Drept constituțional și instituții politice*, (Bucuresti: Ed. Europa Nova, 1996), 509

act of parliament drawn up in accordance with the constitution, according to an established procedure and which regulates the most important and general social rules. A special place in the administered legal system has the Constitution, defined as fundamental law, located on the top of legislative system, which includes legal rules of higher legal force, which regulate fundamental and essential social relations, especially those concerning the establishment and exercising of state power.

The state of legality in the work of public authorities is based on the concepts of supremacy of the constitution and supremacy of law. The supremacy of constitution is a quality of the fundamental law that basically expresses its supreme legal force in the legal system. An important consequence of fundamental law supremacy is the compliance of entire law with the constitutional norms. The notion of juridical supremacy of law is considered to be the feature regarding the fact that the norms it establishes must not be in contradiction with constitutional norms or other legal acts issued by state bodies that are subordinated to the constitutional norms in terms of their legal effectiveness. Therefore, the supremacy of law in the sense above is subsequent to the principle of supremacy of constitution. Important is that the legality, as a feature of the legal acts of state authorities involves the observance of the principle of supremacy of the constitution and law. The observance of these two principles is a fundamental constitutional obligation consecrated by the provisions of article 1 paragraph 5 of the Romanian Constitution. Failure to observe this obligation attracts the appropriate sanction of unconstitutionality or illegality of legal documents.

The legality of the legal acts of public authorities involves the following requirements: legal document to be issued in compliance with the competence prescribed by law; legal act to be issued in accordance with the procedure prescribed by law; legal act to respect the rules of law as superior legal force.

## 4. Legitimacy without politics?

The meanings of the concept of legitimacy, a true political ontology (if we consider its implications that considerably exceed the immediate field of political practice), have always been imposed by elites to those privileged from the point of view of access to the binomial knowledge/power, trying to do their best to justify their position, while convincing societies that the *status quo* is at least desirable. Political elites have not always acted with the conscious purpose of manipulating the governors, weaving the wires of an esoteric political conspiracy of colossal proportions; the Athenian democrats or the French revolutionary bourgeoisie of 1789 honestly tried to identify the most appropriate governing formulas for their situation without realizing that their policies excluded most of the population from the public decision-making process: women, slaves, alienated in ancient Athens, peasantry and the so-called “passive citizens”, whose political non-involvement was perceived as the result of an individual choice, not as a form of coercion and exclusion of dictatorship - as was the case in revolutionary France.

However, from any form of policy benefits, involuntarily or not, a certain social category, the one whose representatives hold the power at that time and that particular political regime is usually trying to convince the rest of the social categories as convincingly, as possible, to join the social project proposed by it. Legitimacy is a quality attributed to the political regime by the people, a quality generated by the regime's ability to inspire confidence in its own legitimacy. The legitimacy of a political system is linked to its ability to impose and maintain the belief that the existing political institutions are best suited to a given society.

Legitimacy will always mean politics and politics will always mean representation, for which we can not really discuss a genuine political ontology, based on the distinction between the subject of study and the science (policy) of study, but especially its progressive transformation - because the rules and procedures we follow are pure, based solely on daily social practice; but there will always be a certain distance between society and the policy through which there is self-instilling, because we will never have direct access to irremediably fragmented social society, without immediate access through abstractions such as language, law, morality or legitimacy. The concrete is given only by a thick layer of abstractions that transforms us into something intelligible and malleable. Similarly, the (concrete) society exists only through the policy (abstract, which includes many layers of significant deposits over time), these two entities being different and impossible to unify; and yet the latter must remain the ideal of politics in excellence. Legitimacy only makes sense in the space between politics and society, being a contiguous field in relation to both categories, a field whose narrowing is paradoxically translated into exacerbating its exogenous effects, that is by bringing as close as possible the represented to the representatives.

The concept of legitimacy bears more quickly, a character of appreciation, an ethical character and also political one, while legality is associated with a legal-formal character and ethically neutral one. State power is, as a rule, legal. In the same time, it can be illegitimate, meaning that it is not accepted by society, if the people representing the state power make laws according to their own vision and use them as means of organized violence by doing arbitrariness. The legitimacy of state power - this is the recognition of the leading role that the social law is entitled to have in the society. Essentially, the subject that holds legitimate power is trying to create a situation in which the decisions to recognize and respect the law are made not through fear, but through conscience, with faith in the moral equity of judgments and laws. State power can

not count on a existence of long duration and actual activity, relying solely on violence, because the voluntary, strengthened consent is needed respecting the legality. By way of threats and repressions, it can be done to obey only a small proportion of citizens, But increasing resistance to power leads to mass disaffection.

The first premise of the voluntary agreement is the sure conviction of the people in the fact that the representatives of the power develop and translate their decisions into life on the path of the interests related to the state, not breaching what is considered private and personal. Where the legitimacy of power is questionable (not certain), the lawlessness and danger of revolutionary unrest.

Legitimacy is not only the legality of power from the point of legal-formal view, but rather the phenomenon of social psychology, which consists of accepting this political power by society or at least passive obedience to it. Thus, new regimes following the revolution, the coup d'etat may become legitimate if it would secure the support of a considerable part of it society. In connection to this, the very nature of legitimacy, its sources and the arrangements for insurance can be enough different, depending on the cultural level, traditions and psychology of the population. Being a complicated social phenomenon, legitimacy manifests itself differently. Talking about the power of legitimacy, we should take into account, on the one hand, its authority, trust, recognition, and, on the other hand, the devotion and the desire of the society to go after it and obey its requirements.

## 5. Authority, discretional power and proportionality

The meaningful links between these terms "legitimacy" and "authority" are quite obvious. The authority, by its nature, is a characteristic feature of power embodied by a person, an institution, etc. Its specificity is manifested by the fact that those subjects of power relations, to whom authority is characteristic, are given the recognition and trust of those who have invested them with power. The authority presents itself as a phenomenon of autogeneration of power, which transforms over time into one of the forms of its existence, most often related to the legitimacy process.

The application and observance of the principle of legality in the activity of the state authorities is a complex issue because the exercise of state functions also implies the discretionary power with which the state bodies are invested or otherwise being said, the authorities' right of appreciation regarding the moment of adoption and the content of the ordered measures. What is important to emphasize is that discretionary power can not be opposed to the principle of legality, as a dimension of the rule of law.

In our opinion, legality is a particular aspect of the legitimacy of legal acts of public authorities. Thus, a legitimate legal act is a legal act, issued within the scope of the discretion recognized by the public authorities, which does not generate unjustified discriminations, privileges or restrictions of subjective rights and is appropriate to the factual situation that is determined by the purpose of the law. On the one hand, legitimacy makes the distinction between discretionary power recognized by state authorities and, on the other hand, excess power.

Not all legal acts that meet the conditions of legality are also legitimate. A legal act that complies with the formal conditions of legality but generates discrimination or privileges or unjustifiably restricts the exercise of subjective rights or is not appropriate to the factual situation or the purpose pursued by law is an illegitimate legal act. The legitimacy, as a feature of the legal acts of public administration authorities, must be understood and applied in relation to the principle of the supremacy of the Constitution.

Addressing the question of the boundaries between legitimacy and discretionary power, Leon Duguit[12] has achieved an interesting distinction between "normal powers and exceptional powers" conferred on the administration by the constitution and laws, and on the other hand situations in which state authorities act outside the normative framework. The author divides these latter situations into three categories:

1. excess power (when the state authorities exceed the limits of legal authority);
2. misappropriation of power (when the state authority fulfills an act falling within its competence for other purposes than those prescribed by law);
3. abuse of power (when the state authorities act outside their powers, but through acts that are not legal).

Proportionality is a fundamental principle of explicitly enshrined law in constitutional and international legal instruments. It is based on the values of the rational right of justice and equity and expresses the existence of a balanced or adequate relationship between actions, situations and phenomena as a criterion for limiting the measures ordered by the state authorities to what is necessary to achieve a legitimate goal, guaranteed fundamental rights and avoid the excess power of state authorities. Proportionality is a basic principle of European Union law being expressly enshrined in the provisions of Art. 5 of the Treaty on European Union.

Therefore, the principle of proportionality is an essential criterion that allows the discretionary power to delimit excess power in the work of state authorities. This principle is explicitly or implicitly enshrined in international legal instruments or by most constitutions of democratic countries. The Romanian Constitution

[12] Leon Duguit, Manuel de Droit Constitutionnel. Théorie générale de l'Etat - Organisation politique, (Paris: A. Fontemoing, 1907), 445-446

regulates this principle in Art. 53, but there are other constitutional provisions involving it. In constitutional law, the principle of proportionality is particularly applicable to the protection of human rights and fundamental freedoms. It is considered an effective criterion for assessing the legitimacy of State authorities' intervention in limiting the exercise of certain rights. Furthermore, even if the principle of proportionality is not expressly stated in the constitution of a State, doctrine and case-law consider it to be part of the notion of the State of law. This principle is applied in several branches of law. Thus, administrative law is a limitation of the discretionary power of public authorities and is a criterion for exercising judicial control of discretionary administrative acts.

Proportionality is not only a question of fact but a principle of law, including constitutional law and the courts of ordinary law, administrative litigation or the Constitutional Court can rely on it to sanction excess power. Our constitutional court may explicitly invoke the criterion of proportionality only under the conditions provided by the provisions of Art. 53 paragraph (2) of the Romanian Constitution. Therefore, there is no possibility of sanctioning excess power of the legislature, using the criterion of proportionality, and in other situations, especially in cases where, through the measures ordered, the legislator goes beyond what is necessary to achieve a legitimate goal.

We consider that the express regulation of this principle only in the content of the provisions of Article 53 of the Constitution, applying in the field of the restriction of the exercise of certain rights, is insufficient to give full meaning to the significance and importance of the principle of the rule of law. It would be useful to be added in the context of Article 1 of the Constitution a new paragraph stipulating that "the exercise of state power must be proportionate and non-discriminatory." This new constitutional regulation would constitute a genuine constitutional obligation for all state authorities to exercise their powers in such a way that the adopted measures fall within the limits of the discretionary power recognized by the law. At the same time, it is possible for the Constitutional Court to sanction the excess of power in the activity of the Parliament and the Government on the way of the constitutionality control of laws and ordinances, using as a criterion the principle of proportionality.

In the administrative doctrine, which mainly studies the issue of discretionary power, it was emphasized that the opportunity of administrative acts can not be opposed to their legality, and the conditions of legality can be divided into: general conditions of legality and specific conditions of legality on the grounds of opportunity.[13] Consequently, legality is the corollary of the conditions of validity, and opportunity is a requirement (a dimension) of legality. However, the right of appreciation is not recognized by the state authorities in the exercise of all their duties. There is discrepancy between the jurisdiction of the state authorities which exists when the law imposes on them certain strict decision-making behavior and on the other hand the discretionary power, particularly the situation in which the state authorities can choose the means for achieving a legitimate purpose or generally, when the organ which the state can choose between several variants, within the limits of its law and competence.

Although the issue of discretionary power is mainly studied by administrative law, the right of appreciation in the exercise of certain duties is a reality encountered in the work of all the state authorities. The Parliament, as the supreme representative body and the sole legislative authority, has the widest limits, and manifest discretionary power, which is identified by the very characterization of the legislative act. Since the interwar period I. V. Gruia stressed: "The need to legislate in a particular matter, choosing the moment of lawmaking, choosing the moment when the law was enforced, by setting the date of law enforcement by the legislator, reviewing previous laws that can not bind and oblige the future parliament work, the restriction of social activities from their free and uncontrolled deployment and their obedience to the norms and sanctions of the law, the content of the legislative act, etc., prove the sovereign and discretionary appreciation of the function of the legislative body."[14]

Discretionary power also exists in the work of the courts. The judge is required to make a decision only when he is notified, within the limit of the referral. Beyond this, the right to sovereign appreciation of the facts, the right to interpret the law, the right to fix a minimum or a maximum penalty, to grant or not to attenuate circumstances, to determine the amount of damages, etc. is manifested. Exercising these competences is nothing more than discretionary power. Exceeding the limits of discretionary power means violation of the principle of legality or what in law, doctrine and jurisprudence is called "excess power". Excessive power in the work of state bodies is equivalent to abuse of the law, as it means the exercise of legal competence without a reasonable justification or without an adequate relationship between the measure, the factual situation and the legitimate aim pursued.

The opinion expressed in the specialized literature was that "the purpose of the law will be the legal limit of the right of appreciation. For discretionary power does not mean a freedom beyond the law, but one allowed by law."[15] Of course, the "purpose of the law" is a condition of legality or, as the case may be, the constitutionality of the legal acts of state bodies and can therefore be considered a criterion to delimit discretionary power from excess power.

[13] Antonie Iorgovan, *Tratat de drept administrative,* Vol I, (București: Ed. Nemira, 1996), 301
[14] I. V. Gruia, *Puterea discreționară în funcțiunile Statului*, (Pandectele săptămânale, 1934), 489
[15] Rozalia Ana Lazăr, Legalitatea actului administrativ. Drept românesc și drept comparat, (București: Ed. All Beck, 2004), 165

## Conclusions

Analyzing different approaches and concepts regarding the legitimacy of the law expressed through state power, we can mention that legitimacy, as a way of social recognition, presupposes a bilateral relationship: first, the perception of power, the relationship between power and the subject that holds the power; secondly, the understanding by the subject who holds the power of law regarding the defining and practical elements of the power he owns. From the above, we can conclude that state power can only be maintained to the extent that the power structures are legitimate and political decisions, including laws, express general will and are not used against a part of the population. And the legitimacy of a state power can be viewed from a dual perspective: (1) as an act of designating the structures of power (the conquest or act of establishing power); (2) the consistency between the content of political decisions and the expectations of those governed.

Our aim regarding this paper and also further research is to outline the role of normative functions in contemporary society and to define the paradigms of law in relation to the evolution of relations between civic society and public, as well as private institutions.

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# *VOX POPULI* - PARADIGM OF CONTEMPORARY LAW

**Oana Andra NIȚĂ***

**Abstract**

*In the contemporary society, which tends to be more and more close to uniformity and globalization, law tends to harmonize the individual interests with the general one. Social life is guided by all the norms imposed on individuals and collectives, which in some particular cases may be applied even through the coercion of the state.*

*Public institutions and democratic societies live through the coexistence and cooperation of their members. As long as the constituent elements of the societies are represented by individuals, each of them must also comply with the coexistence and cooperation rules necessary to maintain the balance of the rule of law.*

*As a society, we need justice, but it is not necessary for people to get tired of pretending justice to be done. Meanwhile, there is a need for a different justice, with a true culture of law and with strong liability.*

*Lately worldwide events, such as great protests with high impact over national administrative and legal systems, as well as over international political relations have proved to be a massive arm against the entry into force of normative acts.*

*The purpose of the paper and the objectives pursued by us will try to reveal whereas the initiatives of*

*the people in their entirety, and not as individuals, are legally solid and if the role of such events is positive or it will only end in destabilizing the rule of law.*

**Keywords:** *rule of law, protest, coexistence, cooperation.*

## 1. Introduction

Often invoked in intermediary, economic, and political discourse, the term *populism* tends to become an infallible label without ideological coverage. The obstacle faced by all those who have tried to define populism is its ambiguity. Margaret Canovan, in her work *Populism* already reported this diffusion, quoting that the spectrum of the diversity within liberalism or socialism is lower than the one within populism. The primary reason is that the use of the first two terms was determined to the greatest extent by adherents.[1]

Two are the sources of populism: Russian natives and American populists. Both currents marked the last quarter of the nineteenth century. Slavic, orthodox, nationalist intellectuals exalted tradition and fought the modernization and westernization of Russia. Being a synthesis between western socialism and the peasant civil society raised at the standard of political organization, nationalism even theorized the advantages of background economy. The American people, whose political expression was the People's Party, had a different social base. Independent agricultural producers are the core of the movement, and private property is for them the fundamental economic principle. The opponents are the big banks or rail trusts, which played an increasingly important role, to the detriment of small producers. Their political vision implies an increase in federal power in order to defend the interest of the "people." Unlike Russia, the impulse comes here from the people, not from the elite. The identity issue of populism comes from its problematic situation on the right / left axis. A mixture of revolutionary socialism and economic conservatism, it definitely goes out of the way.

Eugeniu Speranția's philosophical conception about law is organically integrated into his conception about the world and society as a whole. Spiritual life is presented into two aspects: one which is subjective or individual and the other one which is objective or social. The close interactions between them will result in their development, their continuous enrichment. Personality cannot form itself and progress, unless this can happen in a properly organized legal society; likewise, society will not be able to reach a high degree of organization, unless it's done by laborious and orderly work of the personalities inside her. There will be no justice, nor order of law in a society where individuals are lacking in logical consistency, but neither discipline nor individual consistency can be done in a society lacking in order and justice. In any case, the two aspects of spirituality are developing together.

## 2. The concept of the universal norm

In his conception of state and law, E. Speranția does not exclude the aprioristic transcendental factors related to the genesis and functions of the law. The law appears to us as a spiritual, synthetic product, which tends towards a maximum of harmony and consistency; in relation to this, philosophy of law has to be primarily interested in spiritual issues. Spirit creates certain universal and necessary imperatives, which are conditions of rationality.[2] Such a spiritual

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[1] Margaret Canovan, *Populism* (New York & London, 1981)

[2] E. Speranția, Principii fundamentale de filosofie juridică, (Cluj, 1936), p. 16-17

manifestation is normality - the constitutive dimension of the human being, which explains the natural need of people to obey norms. In all the actions that people do, they realize that there are certain directions to be followed and some limitations that must be respected.

"We know we can not afford anything and that no one has to be able to allow everything in the world, we always and everywhere find out that something must be or not to be. Everything that comes into the field of our attention is subject to evaluation, anything that is the object of consciousness is inevitable subject to appreciation, any fact or thing is a value or a non-value."[3] Therefore, an infallible norm appears to us as dominating our whole world, not as a natural law, but as imperative commander of things; this norm is the norm of universal normalization, it is the norm of norms - a fact that is categorically imperative and, from a logical point of view, all the imperatives emerge from it and are formally justified by it. The imperative character of universal normalization does not specify which are concrete rules that regulate people's actions, but, in any case, it contains the need for a rule to be respected in all circumstances. In a more concrete social plan, people's lives could be adjusted by moral principles, programs, ceremonies, labels, legal norms or technical standards and so on. But all these are alternatives of the general rule in order to implement justice by legislating the social life. Any attempt to limit the universality of any norm is a defeat of the fundamental exigency of the spirit.

Thanks to the imperative of universality, the Ego will conceive the *alter* as an exterior of its own; any person attributes to an *alter* the same goal position and the same requirement to obey a universal norm. These premises issue the following results: first of all, the exigency of equality of rights, secondly, the exigency of reciprocity and lastly, the exigency of compensation.

### 3. The need to legislate

Speranția did not limit himself to enunciating legal mandatory statements, instead he systematically portrayed the form they take in social life. There are two strong tendencies within it: the possession of material goods and the possession of spiritual goods. The first tendency amplifies people's selfishness, shakes and threatens social cohesion, while the latter tends to bring people closer to their hearts and intensifies their sociality. Tempering the contradictory effects of the two tendencies that threaten the cohesion of social life lies in the spiritual power of the human community, which will intervene in regulating the possession tendency of material goods through certain rules. Social life can not dispense with norms, otherwise it would become precarious. Consequently, law is a necessity, it is a rational and intentional creation, similar in terms of technical constructions. But the nature of law can only be understood by taking into account the nature of the spirit, which is always absolute and universal. Our spirit is the source of the initial and an *a priori* imperative of law, from which the justice will be applied in the social order. Justice, in a social sense, is a perfectly consistent social order with normative principles admitted by our spirit. Compliance with a generally admitted rule, either by the theoretical deduction of other particular norms, or by translating it into an action, constitutes justice. A sentence is fair when it complies with a rule of law. A rule of law is equitable when it is in accordance with a more general one or with a principle which is known and admitted in advance, whereas inconsistency occurs as injustice.

Applied to concrete social relations, the imperatives of justice, along with justice as a perennial value, acquire relativity. Justice is relative because it can not be the same everywhere as long as ideologies and traditions change in place and time. The positive law is an ensemble of elements that change their character and circumstances while passing through history. Moreover, in varied historical times, ideologies and traditions could give to the aprioristic norms some interpretations, acceptations or circumstances that have distorted and denigrated their own meaning, so that the legal positive order ended in being damaged by serious injustices. However, Speranția believed that "there are some universal and eternal foundations of justice and those are the aprioristic normative beliefs grown in the general structure human minds. Compliance with them constitutes absolute and universal social justice"[4]. Such aprioristic rules that derive from the very structure of our mind are, for example, the principle of alterity, the observance of the commitments, the logical imperative of consistency with ourselves, the Christian principle that demands to love your neighbor as yourself or the imperative respect for the human person, the human person being regarded as the supreme value and as the arbitrator of its own values.

Law, as a set of norms governing human actions and interpersonal relationships has, among its essential qualities, the one of favoring sociality and always having in its structure a conformity or logical consistency with certain pre-established principles. The legal rules are varied by the degree of generality, by degree of compulsion; some seem to have axiomatic validity, others seem to be arbitrary related; some are more effective than others; after another criterion - that of their importance for social cohesion and the protection of people, some are crucial, vital. On the latter, E. Speranția called them cardinal rules. However, there are rules that are intended to ensure or to facilitate the application of cardinal norms, called adventive norms. The institution intended to ensure the application of all these types of cardinal legal norms is the State. The need for normalization and the justice of the collectivities can be met by express legislation. The

[3] E. Speranția, Introducere în Filosofia Dreptului, (Sibiu, 1944), p. 283
[4] E. Speranția, Introducere în Filosofia Dreptului, (Sibiu, 1944), p. 292

willful creation of the rules of law and the positive legal order implies state goals (plans) and means (procedures, agents, support points, etc.). The actions of purposeful regulation are regulated by valuation values, according to which there have to be established priority programs. The supreme value to which the legislative action is directed is the social peace. Redefining and re-establishing legal values in a new hierarchy by the legislator is very rare in history: such events meet with the revolutions when a new ideology becomes dominated by people's consciousness. According to the principles of the new ideology, there will undergo profound restructuring within the law, new interpretations of the traditional legal norms, some habits, practices will be discussed, it can even get to absurdly altering aprioristic rules.

## 4. Populism-the opponent of the rule of law?

Legislative actions start from a condition of disaffection of the governors towards the existing society and law, accompanied by a negative assessment, according to which they will elaborate a plan, a possibility of superior justice. In this sense, E. Speranția pointed out that "the legislative activity, being an activity directed to the social order, implies discontent regarding the present given situation and it pursuits a new social order of superior value. It is understood that the way of appreciation, the scale of values of the legislator and its possibilities to conceive the change, the means of service and the degree of success are very variable and depend on a large number of factors: the legislator's own mental faculties, the mentality, conceptions, beliefs, habits and criteria of appreciation of the respective social group, all of these constituting also the circumstances that the legislator will take into account, as well as the material on which the legislator is supposed to act upon, but it also constitutes a decisive factor which, by determining the conscious life of the legislator, determines its mode of action."[5]

Laws, once issued, must be justified and accepted. The more a law will be accepted, the more it will be respected. If legal imperatives are unconditionally accepted due to rational character and they must not be proclaimed by the legislator, then the rules of the law must be convincing, accepted and justified. The most spread concepts of justification of the validity of the law in history, were the religious one and the democratic one.

The religious justification of the authority of law considers that laws are, in one way or another, from God. The stronger the religious belief of citizens will be, the more secure will be their obedience to laws, which are considered to be revealed by the divine will. Speranția had noticed that although religious acceptance seems to be outdated for his time, no other justification could give the positive law created by various legislators a more solid basis than compliance to the multitudes of persuasion. On the other hand, democratic acceptance has a rational logical foundation of the thinking that had as protagonists Marsilio of Padova, the Illuminati, in the forehead with J. J Rousseau, A. de Tocqueville, etc. This could be summarized as it follows: "if the law is the product of the will of all people, if the law decides what they all want, it follows that the law that forces and governs the individual is nothing but the expression of his own will, that no one is more free than the one who obeys the law, for only so he works according to his will. The one who breaks the law contradicts itself (.....) the law, made by all people, wants the good of all and there can be no better lawmaking according to the common good than the one emanating from the general will."[6]

But Speranția considered this doctrine of the legitimacy of the legal norms as having a lower intake to the masses, being dependent on the level of intellectual culture and education of citizens. Plurality identification with mediocrity or chaos is translated into elitism that rejects any attempt or any hope to take into account what people say. If the democratic justification of the law would be complemented by religious interpretation, then the degree of acceptance and compliance of citizens to legal norms would be greater. On the same note, Speranția brought substantial criticism of the justifying currents of the law of his time: the acceptance of national or social mysticism, the acceptance of the mysticism of the state (fascist, Stalinist, etc.), the social antagonisms theory, hedonistic acceptance, utilitarian acceptance, implicitly promoted by legal positivism.

Who decides in one case or another, if there should be taken into consideration the voice of the people or combat him in the name of the public interest? No one knows. In other words, the possible errors and the realized ones of the *vox populi*, do not permit a reflection upon the limits of the democracy, instead they permit an instrumentalization that allow the leaders of the state to give to the people what they demand or, on the contrary, give them what brings them to silence. In the latter case, when the popular voice finds a way to express itself, the leaders do not have words to describe anger. Contempt of classes is so odious in itself, just as contempt of race. In Europe, the first one is a national sport, meanwhile the second one is a crime. Is talking too easily of “people”, as if it is a delimited and determined entity, as if we could introduce it in an entirety. When we talk about people referring to populism, we talk about a part of the average of people, difficult to quantify and preliminary define. How could populism become such a disputed opponent during the glory of the triumphant democracy?

[5] E. Speranția, *Introducere în Filosofia Dreptului*, (Sibiu, 1944), p. 315
[6] E. Speranția, *Introducere în Filosofia Dreptului*, (Sibiu, 1944), p. 315

Law, as one of the social aspects of life, analogically evolves as any vital process. Law, as a spiritual fact, evolves through the gradual assertion of human spirituality. The historical development of the law and the genesis of the new laws simultaneously constitute an individual product, as well as a collective one, as human consciousness in general. The origin of the law can not stand in only one will or in "collective consciousness" - it can not be an exclusively natural product which appears only from "the national soul", placing itself above the individual will. Any legal norm, any legal institution keeps a trail of the mind that created it from the beginning. That's why in every law the intentionality and rationality of her author persists as a fundamental and original element. A legal norm, enrolled in the popular use, forming part of the customs of the community, however, anonymously showing up at some point, must have sprung up from a mind of a man who wanted it, thought and formulated to propagate it in the minds and hearts of others.

The state, as an institution overlapped with the institutions of a collectivity and as the coordinated ensemble of the three powers (legislative, executive and judicial) is subordinated to the rule of law: the state operates in the service of the Law. But neither the law is an end in itself: it exists to secure justice and, through it, social cohabitation, which is a requirement of human spirituality. The latter is the supreme value that condenses all conscious goals and actions.

People's life in the community requires organization; organization requires legal normalization; the beginnings of the political organization of human collectives were marked by the tendencies to normalize the functions of creation and to defend the rules. That's why organizing politics is synonymous with the basic organization of the State. As an institution, the state assumes: a) a systematic ensemble of social actions; b) its actions converge for a determined purpose; c) the actions of the state are carried out according to pre-established rules. Being an institution, the state is not a sum of individuals, nor social group, nor can it be identical to the nation, as "organized nation". The fundamental purpose of the State is to ensure a maximum of justice for a maximum of sociality. In this sense, the State creates and defends the rules that constitute the order of law and for this mission he has to follow certain norms of creation and defense of norms.

The State, as an institution intended to organize the legal norm, is self-regulatory by applying the rules designed to ensure or to apply other norms. Through everything that state does, it will subordinate itself to the *a priori* and cardinal imperative of the need for justice. That is why all the state bodies and institutions have a concentric configuration, the pivot of which is the need for justice. In the service of this need, the state creates and dispenses by public force - the guarantee of stability, of the achievement of the spiritual goals. State always defends an order of law and a certain spirituality. Law, as a deductive system of social norms, provides that maximum of sociality in a community. That's why, as long as the State goes in a collectivity, so will the power of his laws and vice versa. Therefore, nothing is more likely to jeopardize the unity of a state than the lack of unity of its legislation.

## Conclusions

The populist assault on the institutions generates political instability and confusion, apparent cohesion beyond classes and private interests, meaning the fragility of social tissue. The reverse of the medal is the demagogic use of the term "populist" to condemn positions that are not in line with right or left political orthodoxy. In itself, the populist aspiration towards advanced democracy is a progressive one, but it systematically fails in authoritarianism. If we schematize populism in some of the enduring features, it would be: the transideological character, the revolt of the ordinary man against the elite, the distrust in intellectuals and politicians, as a model for the future and the denial of progress, the small private property as the basis of economic dynamism and equity, the inclination towards direct democracy or a strong leader as a form of government. Beyond nationalism, socialism, communism or fascism, or messages of this type. To deny them the right to self-existence by virtue of an analytical sufficiency is an error.

However, the various issues raised by the philosophy of law do not have definitive solutions. The theoretical constructions of the law philosophy are designed to accommodate the endless conflicts of our spirit with itself, the contradictions between the terms, concepts and beliefs that has developed. Avoiding internal contradictions is for the mind what avoidance of pain is for the body. Our philosophical exploration will then continue to look for whether the life of the law, taken in its universality, contains principles around which the whole law is structured and evolves; what is the normality in general and the derivation of the legal; what is the essence of the relationship between logic and right, between legal, social and spiritual, between law, state and nation.

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# ANALYSIS OF ART. 396 PAR. (2) CIVIL PROCEDURE CODE, IN THE LIGHT OF THE ROMANIAN CONSTITUTIONAL COURT'S DECISION NO. 454/2018

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**Abstract**

*The present article proposes a brief analysis of the provisions of art. 396 par. (2) of the Civil procedure code, more precisely to conclude whether or not in the future it could be necessary to change the way the courts communicate certain documents of interest to the parties of the trial, thus eradicating the phrase 'through the court's record office'. This provision is analyzed in the light of the Romanian Constitutional Court's Decision no. 454/2018, with a view on the reasonable exercise of possible remedies.*

**Keywords:** *record office, communication, trial, remedies, civil procedure code, art. 396 par. (2)*

## 1. Introduction

Considering that, recently, the Decision of the Constitutional Court of Romania no. 454/2018 was published, we consider that a closer look is requested regarding the subject of the complaint, the motivations that have been considered and especially the solution reached by the Constitutional Court.

Consequently, this article proposes not only a critical analysis of the way in which the text of art. 396 par. (2) Civil Procedure Code was considered to have been constitutional, but rather we would like to draw attention to the fact that, in certain situations, this particular approach has the real potential to lead to the violation of the fundamental rights of the parties to a dispute. We are particularly concerned with the right to a fair trial, the right to defense, and the principle of publicity of court hearings.

Therefore, in the present article we will continue to discuss the reasoning why, in the future, it might be beneficial to consider modifying art. 396 par. (2) Civil Procedure Code.

## 2. Summary of Decision no. 454/2018, regarding the constitutionality of art. 396 par. (2) Civil Procedure Code.

By Decision no. 454/2018[1], pronounced by the Constitutional Court of Romania, there have been analyzed complaints regarding several legal provisions, both from the Civil Procedure Code and from other normative acts. In this article, we are expressly interested in the motivations regarding the way art. 396 par. (2) Civil Procedure Code has been interpreted.

The holder of the objection of unconstitutionality is the High Court of Cassation and Justice, through the United Sections, as it is an adopted and unissued law[2].

The reasoning for the objection of unconstitutionality is that "*by establishing that the ruling is made available to the parties through the court's record office, it does not allow the precise determination of the moment when the ruling has been given, creating uncertainties regarding this particular moment, considering that the law attributes to this moment of the ruling, in some cases, the function of the initial moment of beginning the timeframe limits for certain remedies. The legislator's option of introducing an alternative way of a ruling made available for the parties implies the adoption of a rule that has the capacity to determine precisely the moment when the ruling has been given and to offer the level of precision ensured by the delivery of the ruling in a public hearing. However, the reference to making the solution available to the parties through the court's record office is insufficient to allow accurate determination of the moment when the ruling has been given, with negative effects on the rights which can be exercised in relation to that precise moment, according to the law*".

The Constitutional Court motivated its rejection of the objection of unconstitutionality by means of some main arguments, which bring to light the vision that the Court had in view in this particular situation, namely:

In paragraph 27 of Decision no. 454/2018, the Court argues that "*making the solution available to the parties through the court's record office as a means of*

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[1] Referring to the objection of unconstitutionality of the provisions of art. I point 37 (referring to art. 402 of the Civil Procedure Code] and point 58 (with reference to art. 497 of the Civil Procedure Code], as well as Art. III point 3 [referring to art. XVIII par. (2) of Law no. 2/2013] and point 4 (with reference to art. XVIII1 of Law no. 2/2013] of the Law for amending and completing the Law no. 134/2010 regarding the Civil Procedure Code, as well as for amending and supplementing other normative acts, published in the Official Journal of Romania no. 836 of November 1st, 2018, as further amended and supplemented. The Decision is available on the website https://ccr.ro/, accessed on March 18th, 2019.

[2] At the time when the Court was notified, it was about a legislative proposal, which was initiated by 182 deputies and senators, registered at the Senate on April 18th, 2018. Subsequently, as the Court itself states, the certified form of the law was filed, which did not differ in any way from the original proposal As such, the Court considered that it has been legally notified.

*achieving the alternative publicity of the ruling, as opposed to a public hearing was a major novelty, imposed for unquestionable practical reasons. By normalizing this particular possibility of pronouncing the ruling, it has been ensured that the solution was effectively acknowledged. However, the very doctrine of civil procedural law has been surprised by the limitation of the hypotheses in which this means of achieving the publicity of the judgment was exceptionally regulated only in the case of postponement of the pronouncement regulated by art. 396 par. (2) of the Code of Civil Procedure*".

In paragraph 28 of the Decision no. 454/2018, the Court considers that, in fact, this innovation is an effective way to respect the principle of publicity, in line with the jurisprudence of the European Court of Human Rights.

Next, at paragraph 29, it is expressly stated that it is not possible to reach the conclusion of the breach of the public character of the ruling pronouncement, since any interested person has the possibility to obtain a copy of the solution.

Also, at paragraph 34, the Court stated that the justice system should be properly administered in a democratic society, making reference again to the human rights provided for in the ECHR.

In paragraph 40 we find another argument in support of the constitutionality of this way of communication with the parties to a litigation, namely that, in the Court's opinion, in the last 5 years since the entry into force of the Civil Procedure Code, it has been already applied by the courts.

Finally, it is concluded at paragraph 41 that "*in the event that the court postpone the ruling, the date of the ruling is the day for which the postponement was settled. At this date a record is made, which is made available to the parties through the court's record office*".

Therefore, the Constitutional Court considers that this way of "*communication*" is entirely constitutional and therefore does not violate the procedural rights of the parties, namely the principle of publicity of court hearings.

## 3. The necessary conditions for art. 396 par. (2) Civil Procedure Code to be applied accordingly.

The doctrine has already stated the view that the postponement of the ruling pronouncement established by art. 396 par. (2) Civil Procedure Code should not be made anyhow, a matter of which even the provisions of the new Civil Procedure Code are drawing the attention to.

Thus, the conditions that should be fulfilled at the moment when the postponement of the pronouncement is decided are: *"(i) 1 premise condition: the ruling of the decision to be postponed (therefore the solution provided by article 396 paragraph (2) can not be put into practice when the pronouncement of the luring was not postponed); and (ii) two sub-conditions, namely: (a) there was a justified case for postponing the ruling; and (b) the presiding judge has expressly indicated in the content of the ruling that the postponed hearing will be made available to the parties the court's record office*[3]".

We appreciate, however, that this mechanism of postponement of the ruling should not be embraced and used by the courts every single time. The reason is to avoid making rulings that are no longer in line with the complete information in the files, precisely because, as it is well known, the burden of files for each judge is higher than average.

Consequently, the freshest information on the files a judge has to rule can be found at the moment when the debates were closed. By postponing the ruling pronouncement, it is possible that errors appear that may prejudice the parties to the dispute. Obviously, in truly delicate and complex situations, it is desirable for the judge to carefully measure the solution he has to pronounce. Nevertheless, it has been noticed an unjustified increase in ruling postponements, although the legal situations in question did not present a particular difficulty.

## 4. The effects of art. 396 par. (2) Civil Procedure Code regarding voluntary intervention, before and after the amendments brought by Law no. 310/2018.

Considering the brief aspects previously outlined, which summarise the main arguments of the Romanian Constitutional Court, corroboration with a recent regulation, namely Law no. 310/2018[4], is required.

This normative act brings a variety of changes in the civil procedural matter, but for the present article, it would be beneficial to address the changes mentioned in Art. I point 3.

Consequently, we note that, unlike the previous regulation, art. 64 Civil Procedure Code was adapted to the stringent needs of society in terms of remedies against the rejection / admission of a court resolution.

Thus, please note that there is no longer a distinction between resolutions that can be attacked with the ruling itself. Previously, the law stated that the

[3] See in this respect Daniel Moreanu, extract from the article entitled "Şedinţa publică de pronunţare a hotărârii judecătoreşti în materie civilă. Analiză cu privire la natura juridică procesuală de şedinţă de judecată şi obligaţia legală de înregistrare prin mijloace tehnice audio sau video", which was published in "Dreptul" Magazine no. 4/2018, available online at the following website: https://www.juridice.ro/560481/este-sau-nu-sedinta-de-judecata-sedinta-publica-de-pronuntare-a-hotararii-judecatoresti-in-materie-civila-se-impune-a-fi-inregistrata-prin-mijloace-tehnice-audio-sau-video.html. The website was accessed on March 18th, 2019.

[4] for amending and completing the Law no. 134/2010 on the Civil Procedure Code, as well as for amending and completing other normative acts, published in the Official Journal of Romania no. 1074 of December 18th, 2018.

admission of a resolution could be remedied only with the ruling. The court's resolution of rejecting the intervention as inadmissible was granted a different regime of remedy, meaning that it could be challenged only with appeal / second appeal[5] within 5 days. Here it becomes interesting because the previously regulated 5 days term was flowing differently depending on the presence or absence of the parties, as follows: 5 days from the ruling pronouncement for the present parties, respectively from the communication of the ruling for the missing parties.

The question is what would happen in the following situation: on the day of the trial, with all the parties present, the court closes the debates and is about to rule regarding the admissibility of a voluntary intervention. Since more time to deliberate on the ruling is required, the court decides to postpone the pronouncement. However, the judge decides that in this particular case, the solution should be made available to the parties through the court's record office. At the time of the postponement, none of the parties decides to appear, and the judge rules to reject the voluntary intervention as inadmissible.

Consequently, in this particular situation there are two contradictory regulations, both of them having the same legal power. Thus, in the interpretation of art. 396 par. (2) Civil Procedure Code, the Constitutional Court considered that "*the date of the ruling is the day for which the solution was postponed*", so we would be tempted to consider that the appeal in the above-mentioned situation should be filed within 5 days starting from the date on which the court postponed the pronouncement.

On the other hand, taking into account the provisions from art. 64 Civil Procedure Code, in the initial version, it is clearly specified that the parties, if they wish to appeal the conclusion of the resolution that rejected the intervention as inadmissible, have at their disposal the entire term of 5 days, but specifying two alternatives: from the pronouncement of the ruling for the present parties, respectively from the communication of the ruling for the missing parties.

Considering that none of the parties was present in this particular case, we appreciate, however, that a remedy brought within 5 days of the communication of the resolution should not be considered late. Nevertheless, the act of justice has rarely been applied in a unitary manner, which is why it was necessary to have specially created panels at the level of the High Court of Cassation and Justice to decide, for instance, preliminary rulings for the solving of law matters[6].

Considering that the Romanian society is part of the Roman-Germanic civilization, so not founded on the precedent judicial system, we can only appreciate the new modification of art. 64 Civil procedure code as being beneficial in the particular situation described above. This is because the previous regulation would have breached, in our opinion, the right to a fair trial, the right to defense, and it would have violated the principle of court hearings' publicity.

Thus, there were two regulations, both of which had the same legal force in the event they were simultaneously applied, meaning that they should have been somehow separated. It would have been possible to prioritize the initial regulation on the request for intervention and to consider that, being absent at the time of the pronouncement, the parties were granted a 5-day time limit from the communication of the ruling, in order to be able to challenge the resolution. However, it would have been possible, on the other hand, that the regulation of art. 396 par. (2) The Civil Procedure Code could have been applied first, since the parties were present at the time of the debates and the cpurt decided to postpone the pronouncement, and all the parties were thus informed.

Unfortunately, the situation described above is far from being unique. Thus, in all the cases where there is a certain legal remedy possible either from the ruling pronouncement or from the ruling communication, as the case may be, there is a real possibility that the parties may be prejudiced, despite the fact that the Constitutional Court specified "*the date of the pronouncement is the day for which the pronouncement was postponed*".

For instance, certains situations may be considered, without limiting the analysis to them, as follows:

1. Regarding the regime of straightening, clarifying and completing the court's decision, art. 444 par. (1) provides that "completing the decision [...] may be requested in the case of decisions given in extraordinary appeals [...] within 15 days of pronouncement. In the case of final decisions given on appeal or second appeal, their completion may be requested within 15 days starting from de decision's comunication[7]";
2. With regard to the appeal, art. 468 par. (4) states that "for a prosecutor, the time limit for appeal shall start from the date on which the decision was pronounced, unless the prosecutor participated in the hearing of the case, in this case the time-limit starting from the communication of the decision[8]". Thus, it can also be imagined a situation where law professionals could introduce a late appeal;
3. Also, the litigation regarding the delaying the dispute can not be overlooked. Thus, art. 524 par.

[5] In accordance with art. 64 par. (4) of the already old regulation of the Civil Procedure Code, the remedy that should have been followed by the party unhappy with the court's resolution regarding the rejection as inadmissible of the intervention was either the appeal or the second appeal, depending on the moment in front of which the enforced resolution was pronounced. Thus, if we speak of the first instance, the remedy was the appeal, and if we consider a superior hierarchical court, the party had to file a second appeal.

[6] Art. 519 – 521 Civil procedure code.

[7] Art. 444 par. (1) Civil procedure code.

[8] Art. 468 par. (4) Civil procedure code.

(6) point 1 states that this litigation can be made "when the law sets a deadline for the completion of a procedure, either by pronouncement or by motivating a decision, but this term has been fulfilled without result[9]";

4. The non-contentious judicial procedure is also affected, which is why we are drawing the attention to the content of art. 534 par. (3): "The term of appeal shall run from the pronouncement, for those present at the last hearing, and from the communication, for those who have been absent[10]";
5. Concerning the precautionary and provisional measures, especially the distraint upon property and the court receivership, art. 957 par. (1) and art. 975 par. (4), in conjunction with the postponement of the pronouncement, may create difficulties as well.
6. Regarding the property sale in the proceedings of the judicial division, we must also draw the attention to the provisions of art. 991 par. (4): "The Regulations provided for in this article may be challenged separately only with appeal, within 15 days starting from the pronouncement[11]".

As one can easily notice, these articles are just a few examples of legal provisions that have the potential to generate frustration and even create discriminatory situations when they will be applied in corroboration with the postponement of pronouncement.

Consequently, it is absolutely necessary to note that the major issue is the formula "*by making the solution available at the disposal of the parties through the court's record office*". Thus, we consider that it would be beneficial that the the Romanian legislator analize the situation, in order to determine whether this formula actually meets the needs of the society in the field of justice or creates useless difficulties when applied, that could be easily avoided.

## 5. Conclusions

The normative acts, therefore the legislation as a whole, must be predictable and be drafted in such a way that they can be considered clear. However, we consider that these two requirements are not fully or even partially achieved in terms of art. 396 par. (2) Civil Procedure Code. The article is not clear even for law professionals, not to mention for the parties of a litigation that don't have an attorney, since a decision by the Constitutional Court of Romania was needed to set and try to clarify a specific term.

However, the present article does not question in any way the applicability of the Romanian Constitutional Court' Decision no. 454/2018, since we are not able to begin such an approach. It is believed, nonetheless, that in the future, it can not be ruled out the idea of completing the article in question even with what the Constitutional Court explicitly mentioned in the decision. Thus, we appreciate that it would be welcome to fill in the clarification that the terms that flow from the pronouncement will be considered from the date when the dispute is postponed and the court actually pronounces the solution. In this way, there would be no confusion, as the article would be much clearer than in its present form.

S-ar putea sa se considere pe viitor ca nu este necesara o asemenea adaugire, motiv pentru care articolul ar urma sa fie scurtat in mod corespunzator.

Thn again, a modification of the article should not be totally excluded from the future analysis, in the sense of excluding the phrase referring to making the solution available to the parties through the court`s record office. In fact, this is the concept that has generated the most concerns and even an objection of unconstitutionality, which is why the regulation may need to be further analyzed by the Romanian legislator. Therefore, the legislatior may reach to the conclusion that such an addition is not necessary, which is why it is perfectly possible that the article be shortened accordingly.

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- Law no. 310/2018 for amending and completing the Law no. 134/2010 on the Civil Procedure Code, as well as for amending and completing other normative acts;
- Law no. 134/2010 on the Civil Procedure Code;
- https://ccr.ro/;
- https://www.juridice.ro/.


[9] Art. 524 par. (6) point 1 Civil procedure code.
[10] Art. 534 par. (3) Civil procedure code.
[11] Art. 991 par. (4) Civil procedure code.

# THE LIMITS OF RECOURSE TO FORCE IN THE CONTEXT OF CONTEMPORARY GEOPOLITICS

**Sandra Sophie-Elise OLĂNESCU**[*]

**Abstract**

*Recourse to force represents a highly controversial subject matter, given its political sensitivity, as well as the legal framework that authorizes it.*

*At the present time, it has commonly been assumed that recourse to force is highly forbidden in International Law. However, modern history has shown that this rule is strictly a desiderate that may be unobserved in certain circumstances by states, with the tacit consent that the International Society has expressed through its inactiveness.*

*Thus, are military interventions of foreign states within the territory of other states legitimate? If so, how can reasonable motives be regulated to legitimate such actions under International Law?*

*In this context, is recourse to force infringing the notion of external sovereignty, that serves both at protecting the states' identity and personality, as well as at preserving individuals from armed conflicts?*

*The purpose of this paper is to find possible answers to these questions, considering the trends in contemporary geopolitics.*

**Keywords:** *recourse to force, state, military intervention, sovereignty, infringement*

## 1. Introduction

### 1.1. Recourse to force – from rule of war to regulated exception in contemporary society

From a historical standpoint, it is widely acknowledged that recourse to force was the main tool for waging wars, "*as a legitimate means of policy, its foremost aim changing territorial boundaries*"[1].

Moreover, while waiting for the founding of The League of Nations, the right to war (*jus ad bellum*) was regarded as a normal manifestation of state sovereignty and as a means of resolving disputes between States[2].

In other words, recourse to force was regarded, up until the beginning of the 20th century, on the one hand, as an instrument in the use of military force in international relations between States, in particular for the conquest of territories and State expansion, and, on the other hand, as a legitimate expression of state sovereignty, which could not be bordered by willpowers expressed externally.

As a result, most international treaties concluded between States were more likely regulating the rules of war, rather than stating the rules of peaceful settlement of disputes between States, in order to avoid recourse to force in such cases.

Thus, at the end of the 19th century, the most striking concern at international level was the aim to find optimal solutions which would be in agreement with State sovereignty for the exclusion of war as a means of resolving conflicts between States.

The first attempts to seclude war as a means of regulation of disputes between States and imposing peaceful means therewith took place towards the end of the 19th century.

However, long before this period, there has been another noticeable effort, in the form of the Westphalian Peace Treaty of 1648. According to this agreement, European states arranged to end a distressing long war waged on religious and territorial limitations. The importance of this treaty, as concerns the exclusion of war in international affairs, resides in „*the separation of domestic, especially religious, and international affairs, that has strongly influenced both the drafting and interpretation of the prohibition of the use of force*". Nevertheless, it should be underlined that in accordance with traditional understanding, „*domestic affairs cannot serve as an exception from the prohibition of the use of force in international relations*"[3].

Going back to international regulations with an impact on the elimination of war as a legitimate means of resolving international disputes, it shall be emphasized that the Hague Peace Conferences of 1899 and 1907, that were gathered under the auspices of peace, disarmament and arbitrage, tried to solve the problem of disarmament, unsuccessfully. Nonetheless, an important victory of the two conferences resides in the systematization and perfection of the diplomatic procedures for regulating disputes, the consecration of Arbitration under peaceful means, as well as the institutionalization of International Jurisdiction. As an example, regarding the recovery of contractual debts,

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[1] Sebastian Heselhaus, *International Law and the Use of Force*, Encyclopedia of Life Support Systems (EOLSS), p. 2, available here: https://www.eolss.net/Sample-Chapters/C14/E1-36-01-02.pdf;

[2] Raluca-Miga Beșteliu, *Drept internațional public. Vol. II. Ediția 2,* ed. C.H. Beck, Bucharest, 2014, p. 161;

[3] Sebastian Heselhaus, *op.cit.*;

the Hague Convention II (Drago Porter Convention) imposed a type of prohibition on recourse to armed force provided that the debtor State shall accept and submit to an arbitrational settlement[4]. However, as concerns the settlement of conflicts between states, these two major events could not ascertain a solution to exclude war. Thus, States could continue to determine by their own free will the means of settling international disputes, whether these means were peaceful or involved the recourse to force.

Afterwards, the League of Nations Covenant was primarily aimed at drawing up principles and rules, as well as establishing an institutionalized framework for peacekeeping and organizing nations to prevent and avoid wars. Thus, for the first time in contemporary history, establishing international limitations on the right of States to resort to war was successfully achieved. Despite this notable accomplishment, the Covenant did not prohibit *per se* the use of war, thus recourse to force in international relations was still permitted.

Following the League of Nations Covenant, a series of treaties and agreements were concluded between States regarding the limitation of recourse to force in International Society. The relevant period during which these treaties have been concluded extends from 1925 to 1935, all of which are aimed at establishing rules of International Law in relation to non-recourse to war and the use of peaceful means of dispute resolution between States. One of the most important treaties is the General Treaty for Renunciation of War as an Instrument of National Policy, known as *the Briand-Kellogg Treaty*, signed in Paris on 26 August 1928 and entered into force on 24 July 1929.

According to Article 2 of the Briand-Kellogg Pact, "*The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means*"[5]. Parties failing to abide by this commitment "*should be denied of the benefits furnished by [the] treaty*". Nevertheless, the Pact does not provide any sanctions or collective compulsion measures in respect of possible violations of the prohibition on recourse to war. Moreover, this treaty does not even refer to banning of other means of armed force use except for war, which is expressly prohibited by its provisions.

As such, it is once again proved that the International Society was not prepared at that moment for the exclusion of recourse to force in international relations between States.

Finally, with the United Nations Charter (the U.N. Charter), the overall prohibition of recourse to force has become not only an international obligation of Member States, but even a fundamental principle of International Law, governed by o peremptory norms of general International Law. Thus, Article 2 paragraph 4 of the U.N. Charter sets forth a ban on "*the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the U.N.*". In other words, for the first time in modern history, a general rule of "*peaceful means of dispute resolution*" (Article 33 of the U.N. Charter) and "*general prohibition of recourse to force*" was adopted by the International Society. In addition, the U.N. Charter not only excluder war as a means of international relation between Member States but also prohibits measures short of war. The Charter comprises also one exception that permits States to recourse to force as an expression of the right of self-defense.

Probably the most important progress made at international level is that the U.N. Charter provides for express coercive measures that can possibly be taken by the U.N. in case of violation of the general principle of non-recourse to force, as established by Article 39.

### 1.2. The principle of non-recourse to force or force threat in international relations

As concerns the concept of "recourse to force" it has been linked, in international affairs, to relationship between States. Thus, given that recourse to force has been generally seen as a means of dispute resolution that may occur between States, at a certain time, as well as the consequences following such a conduct (especially World War II), the International Society had to come with better solutions that did not imply the use of military forces. In other words, the 20th century was marked by a quest for States to find an optimal manner to solve international disputes without the high price that humanity had to pay at its beginning.

According to Article 2 paragraph 4 of the U.N. Charter "*all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*".

Hence, the U.N. Charter expressly states that the territory of a State cannot be subject to occupation by use of armed force, nor to territorial expansion by States through use force or force threat exercised against other States. Moreover, it is strictly forbidden to make use of force or of force threats against the political independence of other States[6].

However, the U.N. Charter legitimates recourse to force in merely two exceptional situations: as exercise of the right to self-defense and for the purpose of maintaining international peace and security.

As concerns the right to self-defense, Article 51 of the U.N. Charter states that nothing "shall impair the

[4] Sebastian Heselhaus, *op.cit.*;

[5] *The Briand–Kellogg Pact 1928*, Yale University, available here: http://avalon.law.yale.edu/20th_century/kbpact.asp. Romania acceded to the Briand–Kellogg Pact in 1929;

[6] Raluca-Miga Beșteliu, *op.cit*., p. 162;

inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.".

By interpreting the above quoted text, it follows that recourse to force, even in the case of self-defense, is strictly limited to the period prior to that the Security Council manages to take the necessary measures to maintain international peace and security. Additionally, it shall be noted that the right to self-defense regards not only the State against which is triggered by the armed attack, but also other Member States that are authorized to intervene in order to counteract the armed assault against the targeted Member State.

Consequently, recourse to force under Article 51 of the U.N. Charter shall be legitimate provided that the following requirements are met:

a) recourse to force is necessary to protect the security of the Member State targeted by an armed attack;
b) recourse to force is proportionate to the intensity of the armed attack;
c) measures taken by exercise of the right to self-defense are immediately reported to the Security Council.

The second situation that authorizes recourse to force under the provisions of the U.N. Charter is expressly stated by Article 39. According to this text, "*the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41[7] and 42[8], to maintain or restore international peace and security.*". In other words, Member States are approved to use force in order to preserve international peace and security, under the collective security system constituted by the U.N. Charter.

With that being said, there is a legitimate question arising from the system implemented by the U.N. Charter that authorizes recourse to (armed) force: how can abuse of recourse to force be identified and stopped, if it is at the shelter of the mask of an intervention aimed at maintaining international peace and security?

This paper aims to find the answer to this question, as well as to many others, by reporting on a practical case that has put a striking footprint on contemporary International Law: Kosovo.

## 2. The Kosovo Case Study

### 2.1. Historical overview

Even before the end of the hostilities in 1945, the United Nations have expressed the natural wish of its Members to ensure peace and prosperity. At least these where the declared objectives.

Despite the development of nuclear weapons and intercontinental missiles, the world did not go through a new global conflict since the end of World War II, although at least two times – during the Korean war of 1951 as well as during the Cuban crisis in 1962 – the risk escalated in that direction.

The United Nations did not always interfere to stop conflicts, many of them leading to heavy fighting, but when they did, the results were not conclusive in all cases, as the Middle East conflict proves it.

The preamble of the U.N. Charter states the wish of the representatives of the nations to "*save future generations from the scourge of war which two times during a human life has brought so much suffering to human kind".*

The first failure of the U.N. was the actual impossibility to maintain international peace and security and, consequently, the incapacity to adopt efficient collective measures to prevent and remove the threats against peace, suppress acts of aggression and solve through peaceful means the litigations and situations which could endanger peace.

So, the members of the United Nations committed, among others, to solve international disputes with peaceful methods and abstain from using force or threats with the use of force, except for self-defence or maintaining peace and international security cases.

According to the terms of the Charter, the General Assembly and the Security Council could interfere in any litigation whose extension could threaten the international peace and security but limited only to recommendations which were not legally binding.

Only the Security Council has the power to decide, according to Chapter VII, when to actually act in case of a peace threat, of the infringement of the peace or an act of aggression.

So, the Security Council could not only decide on the mandatory preventive coercive measures, but also on the repressive measures involving, if necessary, the use of armed forces.

[7] The U.N. Charter, Article 41: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations";

[8] The U.N. Charter, Article 42: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.";

For this, it was provided that the armed forces will be made available to the Council by the member states, according to the agreements concluded with it.

With all the "efforts" of Member States permanently in the Security Council to use their veto right in blocking the intervention in certain conflict areas, the U.N. efforts to re-establish peace did not fail. If we stick only with disputes which lead to the appearance of the hostilities, we can consider that since 1945 thirty focal points started in the world.

These conflicts can be grouped in four categories: the "*classic*", border disputes, especially in Latin America, but also in Africa and the Far East, civil wars, which turned into international conflicts because of the interference of external powers, to which colonization wars and armed conflicts related to the ideological opposition of both East and West blocks were added.

The U.N. did not interfere in at least a third of these conflicts. Three reasons which explain this passivity can be identified, even if they don't justify it:

First of all, various conflicts where examined in a regional framework or at least in that of the Organization of the American States (OSA) (for example, the conflict between El Salvador and Honduras in 1969) or in that of the Organization of African Unity (OAU) (for example: the border conflict between Ethiopia and Somalia in 1964).

Actually, the U.N. Charter encourages the resolution of international disputes in a regional framework, but the ambiguous phrasing of the Charter in chapter VIII questions the priority of notification of the regional organizations.

But the war returned strongly in the centre of the debates related to international law. And it did not return as a final ban practice, but as an aggressive and violent manner used by States to establish their own interests, and not as a scourge which can be avoided and repressed[9]. On the contrary, the war appears as a method to check, in certain contexts, the legitimacy, legal admissibility or even its use as method to apply the law, guaranteeing the compliance with "*international legitimacy*", "*war against terrorism*", "*preventive war*", "*war against rogue states*".

So, in the current context, we no longer refer to "*the war against poverty*" or the "*war against illiteracy and ignorance*", but we face a current reality in which the international community is called to express itself in relation to the threats related to the abusive use of force, according to the various partisan interests.

Each of the "*new wars*" in the past decade - from the first Gulf war to the Kosovo war, the Iraq war - clearly represent a challenge for the law, in general, and for the international law especially.

From all these wars, we think that Kosovo (March - June 1999) raises the most delicate doubts and problems from this perspective. In fact, this is the most "*moral*" of all these modern wars, the "*fairest*": a humanitarian intervention, implemented by the NATO Member States to avoid sacrificing the innocents, to stop the genocide committed by an oppressive regime and a bloody tyrant[10].

No matter if this is accurate, in the case of Kosovo there is a dilemma when there seems to be no other way to save an entire population but by force, through serious infringements of the fundamental rights, the only possibility found being to use the armed force against the government which declares to be a defender and protector of these rights.

In order to express opinions about such cases, the seriousness of the background problem cannot be omitted: if actually an assessment, no matter what this is, which confirms the possibility of an armed intervention, "*humanitarian*" can mean supplying an easy justification for hegemonic and aggressive policies, to unjustified and violent intrusion acts from one or more states into the affairs of other states and peoples, lethal attacks and military invasions.

On the other hand, such an "*assessment*" which stigmatizes the other party without any right of appeal, without the right to appeal against the right/ lawfulness of an intervention in force, can offer a convenient alibi, no matter the opinion of the international community in front of a real danger of humanitarian tragedies, contributing in this manner to abandoning the tragedy of a whole population subject to racist and dictatorial regimes.

### 2.2. The use of armed forces for the protection of human rights in the recent international practice

In order to attempt an assessment of the Kosovo war in general and of the humanitarian military intervention, in light of the current international legislation, it is essential to restore the wider image of the various hypothesis in which, in the past year, the armed force was used to protect human rights at international level.

A first group of cases is related to the system of the United Nations and, especially, to the operations to maintain (or restore) the peace implemented or authorized by the Security Council.

A use – no matter how limited – of armed forces for humanitarian purposes can be provided and took place sometimes in the context of peace maintenance operations in the strict meaning (sending the "*blue helmets*" in a state or in the border areas), as forces which target separating the forces in conflict or guaranteeing security and public order in serious

[9] In 1945, the founding states of the United Nations have solemnly declared that the Charter they would sign was based on the common interest to "*save future generations from the scourge of war, which two times during this generation lead to countless sufferings of humanity*".

[10] Regarding the terms "*fair*" or "*moral*" in relation to Kosovo, it is worth mentioning the article of President Clinton in The New York Times on May 24, 1999 ("*My Just War*"), the speech of first Minister Blair at the Economy Club of Chicago of April 22, 1999, Cassese "*Le cinque regole per una guerra giusta*", in AA. VV., "*L'ultima crociata"*, Roma, 1999, 74 ss., the observations of Brutti, in "*Guerra giusta o guerra utile? Le norme, l'esperienza, gli interessi*", in *Italiani europei*, 2002, n. 3, 165-169;

internal instability situations) or "*the consolidation of the post-conflict peace (sending military and civil staff to adjust the countries destroyed by civil wars, restored the conjunctive tissue of the civil society and political institutions [...], promoting the national reconciliation and the observance of human rights*"[11].

In both cases, we refer to the operations established by the United Nations' Security Council (more seldom by the General Assembly), performed under the guidance and control of the General Secretary's Office and implemented with the agreement of the territorial state in which the missions must be performed. In these type of operations, the use of force by the military staff, or by the police sent in the area, is generally allowed for legitimate self-defence or, in the measure strictly necessary to obtain the humanitarian purposes assigned to the mission: for example, to defend the populations in subject against violent attacks, prevent the serious infringement of the fundamental rights, protect humanitarian activity against non-governmental organizations, guarantee the security of humanitarian corridors or protected areas (for example, for groups in a certain ethnic group or refugee camps[12], out of which one can recall the interventions of the United Nations in Salvador (ONUSAL, 1991), Cambodia (UNTAC, 1992), Mozambique (ONUMOZ, 1992), Angola (UNAVEM III, 1995), Sierra Leone (UNAMSIL, 1999) and the first intervention of the "blue helmets" in Somalia (UNOSOM I, 1992)[13].

The use of force for humanitarian purposes does not bring, in this type of operation, specific admissibility problems in relation to international law. In fact, these operations take place with the approval of the territorial state as well as of any other contradictory party present in the area where the mission will take place (groups organized by insurgents, organized ethnic fractions). So these groups do not involve any form of violence against the territorial state, or against other international subjects: consequently they are not an international military coercion.

In addition, even if their legal grounds are not clearly identified, the related operations can be debated in - the Security Council - which has the power to use force in order to maintain international peace and security, and then (the operations) are led by military groups assigned by the states under the guidance and control of the General Secretary of the United Nations, to guarantee the impartiality of the intervention and its compliance with the purposes officially established for the mission.

A higher frequency in the "*humanitarian*" use of armed forces can be found in the hypothesis in which such use, although appeared in the context of a peace maintenance operation as the previous one, is implemented without considering the approval of the territorial sovereignty and is not limited to the purely "passive" dimension of the legitimate defence and protection of the populations or localities entrusted during the mission. This can happen, for example, in case of an "anarchy" situation, meaning a total collapse of the governmental organization, of the territorial state and when, because of the aggravation of dangers from which the populations must be protected or for the military and civil safety involved in the mission, it is necessary to disarm the hostile groups present in the surrounding territory. In these cases, the Security Council of the United Nations extends the initial mandate of the mission, assigning to the groups sent not only the task to keep the peace, but also apply the peace, apply, by force, objectives which are indispensable to the performance of the mission in that territory, in safety conditions and in a safe environment.[14] The episodes in which such situations appeared: the mandates for ensuring peace assigned to the United Nations protection force in former Yugoslavia (UNPROFOR, 1992), the second Force of the United Nations which operates in Somalia (UNOSOM II, 1993) and the Forces of the Nations sent in Rwanda (UNAMIR, 1992).

In relation to this type of intervention, one must notice that independently of the approval of the territorial state and of the other possible parties at conflict and which needs a real military constraint, this was always decided by the Security Council based on the assumption of its need to keep or re-establish peace and international security, in the presence of a threat against peace or a peace which is already infringed. This would justify its legitimacy in terms of international law as, it is known, it belongs to the Security Council, according to chapter VII of the UN Charta (especially art. 42) which provides using actions through military force in any case considered necessary to maintain international peace and security, in the presence not only of an act of aggression, but also an infringement of the peace or a simple threat against the peace.

Another type of "*humanitarian*" armed actions, related to the United Nations system, includes the interventions which are not directly organized and performed by the UN bodies, but which are authorized only by the Security Council, to be then implemented

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[11] Così Marchisio, *L'ONU. Il diritto delle Nazioni Unite*, Bologna, 2000, p. 260. Antonio Marchesi, *I diritti dell'uomo e le Nazioni Unite*, Milano, 1996, pp. 100-124;

[12] *Le développement du rôle du Conseil de Sécurité: peace-keeping and peace-building*, Dupuy (R.-J.), Dordrecht, 1993; *New Dimensions of Peace-Keeping*, Warner, Dordrecht-Boston-London, 1995; Ratner, *The New UN Peacekeeping: Building Peace in Lands of Conflict After the Cold War*, New York, 1995; Gargiulo, *Le Peace Keeping Operations delle Nazioni Unite. Contributo allo studio delle missioni di osservatori e delle forze militari per il mantenimento della pace*, Napoli, 2000;

[13] *Interventi delle Nazioni Unite e diritto internazionale*, Picone, Padova, 1995;

[14] Corten e Klein, *Action Humanitaire et Chapitre VII: la redéfinition du mandat et des moyens d'action des forces des Nations Unies*, in *AFDI*, 1995, 105.; Lattanzi, *Assistenza umanitaria e intervento d'umanità*, Torino, 1997, 56-67. Magagni, *L'adozione di misure coercitive a tutela dei diritti umani nella prassi del Consiglio di Sicurezza*, in *CS*, 1997, p. 655;

in practice by the individual states, groups of states or the so-called regional organizations[15] As examples we have the authorization of the Security Council for the member states "*to use all necessary means*" to re-establish a safe environment for the humanitarian operations in Somalia, authorization followed by the Restore Hope operation, led by the UNITAF multinational force, with a mainly American structure; the authorization to use all necessary measures to defend the "*protected areas*" in Bosnia, followed, among others, by the NATO air operations called Air Strikes in April 1994 and the Deliberated Force, in August/ September 95; the authorization to use all necessary means to protect the displaced masses, the refugees and civilians in danger in Rwanda, followed by the turquoise operation, led by six states, under the command of France, which aimed to create a humanitarian security area from June to August 1994.

The compliance with the international law in relation to this type of intervention is not really conclusive in relation to the U.N. Charter, which doesn't explicitly provide the possibility of the Council to directly exercise/use a certain armed force through its own military groups, or authorize the "*individual or coalition*" member states to use armed measures to maintain international peace and security. Such an authorization is explicitly provided only in Article 53 of the Charter, in favour of the "*regional organizations*". In any case, if it is considered extended - in virtue of a consolidated practice and not appealed against by the UN member states - the power to authorize the Security Council in favour of some states, groups of states (or organizations which do not fully comply with the requirements established for the "*regional organizations*" specified by Article 52 of the Charter), it does not mean that the use of armed force in this "*authorized context*" should not legitimately comply with the precise and pretty strict conditions and requirements.

First, the authorization should involve - as it happened in the actual cases specified above - the existence of a danger situation, clearly qualified by the Security Council as a threat against peace or an infringement of the international peace.

Second, the use of force (elliptically understood with the expression "any necessary means") should be exclusively conceived and limited to the object considered essential by the Council to re-establish or keep peace and security in the region: to re-establish a safe environment for the populations threatened or a situation in which it is possible to prevent a serious infringement of the fundamental rights of this population.

Last, the security measures should take place under the careful and constant supervision of the Security Council, eventually through the U.N. General Secretary, specifically appointed by the Council.

Moreover, this last condition is very difficult to achieve in practice and for sure it was not always performed in a satisfactory manner in the above specified cases. Moreover, it remains more than a doubt in relation to the conformity of the United Nations law in the use of the armed force which took place in these episodes.

No matter the assessment of the individual episodes, one can state, in principle, that the use of force for humanitarian purposes authorized by the Security Council, in the measure in which it complies with the above-specified requirements, is acceptable for the current international law and especially for the law of the United Nations. Still, it is important to recall that in order for the authorization and the consistent use of force to be legitimate, it must be justified by the need to maintain or re-establish a peace and security situation, meaning eliminate or reduce this particular type of peace infringement or peace threat, which consists in serious and systematic infringements of the most fundamental human rights (for example, the right to life, physical and mental integrity, not to be reduced to slavery, not to be discriminated and isolated because of race, ethnicity or religious belief).

Once a "*safe environment*" was created - a situation in which these fundamental rights are not exposed to the risk of being stepped on - the military force for humanitarian reasons no longer has a reason in the UN system, neither authorized nor applied. This is actually the substantial limit inherent to the coercive intervention provided to the Security Council based on chapter VII of the UN Charter: "guardian of the international public order" (or, if you prefer, "international cop") this body has, without a doubt, the right and obligation to put the state or the organized group which seriously infringes human rights in the situation in which they "cannot harm" (meaning they cannot continue their barbaric brutality), re-establishing security and eliminating this peace threat; but it does not have the right to interfere in another manner or go on.

Consequently, the Council cannot legitimately "*judge", "sanction" or "punish*" the state or the group in charge, nor does it perform violent constraints to impose a change of political regime. The use of armed forces, even if partially motivated by the humanitarian protection purposes, which has the aim to remove a political regime, would be totally against the rights the United Nations has, would be an illegal action, even if adopted according to the procedural rules of the UN Charter[16]

Another type of cases in which in the past years there an international use of the armed forces for

[15] Freudenschuss, Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council, in EJIL, 1994, p. 492; Gaja, Use of Force Made or Authorized by the United Nations, in The United Nations at Age Fifty, a cura di Tomuschat, Dordrecht, 1995, p. 39.; Lattanzi, op. cit., p. 71.; Sarooshi, The United Nations and the Development of Collective Security. The Delegation by the Un Security Council of its Chapter VII Powers, Oxford, 1999;

[16] Arangio-Ruiz, On the Security Council's 'Law Making', in RDI, 2000, p. 609;

"humanitarian" purposes was, is the interventions established outside the decision-making system of the United Nations, which includes the Kosovo war[17].

A first type is given by the interventions performed with the agreement of the territorial state: the operation performed by ECOWAS ("The economic community of the states in Western Africa"), in Liberia between 1990-1991 with the agreement of the then government in charge (but against the will of the biggest insurgent group there) - a force of about 10.000 men (ECOMOG), mainly Nigerian, with the purpose - at least declared - to maintain public order and prevent the serious human rights infringements as a result of the ethnic tribal conflicts they produced and are still producing. Also, it could refer to the IFOR (Implementation Force) case, the multinational force mainly formed by the groups supplied by the NATO countries, provided in the Dayton agreements in 1995 and performed in Bosnia and Herzegovina, with the approval of all interested parties, Bosnia, Croatia, the Yugoslav Federation, the Croatian-Muslim Federation and the so-called Republika Srpská) with the purpose - among others - to guarantee, if necessary, the use of force, the application of the peace plan and a situation of total respect of the human rights.

In fact, as already observed for the peace maintenance and peace consolidation operations, the decisions adopted in the United Nations Organization do not involve military constraint towards the territorial state or other international subjects.

Very different is the case in which the "*humanitarian*" armed intervention of the states or coalition of states takes place without the agreement of the territorial state or even openly against that state. Precisely in this category we must follow the intervention of the NATO countries in Kosovo. And in the same category we have another famous episode: the Provide Comfort operation in the Iraqi Kurdistan.

In relation to the latter, it must be recalled that the real humanitarian intervention, meant to allow the humanitarian activity of the United Nations and of the non-governmental organizations in favour of the Kurdish populations submitted to the repressive regime of Saddam Hussein, although the mandate of the UN Security Council was very limited in time and intensity, the ground forces and the aircrafts of the "interfering" coalition's countries (US, France, The United Kingdom, Italy, Spain, The Netherlands and Australia) entered Iraq on April 17, 1991, creating certain safe enclaves in Kurdistan (the so-called safe havens) and establishing a flight free area, above the 36th parallel, without the need to use war violence, but limited to the application of a force threat. Although the next day (April 18) Iraq also reached an agreement (supplemented by the previous agreement of May 25), which allowed not only the performance of the humanitarian aid operations in the area and the establishment of safe havens, but also to the displacement of 500 UN "white helmets". This displacement was performed; the ground troops of the coalition withdrew the next July. But the flight corridor area remained, to which another was added, under parallel 32, by unilateral decision of the United States. It is important to underline that imposing and maintaining both flight interdiction areas have nothing "humanitarian" about them and, consequently, besides being illegitimate, are away from the interest area of this analysis.

In relation to the Provide Comfort operation, the Kosovo intervention had a very different area and resonance: in fact, after this intervention, the world problem was brought in front of the global public opinion, that of humanitarian intervention, with all its implications.

Before attempting a judicial assessment, it is necessary to recall the facts briefly (10). In the spring-summer of 1998, a wide repression campaign was launched against the ethnic Albanian population by the Yugoslav army and police, started also by the intensification of the guerrilla war and of the terrorist activity of UCK, the "Kosovo Independence" army. In autumn, according to the estimates of the High UN Commissary Office for Refugees, there were already over 200.000 refugees. Still, a big part of them (about 100.000) were convinced to return to their places of origin as a result of the agreement between Holbrooke - the US representative and Milosevic, in relation to the withdrawal of a big part of the Yugoslav armed forces in the area, under the control of an international mission established by OSCE.

In January 1999, the situation (Albania's guerrilla war and the Yugoslav repression) worsened again, until the very serious episode of Racak (where - for reasons and conditions not fully clarified - 45 Albanian ethnics were killed and mutilated), sealing in this manner also the failure of the OSCE mission.

In February, the negotiations performed at Rambouillet between an Albanian delegation and a Yugoslav delegation also failed, in the presence and under the pressure of the c.d. Contact group member states (United States, The United Kingdom, Russia, France, Germany and Italy). The proposed agreement was in fact rejected by the Albanian delegation (at it did not clearly stipulate the future independence of Kosovo) as well as by the Yugoslav one (as it provided detaching on the territory of Yugoslavia an international military force under the command of NATO). Still, in March, the Albanian party - convinced by the reinsurances of the United States, declared to accept the proposal. Yugoslavia insists in its refusal, perhaps in the conviction it managed to defeat the UCK guerrillas, despite the NATO military intervention, maybe thinking it could take advantage in case of a wider and more intense conflict, to eliminate for good part of the Albanian population in Kosovo and, in case

[17] Ronzitti, Uso della forza e intervento di umanità, in NATO, conflitto in Kosovo e Costituzione italiana, Milano, 2000, p. 1, Lattanzi, op. cit., p. 68<

of a division of the region, to keep a "safe" an ethnically controllable part of Kosovo.

On March 20, a new, painful and repressive campaign of the Federal Republic of Yugoslavia starts in Kosovo which, in a few days, leads to 15 000 refugees.

On March 24, the NATO countries start the bombing, which continues until June 9. The strategy followed by the Alliance immediately and clearly shows that the immediate objective is not to avoid an imminent humanitarian tragedy, but to protect the Albanian population in danger.

This is sooner the "mediated" and "indirect" objective wished to be obtained by reaching the objective to defeat Milosevic's Yugoslavia, meaning imposing the abandonment of Kosovo as counterparty for not destroying Serbia.

The Yugoslav military forces are than attacked and the air defence destroyed; but, considering the weak results of this operation, the bombings extend to non-military objectives; industrial plants, oil refineries, oil pipes, bridges, railways and roads, until the bombing of Belgrade and some objectives such as the head office of the Yugoslavian television, the head offices and residences of Milosevic and his family.

Meanwhile - and predictable - the Serbian repression in Kosovo intensifies. The infringement and worsening of the human rights violation, an "Ethnic cleaning" campaign, which determines the massive exodus of the Albanian population in only two months, especially in relation to Albania and Macedonia (The High UN Commission talks about 800.000 new refugees in two months)[18]

At the beginning of June, after Yugoslavia accepted the peace plan drafted between the G8 countries (the plan was also submitted to the general approval of China) and the inclusion of this plan in the resolution 1244 of the UN Security Council, the NATO countries officially ended the bombing, on June 10, 1999.

Between June-November the same year, almost all exiled Albanians returned, but, together with the entry of the mainly NATO multinational force (KFOR, the Kosovo force) and the resumption of the biggest part of the CK extremist fraction, the Kosovo Serbian diaspora starts. Approximately 200.000 Serbians leave their places of origin. Approximately 60.000 of them remain in Kosovo, focusing in certain "leopard-skin" areas, which need constant protection against vendettas and acts of violence. The hope of a multi-ethnic Kosovo seems, at least for the near future, affected for good. [19]

### 2.3. Arguments supporting the Kosovo war legitimacy thesis in terms of international law

The legitimate question made is if the Kosovo war and - in general - the unilateral and "*unauthorized*" armed humanitarian intervention can be or not be considered legitimate according to the current international law.

In order to assess this matter, it is necessary to examine the various legal arguments proposed to justify the NATO intervention in Kosovo.

A first series of arguments outline the NATO intervention as descendant or "tangible" in another manner to the international peace and security maintenance system, which operates in the United Nations.

So, it was suggested that the use of force against Yugoslavia was authorized by the previous resolutions of the Security Council, precisely through the Resolution 1199 of September 23, 1998 and 1203 of October 24 the same year.[20]

If read the two resolutions, it is easily obvious that while the situation created in Kosovo is classified as a threat against peace, it did not reveal any authorization, even ambiguous, to use armed forces. On the contrary, those acts of the Council are characterized, as noticed, by a substantial equidistance towards the parties in the already on-going conflict: both parties are actually being reproached the acts of violence already committed, and are called to avoid the catastrophic humanitarian risk[21]

In addition, the resolutions quoted always repeat the obligation of all U.N. Member States to respect the sovereignty and territorial integrity of the Yugoslav Federation, also underlining the main responsibility of the Security Council in relation to keeping and maintaining international peace and security.

In a different manner, and without denying that the NATO bombings were officially "unauthorized" when they took place (because of the lack of authorization by the Security Council) it was argued - in light of a very "free" reading of the 1244 Resolution of June 10, 1999 - that the Council itself would have corrected the inherent vice of the NATO bombings, approving also the implicit adoption of the military action performed by the countries of the Alliance[22] This justification must also be rejected.

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[18] Pretelli, La crisi del Kosovo e l'intervento della Nato, in Studi Urbinati, 1999/2000, pp.295, L'intervento in Kosovo - Aspetti internazionalistici e interni, de Sciso, Milano, 2001, p. 189;

[19] Lo Savio, Esodi di massa e assistenza umanitaria nella crisi del Kosovo, in L'intervento in Kosovo, cit., p. 99;

[20] Balanzino, NATO's Actions to Uphold Human Rights and Democratic Values in Kosovo: A Test Case for a New Alliance, in Fordham ILJ, 1999, 364 .; Bermejo Gracía, Cuestiones actuales referentes al uso de la fuerza en el derecho internacionál, in An. Der. Int., 1999, 3-70; Zanghì, Il Kosovo fra Nazioni Unite e diritto internazionale, in I diritti dell'uomo - cronache e battaglie, 1998, n. 3, 57; Saulle, Il Kosovo e il diritto internazionale, ibid., 53-54; Charney, Anticipatory Humanitarian Intervention in Kosovo, in AJIL, 1999, 834-841; Falk, Kosovo, World Order, and the Future of International Law, ibid., 847-857; Ferraris, La NATO, l'Europa e la guerra del Kosovo, in Aff. Est., 1999, pp. 492-507;

[21] Delbrück, *op.cit*., 28; Leanza, *op.cit*., 28; Momtaz, *op. cit.*, 98; Weckel, *op.cit*., pp. 21-25;

[22] *L'intervento in Kosovo*, cit., p. 57. Gargiulo, *La guerra: profili di diritto internazionale*, in *La Guerra - Profili di diritto internazionale e diritto interno*, Quaderni dell'Istituto di studi giuridici dell'Università di Teramo, n. 3, Napoli, 2002, pp. 88-89.

First of all, no matter how "generous" are the powers assigned to the Security Council on the UN Charter, they must be understood so that, in virtue of a subsequent practice, what was declared illegal from the start cannot be declared legal. One must not forget that the Council is granted mandatory legal powers only for the specific purpose to establish, during crisis periods, the necessary measures to restore and maintain international peace and security, and not for general governmental purposes or in relation to the assessment and "replacement" of the law[23]

Bur no matter the general aspects, it is enough to read the 1244 resolution previously mentioned to understand it does not involve any approval of the armed intervention. Moreover, in this resolution, the Council, starting from the situation decided as a result of this intervention - meaning from the acceptance of the peace plan by Yugoslavia - starts, according to this plan, the next steps which must be performed to obtain the full restoration of the peace and security in the area and the establishment of a temporary civil administration regime for Kosovo, organized and managed by the United Nations. In other words, the resolution 1244 looks towards the future and does not revise the past[24]

Moreover, one cannot ignore that two important permanent members of the Council - Russia and China - a few days after the bombing, voted to adopt a resolution condemning the military action of NATO[25].

The reality is that the silence regarding the military action, in the text of this resolution, was the only diplomatically viable method to return the Kosovo back in the hands of the United Nations, to entrust the task to manage the "post-war" to the world organization, which would establish and control a peaceful reconstruction of the area, respecting the human rights, the self-determination of the ethnic groups present there and, as much as possible, the territorial integrity of the Federal Republic of Yugoslavia.

If we wish to talk, in relation to this, about the "return to the international lawfulness", it is a substantially accepted statement, but the "return to lawfulness" involves being aware of the "illegality" previously committed by the NATO member states with their intervention and should be understood as a wish to close the "illegality brackets" and not in place of "amnesty" or even a "blessing" for what happened[26]

Briefly, with the silencing of the 1244 Resolution, no armed intervention was approved or implicitly approved; it just spread a veil on it.

Another type of argument, proposed to explain the eligibility of the Kosovo intervention in light of the United Nations law, shifts the focus from the "procedural" size of their approval (or approval) by the Security Council, of the content of prohibition to use armed force, provided in the UN Charter.

It was especially claimed that the NATO intervention did not infringe this interdiction, as it would regard only the use of armed force incompatible with the purposes of the United Nations. And as the NATO member states would bomb the Federal Republic of Yugoslavia to protect human rights - especially the fundamental rights of the Albanian population in Kosovo - their action would be legitimate as off-line, de facto, according to one of the main purposes of the UN[27].

We consider this argument at least debatable.

As shown in the specialty literature, art. 2, paragraph 4 of the UN Charter, in this text's preparatory works, as it results from the construction given with the numerous statements of the General Assembly, from the studies made by most part of the most representative doctrine, the interdiction of the states to use armed force in international relations (an interdiction which, as known, is one of the pillars of the whole United Nations legal system) refers not only - always and in any case - to any use of the force against territorial integrity or political independence of a state, but to any use of force incompatible with one of the objectives established by the United Nations. In other words, it is an absolute interdiction (without affecting the legitimate individual and collective defence exception, as well as the hypothesis in which the use of force is legitimately applied or decided by the Security Council)[28]

Indeed, the use of military force, which does not aim to undermine the political independence or territorial integrity of a state, can never be compatible with the objective of "developing a friendly relationship between nations" [article 1 paragraph 2 of the UN Charter] or the "peaceful resolution of international litigations" (article 2 paragraph 1 of the Charter" or "the performance of the international cooperation, the resolution of the international problems of an economic, social, intellectual or humanitarian order" (art. 1, paragraph 3 of the Charter).

Besides the incompatibility of the armed intervention in Kosovo with the various purposes of the United Nations, it is incontestable that this intervention, in its manner, as well as in its objectives, was open against the political independence and, last, against the territorial integrity of the Federal Republic of Yugoslavia. Consequently, it is classified, without a doubt, in the type of war intervention explicitly condemned and forbidden by the United Nations Charter.

[23] Così Condorelli, *La risoluzione 1244(1999), op. cit*., pp. 36-41; Henkin, *op.cit*., p. 826.
[24] Arangio-Ruiz, *op. cit.*;
[25] Sciso, *op. cit.*, p. 60.
[26] The conviction resolution project submitted by Russia, India and Belarus), according to the U.N. document S/1999/328. in the Security Council,
[27] Gargiulo, *op. cit.*, p. 92;
[28] Leanza, *op. cit.*, 27-29; Sofaer, *op. cit.*, 12 ss.; Weckel, *op. cit.*, pp. 31-33;

A second set of arguments which can be supported as base for the admissibility, in the international law, of a NATO military intervention, do not appear at UN system level, but at international law level.

These are actually the arguments which must be analysed, because of the less clear, as well as more permissive content in relation to the United Nations law, of the international unwritten regulations regarding the obligations of the states to abstain from the use of armed forces and as the admissibility of the "humanitarian" intervention in the customs law field is aligned, in principle, in the presence of certain conditions, even by those which do not hesitate to define the serious specific action performed by the NATO countries in the spring of 1999.

So, a first argument refers to the notion of "state of necessity", which must be understood as the reason for exclusion of the illicit facts approved by the general international law.

As we know, this liability exemption provision excludes the illicit nature of the behaviour of a state, in case such behaviour is the only way the state can protect an essential interest due to a sure, serious and imminent danger. Consequently, one could argue that while the protection of the fundamental rights of each individual and each group, no matter the nationality and territory it is part of - the prevention of "humanitarian catastrophes" everywhere - the whole international community (and, consequently, for each state) must show an interest, an essential preoccupation, so that after the intervention of one or more states towards the state where a humanitarian tragedy took place, no matter how licit or objective is considered, is actually justified if it was the only manner to protect a similar interest, essentially "humanitarian"[29].

However, several reasons leave this type of explanation seriously unclear and, above all, its ability to establish the legal admissibility of an armed intervention such as that in Kosovo.

One must not forget there are important conditions for the "*state of necessity*" to justify the performance of an illicit international act. As it results from the International Liability Project of the States of the International Law Commission, a State may invoke the "*state of necessity*" as justification only if its conduct does not in turn undermine the essential interest of the State to which it is addressed (Article 25 of the CDI Project).

It is undeniable that an intervention like that of NATO in Kosovo seriously undermines the essential interest - actual and legal protection - of the state against which one acts: the interest in not violating its territory, not interfering with external forces in the affairs its internal (as a reflection of non-interference in the internal affairs of the state, territorial integrity and inviolability of the frontiers and the failure to return to armed force or the threat of force as fundamental principles of international law, as stated in the UN Charter, art. 1, paragraphs 4, 7 of the Charter). This is, in particular, the interest not to be subjected to forms of armed constraint against political independence, territorial integrity, not to say against the right to life of its own citizens.

In addition, the "*state of necessity*" cannot be invoked no matter the circumstances, and, in any case, to justify the infringement of the peremptory norms of the general international law (*i.e. the jus cogens regulations)*, according to article 26 of the CDI Project.

NATO's armed action - objectively taken into account in terms of conduct, scope and intensity - outlines a clear example of an armed attack against a state, a behaviour that is undoubtedly in contrast with the meaning of the obligation which arises from the general international rule of law that requires states to refrain from using to armed forces in their relations. No "humanitarian" or other kind of necessity would be proper to justify such a behaviour.
For this series of reasons, the concept "state of necessity" proves to be insufficient to justify the specific case of NATO's intervention in Kosovo, it is difficult to generally use the basis of the legal admissibility of armed humanitarian interventions.

According to another argument, the use of force for humanitarian purposes would be allowed through an ordinary ad hoc standard established before the entry in force of the San Francisco Charter and the UN Constitution, which has so far survived the prohibition to use force established in the United Nations system and in the existence of which the decision of the NATO countries to intervene in Kosovo is an important manifestation and confirmation[30]

Also, this explanation is not convincing. Regardless of the fact that the doctrine of legitimacy of humanitarian intervention is supported by a minority part of the internationalist doctrine (generally by the Anglo-Saxon culture), the data of the practice and beliefs repeatedly expressed by most states to reject it.

The period before the end of World War Two is not considered. It is well known that until then the use of the armed force in international relations and war as a direct means for a state to affirm its interests was admitted in the international law, in more comprehensive terms than "it was a contemporary legal state" (the one that has begun - to be introduced - with the United Nations). It should also be noted that, even in the less recent past, the practice of armed humanitarian interventions has been extremely rare, unless they date back to the mid-nineteenth century and, in particular, relate to interventions of the European powers.

The intervention cases mainly motivated by humanitarian purposes and put in practice in the presence of a real humanitarian emergency where very few:

- the intervention of the Arab Countries in 1948

[29] Ronzitti, *Diritto internazionale dei conflitti armati*, Torino, 2001, pp. 30-34;
[30] Ronzitti, Diritto internazionale dei conflitti armati, Torino, 2001, 30-34;

(after the proclamation of the State of Israel), motivated - among others - by the protection of the Arab population present in Palestine, which was immediately followed by strong protests in many states, including the United States and the Soviet Union;

- the intervention in 1971 of India against Pakistan over Bangladesh, for which India has, however, invoked beyond any legitimate defence and protection of the right to self-determination;
- the interventions, between 1978 and 1979, of Vietnam in northern Cambodia against the Pol-Pot regime and Tanzania in Uganda against the Amin regime; but even in these cases, the reasons for the interventions essentially refer to legitimate defence or to the matter of territorial sovereignty and have revealed the real intentions of the intermediate states to create or consolidate in their favour an area of regional influence (such interventions have, however, provoked the wide and intense disapproval of many states and, in particular, of European countries);
- the US interventions in Grenada (1983) and Panama (in 1988); In these cases, in addition to the fact that there is no evidence of humanitarian urgency, the US did not refer to humanitarian motivations but to the need to protect its compatriots in danger abroad and / or the existence of a consensus to intervene with the territorial state;
- the Provide Comfort Operation in the Iraqi Kurdistan in 1991: however, it has taken place in a context of widely and differently justified use of force against Iraq, in the absence of which it is unlikely that the humanitarian intervention in question in favour of the abandoned Kurds would have been done.

A different reasoning line, according to which the admissibility of the armed humanitarian interventions, like those in Kosovo, would be proven, refers to the obligation theory, *erga omnes*[31].

This theory starts from noticing the increasing importance in the international law of a limited core of regulations, placed to protect the fundamental values of the entire international community, from which precisely each *erga omnes* state obligation would derive, that is, the obligations to this community considered as a whole (or, according to another version of the theory in question, to all and each state)[32]. These rules include, for example, the prohibition of aggression, respect for the self-determination of peoples, prohibition of serious human rights violations. The violation by a State of the obligations under these rules would entitle any other state or group of states to act in order to undertake responsibility for the state which caused the violation. This would happen regardless if the State which acted was or was not "personally" affected by the violation, meaning if it suffered direct damage or the prejudice of its own subjective right. Rather states would have the right to act against the responsible state, as it is called "on behalf of and on behalf of" the entire international community or, if you prefer, to protect the value of the fundamental interest for these communities, affected by the violation committed. Each state or group of states may therefore claim from the responsible state: the cessation of the unlawful conduct still in progress, the repair (in a broad sense) of the material and moral damages produced, as well as the guarantee that the violation committed shall not happen again. And above all, each state would have the right, in order to obtain the performance of the obligation by the responsible state, to resort to "countermeasures" against it, if necessary: that is to say, sanctioning behaviours which, per se, violate the rights of the responsible state , but which lose their illegality because they appear as a reaction to an offense already committed. This final right would expand to allow - in case of very serious violations of the *erga omnes* obligations - the unilateral use, by one or more states, to armed force against the responsible state. This would be acceptable in particular when the collective security system provided by the UN Charter and centred on the coercive powers of the Security Council has been paralyzed, that is, due to the veto of a permanent member and to implement, if necessary, the use of military force to sanction the responsible state and to guarantee the protection of the fundamental value violated by the behaviour of the state concerned.

Such a hypothesis would be given precisely in the presence of serious and systematic infringements of the human rights by a state, for which the Security Council could not establish a term by using the forces authorized by the states or regional organizations. The case of Kosovo would offer a clear example of this situation[33].

Also, it is not the case to refer to the evolutions of the related theory, which give rise to bigger doubts. These concerns regard, in particular, the interpretation of the United Nations Collective Security System as an appropriate mechanism for the enforcement of the author's liability obligations for the serious violation of the international law and the consideration of the intended Security Council's role as a "material body" usable by the international community to impose real sanctions against the responsible state[34].

However, there is at least one point worth approaching from the analysed perspective, namely that, in order to ensure that *erga omnes* obligations are complied with, in the event of their serious violation, the use by states or group of state of countermeasures involving even the use of force against the responsible state is approved.

This corollary - because the truth is not indispensable in a general theory of the *erga omnes* obligations - cannot be shared.

[31] Lillich, Reisman-McDougal in Humanitarian Intervention and the United Nations, Charlottesville, 1973, pp. 58, 177;
[32] Ronzitti, Uso della forza e intervento di umanità, cit., 3, Brownlie, International Law and the Use of Force by States, Oxford, 1963, p. 338;
[33] The International Court of Justice in the *Nicaragua* case (1986);
[34] Picone, *La 'guerra del Kosovo'*, cit., pp. 309, 343;

On the other hand, the evolution of the general international law in the period after the incorporation of the United Nations and the prohibition of the armed force in art. 2, paragraph 4 of the Charter has gradually progressed towards adopting the "absolute" interdiction of the states to use armed force in their relationships, to the legal status of the regular regulations and, in addition, to mandatory force.

Notwithstanding the right to self-defence (individual and collective) in the face of an armed attack, not even the serious violation of the obligations considered to be of fundamental interest to the entire international community - such as genocide or systematic and widespread violation of fundamental rights to a certain community - would make legitimate the unilateral use of the armed force by a state or a group of states against the responsible state (or, with more classical terminology, would justify the use of armed retaliation) in times of peace; and if the state or group of states interfere - *ut singuli* - in order to protect their own subjectively violated right, regardless of whether they claim to intervene to protect the fundamental values of the international community as a whole.

The existence in international law of such a mandatory limit for all counter-measures - including those that can be adopted in response to the *erga omnes* breach - has recently been reaffirmed by the two most authorized global authorities, designated to know international law: The International Court of Justice, which, in its 1996 opinion on the lawful use of nuclear weapons, has expressly denied any legitimacy of the counter-measures in times of peace[35] and the U.N. Commission on International Law, Article 50 of its Project regarding the liability of States has put countermeasures in contradiction with the obligation to refrain from threatening or using force, as laid down in the Charter[36] among the counter-measures prohibited by the international law.

Briefly: although it is considered acceptable for one or more states to react unilaterally to serious and systematic human rights violations committed by another state - such as those committed against the ethnic Albanian population in Kosovo - in violation of the rights of the responsible state, as countermeasure for the infringement of the *erga omnes* obligations, this reaction cannot legitimately constitute a use of armed violence against that state, as happened, in turn, with NATO's military action against the Federal Republic of Yugoslavia.

If we refer to the analysis performed until now in relation to the various arguments proposed in relation to the Kosovo war:

- at a general level, the military intervention for humanitarian purposes, performed unilaterally by a state or a group of states, was, at the time of NATO's military action, a case prohibited by international law;
- at particular level, the NATO countries which did not have (before, during nor immediately after the intervention) any valid title or justification for their action, seriously infringed Article. 2 paragraph 4 of the U.N. Charter, which orders the U.N. Member States to abstain from the threat and use of force in international relations, as well as the general rules which prohibits the use of armed forces.

Even if it were determined by more actually human humanitarian motivations and led in a humane and efficient and less devastating manner, the intervention would have violated international law: perhaps less seriously, but would have violated it anyway.

Moreover, judicial experts are aware of the fact that when we start to discuss based on relative, subjective and flexible parameters (such as "*good faith*", "*proportionality*" or "*necessity*"), it is always possible to find, in the assessment the actual situation - of the real and presumed facts, of the statements and counter-statement - it is easy to adopt an attitude that is not the most objective in favour of a conclusion or even the opposite of it. In this respect, the Kosovo case is not an exception[37].

Still, the judicial reflection on the Kosovo war cannot be considered concluded. Meaning it cannot stop to the existing law assessment, as it is said.

We still have the question, according to the intended law, if the Kosovo intervention and the manner in which it was received by the so-called international community does not represent an important element, a significant precedent, in the context of a replacement process of the current law or, if someone prefers, the effects of forming a usual regulation which would allow the armed intervention for humanitarian purposes, in certain conditions?[38].

From this perspective, some data should be reported, it is especially relevant that the official position of NATO (and, also, of the European Union) to justify the intervention was to appeal, mainly (but not exclusively) to the need to prevent a humanitarian catastrophe in danger [39]. This position was also developed and clarified in legal terms by some member states of the Alliance, especially by the United Kingdom, which repeatedly claimed, through the change of its previous orientation, the international lawfulness of the humanitarian unilateral interventions, even in the absence of the Security Council's approval[40].

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[35] Iovane, *La tutela dei valori fondamentali nel diritto internazionale*, Napoli, 2000, pp. 417-420;

[36] Iovane, *op. cit.*, pp. 417-418;

[37] *ICJ Rep.*, 1996, par. 46.

[38] Art.50 of the Project: "*Countermeasures shall not affect: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations*";

[39] Picone, *La 'guerra del Kosovo', op. cit.*, p. 344;

[40] Petrovic, *Il rispetto del diritto internazionale umanitario da parte delle forze dell'Alleanza atlantica nel Kosovo*, in *L'intervento in Kosovo*, pp. 135-138.

Also, one cannot ignore the absence of any explicit disapproval of the action of NATO by the bodies of the United Nations, contextual or subsequent to the intervention.

Most important are the strong reserves about the lawfulness of the intervention, explicitly exposed by one of the NATO members: especially in France and, more than anywhere, in Germany, which explicitly declared the exceptional nature of the intervention, in the meaning of the incapacity to establish a valid precedent in terms of the extreme danger, as well as the illegality of any "humanitarian" intervention practice implemented outside the authorizing system for the use of force in the UN Security Council[41].

Last, we must not forget that the "*international community*" does not include only the member states or the NATO friends. Then, the various convictions and official protests regarding the serious opposition against the international law of the NATO action, coming from the most various geopolitical areas of the world, cannot be ignored: from Russia to India, from China to the twelve Latin-American countries of the "*Rio Group*", to the 114 countries of the "*non-aligned movement*"[42].

Paraphrasing Antonio Cassese, with reference to the Kosovo intervention[43]: "*one could state, in relation to this that, at least for the moment, ex injuria jus non oritur (unjust actions cannot create a right): a «humanitarian» war, such as the one lead by NATO, besides not finding any support in the existing international law, could not even improve this already inadequate and primitive legal system*".

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[41] Pretelli, *La crisi del Kosovo e l'intervento della Nato*, *op. cit*., pp. 330-332.
[42] Ronzitti, *Uso della forza e intervento d'umanità*, *op. cit.*, p. 14;
[43] Cassese, *A Follow-Up*, op. cit., p. 792.

# THE CRIMINAL NORM IN DIFFERENT LEGAL SYSTEMS – COMPARATIVE PERSPECTIVE

**Alexandru Vladimir OLĂNESCU***

**Abstract**

*This paper aims to analyze the structure and evolution of the criminal norm in the context of various existing legal systems at the global level, showing both the similarities and the differences between these systems. Thus, in the context of increasingly prominent globalization and unification of legal systems, there is some reticence registered within states in relation with the "modernization" and uniformity of the criminal norm.*

*Therefore, a comparative presentation of criminal norms in certain representative legal systems, namely China for the Asian legal system, the United States of America for the North American legal system, Lebanon for the Islamic law system, and Italy for the European law system, is desirable.*

*Also, the paper shall highlight the historical evolution of criminal norms as well as their development according to the existing cultural valences in each region.*

*Moreover, this paper provides an overview of the development of criminal law in different legal systems and underlines the social and cultural factors as well as the space and time matters that customize the legislation of each state subject to analysis.*

**Keywords:** *criminal norm, legal systems, development, globalization, state*

## 1. Introduction

"*Il faut éclairer l'histoire par les lois et les lois par l'histoire*"[1] – "*We must highlight history by laws and laws by history*" said Montesquieu, which clearly shows that legal and historical subject matters are closely interrelated.

The drafting of the law is conceived only in the light of the past: the legal norm is always created based on empirical observations attesting an abnormality that should be corrected. The reason why we resort to the link between the two subjects is simple: events and facts with historical impact have influenced the evolution of the **Criminal Law** envisaged as a whole.

History is not a monolithic notion, in the sense that it refers to two main ideas that we have to underline.

Defined by Petit Larousse on the one hand as "the relation of past facts and events related to life of mankind, of a society, of one person" and, on the other hand, as "the study and science of past events, of evolution," history designates both the sequence of past events, and the discourse originated therefrom, i.e. the relation of these facts. Etymologically, the very notion of history refers to narrative, the Greek verb "*historein*" means "to *attempt to know"*, "*to say*".

Paul Ricoeur places of interest the distinction in German between the future of mankind and the discourse related to this becoming: "*The history we write, the retrospective history (die Historie) is made possible by the History that was made* (die Geschichte)"[2].

History and criminal law meet in force, essentially as follows: if criminal law, through its deterrent effect, has a preventive role, it also aims at sanctioning the hypothetical behaviour of a thing of the past. There is no problem of advance punishment, repression can only focus on a crime committed. At first glance, Criminal Law seems rather to have to know history in the sense of the German Geschichte, i.e. of the events from the past. In this respect, time is considered of the essence: **Criminal Law** does not intend to return forever to the past, and the passage of time generally hinders sanction. But, in some cases, the criminal law is working backwards, taking into account the facts whose oldness would have suggested they would escape the sanction of criminal law. Different mechanisms may, however, be taken into consideration: one may believe that when one created the statute of limitation for a public action, a crime should be considered history. The more serious a crime, the more stringent the need to enter the domain of the past and, therefore, of the unpunished. It is also possible to refer to more specific provisions[3].

But history is above all the discourse regarding sequence of events; history is the story of past events.

Originally, the story aims to revive the memory of the past, as Herodotus begins his "Historia" with the following words: "*Herodotus of Halicarnasus presents here the results of his investigation so that time does not destroy the memory of people's actions and the*

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[1] Montesquieu, *De l'esprit des lois*, 1748;

[2] P. RICOEUR, *Histoire et vérité*, Seuil, 1955;

[3] Article 35, Law of 29 July 1881;

*great explorations made by the Greeks or the Barbarians do not fall into oblivion*".

The work of Herodotus, called "*the father of history*" by Cicero[4] has essentially a memorial vocation. It is a matter of history to guarantee the sustainability of past events. In this sense, history was seen by positivists as science [5], such as mathematics and physics. Henri Irénée Marrou[6] said, with reference to history, that it is "*the knowledge of the human past*", and that "*history is the relationship, the conjuncture established by the initiative of the historian between two planes of mankind, the past lived by the ancient people, and the present moment in which we witness developing the effort to recover this past for the benefit of the future*[7]. "*History is therefore extremely subjective, because it depends on the manner in which each historian retains the past to extract a certain truth therefrom*". For Serge Carfantan, history is *"a representation that links the values of today's people to the past lived by the ancient people and their values*"[8].

As time goes by, history is rewritten, reinterpretation is enriched and becomes more refined; the story never ends. In this regard, Criminal Law can be brought forward in several respects in the sense that it is not limited to the assimilation of the past facts but it also knows the discourse resulting from these facts by framing the subjective history.

History therefore refers to two realities: the sequence of facts transmitted in se, but also the discourse - especially historical - corresponding to this chronology.

Consequently, we need to see in what context Criminal Law can be brought to the cognisance of history as it has just been defined [9], because many of the sanctions provided in the Criminal Law are based on the very relation between events and historical facts, especially when we refer to the Muslim space.

The story must find a balance between, on the one hand, the need for fighting against forgetting the past and, on the other hand, using this past as a precedent that allows man to progress. Man must feed on the past, learn from it, but must not be paralysed by it. Many punishments provided by the Criminal Law, in many parts of the world, have remained at an original stage without evolving in line with the time to which we relate.

As regards Criminal Law, it is about knowing the past and assimilating it: history hinders the passage of time, prevents the memory of the past from disappearing. In order to fight against oblivion, the historian presents a narrative of events in order to pursue and maintain consistency. Jean Favier believes that "History, first of all, is a narrative, and then an analysis, a reconstruction of the past, and finally an attempt to understand the past.[10]

Thus, history necessarily implies a certain subjectivity. Even if in principle it does not have the role of making important assessments of the past, it can engage and influence perceptions of past events /facts. (we refer to history as science). As a rule, historians enjoy great freedom in their activity of research and reconstitution, which explains why they oppose any dogma, taboo or order [11].

According to Madeleine Rebérioux, historians can be considered "*revisionists not by ideological will, but by profession*".[12]

Criminal Law it is not as fluid as the historical discourse; there is indeed a principle of legal certainty that requires some stability in the legislative system, especially with regard to the repressive device that affects individual freedoms. If history is essentially an evolutionist science, Criminal Law tends to solidly define its object and therefore to be perennial. However, within these developments we witness the fact that Criminal Law has not ceased to intervene in the elaboration of a historical truth; repressive law treats history as a discourse about the past.

Criminal law has no choice but to know the past, it is in its nature to deal with past facts. Some of these facts have a special dimension allowing them to be described as "*historical*" because of their age or the impact they have had on mankind.

Criminal Law must "*digest*" the past, know history in the "*event*" dimension; it is its duty to assimilate facts related to history.

The first actor who has the possibility to retain facts of a historical nature is the legislator, who, through the creation of incriminations and the definition of their regime, can influence history or be influenced by it. Certain mechanisms make it possible to note that history, through the special crime it has generated, requires an adequate criminal response, even if the passage of time is generally a factor of impunity; it is essentially the creation of retroactive incriminations. Other mechanisms allow, on the contrary, to anticipate the potential difficulties, deciding that in the future certain facts can never be resumed in history, and that their objective gravity requires they are given an adequate response at all times: these are the imprescriptible crimes.

As for the timely implementation of laws, the legislator has the opportunity to understand facts that, hypothetically, belong to past or even to history. In principle, material criminal law is intended to apply

[4] Cicéron, De Legibus, I, 1;
[5] S. Carfentan, Philosophie et spiritualité, 2002 (http://serfecar.perso.neuf.fr/).
[6] Henri Irénée Marrou, De la connaissance historique, Paris, Le Seuil, 1954;
[7] Ibidem;
[8] S. Carfentan, Philosophie et spiritualité préc.;
[9] E. Cobast, Petites leçons de culture générale, coll. Major, PUF, 2007, 6th edition;
[10] J. Favier, speech of 15 April 2008 before the information mission about memorial issues;
[11] Information Report by B. Accoyer in the name of the information mission on the memorial issues, 18 Nov. 2008;
[12] B. Accoyer, the Information Report above;

only to future situations, a new law can only apply to the acts committed after its entry into force. The past seems, on the contrary, to be granted a certain immunity because, according to the principle of legality, it does not seem possible to punish a person for facts that have not been incriminated. The principle stated in Article 8 of the Convention on the Rights of Man and Citizen of 1789, "The right to respect for private and family life", has been and is interpreted in relation to various contextual elements.

Criminal Law is used by lawmakers to sanction behaviours that require a response according to the gravity of the act.

If we proceed to a comparative analysis of the criminal legislation in different cultural-religious backgrounds, namely the United States, China, Italy and the Middle East (the Muslim space), we find specific peculiarities, some of them extracted from historical facts, others remained unaltered and unchanged since they were stated.

## 2. Muslim Criminal Law

The Muslim criminal legislation is based on Sharia law, the tradition.

Sharia, *charâ'a* or *sharî'a* (in Arabic: الشريعة) represents, in Islam, the tradition preserved by Prophet Mohammed, a set of doctrinal, social, cultural and relational rules received through revelation. The term used in Arabic in the religious context means "*a way to obey [God's] law*".

In the West, reference is made to "*Sharia*", meaning the Islamic term, which is an approximate translation, since it only partially covers the true meaning of the word (this term is also used instead of the Islamic law). Sharia codifies both public and Muslim life aspects, as well as social interactions. Muslims consider this set of rules to be the emanation of God's will (Shar). The level, intensity and extent of Sharia's normative power vary considerably in historical and geographical terms [13].

In the world, some of these rules are considered incompatible with human rights, particularly as regards freedom of expression, freedom of belief, sexual freedom and women's freedom.

The link to the past we mentioned earlier, analysing the relationship between history and Criminal Law, referred precisely to this aspect, namely that historic events / facts serve for the capacity of rebuilding the coherence and chronology of past events; it is correct to accept the past and look toward it, but to adapt it in order to understand the present.

Sharia, little applied during colonisation, when European law was often imposed (in Lebanon legislation is still predominantly French), is back in some Muslim majority states (for example, Sudan has reintroduced amputation for theft).

Many countries have promulgated Islamic criminal law codes including Afghanistan (Criminal Code 1976), Brunei (CC 2014), Iran (CC 1991, reformed in 1996 and 2013), Kuwait (1960, 1970), Libya (1953, 2002), the Maldives (1961, 2014), Oman (1974), Pakistan (1860, as amended by the Hudood Ordinances in 1979), Qatar (1971, 2004), Sudan (2003), the United Arab Emirates (1987), Yemen (1994) and several provinces in Malaysia (Kelantan in 1993), Nigeria (about ten provinces) and Indonesia Aceh, 2014)

Although the Muslim law is in no way limited to criminal law, it is often the most known because of the severity of certain punishments.

### 2.1. Categories of crimes

Sharia distinguishes several categories of crimes and related sentences:

Crimes falling within "God's law" and divided into two categories:

Crime that may give rise to revenge, according to the equivalent of the law of reprisals (qisas); hudud, which are "fixed phrases" defined by the Qur'an; less serious or offenses unknown in the Qur'an that fall within tazir [14].

Due to the severity of the prescribed condemnations (hudud), Muslim jurists often had the tendency, except the Zahirite school (present in the 9th and 10th centuries in Iraq, then in the 11th century in Spain), to apply a criterion of doubt, shubha, to the deed, which allows the "modelling" of the sentence or even its non-application (by casting doubt on the person responsible for the crime or on the legal framing of the punished deed[15].

Thus, the application of Sharia was, in fact, more flexible than what written texts 16 seemed to grant. The criminal codes promulgated in the twentieth century, however, disregard this canon, shubha, the legislator resorting most often to the earliest written sources of the Muslim law, contrary to medieval legal practice17 - with the notable exception of the 2013 reform of the Iranian Criminal Code, which incorporates this canon (Articles 120 and 121)[18].

However, this canon is sometimes invoked by judges and / or lawyers (for example, in 2002, in Nigeria, to defend Amina Lawal, the lawyer invoked this canon, as well as the case of Ma'iz illustrated in the

[13] Intisar A. Rabb, *Reasonable doubt in Islamic Law*, *Yale Journal of International Law*, vol.40-41, 2015, pp.40-94 (p.48-49, note 30);

[14] Ali Kazemi-Rached, *L'Islam et la réparation du préjudice moral*, Genève, Droz, 1990, abstract published in *Revue internationale de droit comparé*, 1991, n° 3, pp. 733-735;

[15] Elias Saba, Le bénéfice du doute en droit musulman, La Vie des idées, 7 March 2016 (ISSN 2105-3030);

[16] Intisar A. Rabb, Reasonable doubt in Islamic Law, in Yale Journal of International Law, vol.40-41, 2015, pp.50, note 35;

[17] Intisar A. Rabb, Reasonable doubt in Islamic Law, in Yale Journal of International Law, vol.40-41, 2015, pp.50, note 36;

[18] R. Peters, Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century, Cambridge Univ. Press, 2006, pp.67-68;

Qur'an for to annul the death penalty as a result of the adultery committed by her[19].

Finally, there is a fourth category of punishment, which falls under the competence of the leader and does not aim to punish a person for what that person has done, but to preserve the general interest and / or to protect society against persons committing a crime that poses a threat against public order (fitna)[20].

This category of punishments is in the form of certain sentences, siyasa, and often consisted either in life imprisonment or in permanent exiles or in capital punishments - under the Ottoman Empire, siyasa had become synonymous with capital punishment[21]. These punishments are justified on the basis of a historic fact that would have occurred under Caliph Omar (634-644), who exiled a certain Nasr b. Hajjaj because he was too handsome, threatening thus all the women in the city by tempting them through his beauty , though he was not doing anything condemnable[22].

**2.1.1. Talion (qisas) and compensation (diya)**

Qisas may be applied to murders and intentional injuries [23]. It may be replaced by diyya, financial compensation or "blood money", according to the recommendations of the Qur'an [24]. Therefore, there is "a desire to replace private revenge (when accepted or acceptable) by compensating victims" [25], the doctrine specifies the conditions for such compensation (possibly even in the case of homicide[26]). The amount of compensation, which can never be strictly equivalent to the damages produced, varies according to gender and religion [27].

These provisions were detailed in the Ajarif Charter (1405) used by the Berbers of the Anti-Atlas[28]. For example, to the burden, *al'hamal*, *diya* was attached [29]. Thus, in accordance with the traditions of Bedouins in Egypt, besides *diya*, the tribe whose member has caused injury must also ensure the birth of a male child in the opposite group / tribe to compensate for the loss of a person [30].

The murderer had to lend his wife, sister or daughter to one of the victim's relatives so that she could give birth to a son and restore the balance of tribal powers [31]. This provision has disappeared from the most recent Anti-Atlas documents (at least from the 16th century); it was replaced by the exile of the murderer, a measure that remained in force until the imposition of French laws on the Anti-Atlas tribes in 1934 [32].

Some contemporary authors (Ali Kazemi-Rached [33]) saw in *diya* a possibility to theorise moral prejudices[34].

**2.1.2. Hudud**

Hudud (literally meaning "*limits*") include the crimes and sanctions defined by the Qur'an that cannot be challenged by judges; these offenses are considered to be committed against God Himself. Islamists are the ones who defend most the introduction to the positive law of this type of punishment[35] (and, in people's conception, what is often understood by the "*restoration of Sharia*").

There are seven such punishments [36]:

- sex outside marriage, called zina الزنا
- false imputation of this crime, called القذف بالزنا
- wine drinking, called شرب الخمر
- theft, called السرقة
- banditism, called الحرابة
- apostasy / abandonment of Islam, called الردة
- rebellion, called العصيان

**2.1.3. Ta'zir**

The penalties and crimes from the *ta'zīr* category (التعزيرات: the corrections) are discretionary judgements (established by public authorities and ruled by judges) which, by definition, vary according to circumstances. They are not fixed either in time or space. These penalties vary depending on the judge's assessment of the seriousness of the crime and the criminal provisions[37]. Sanctions range from sermon or verbal exhortation to death penalty for violation of

[19]Intisar A. Rabb, Reasonable doubt in Islamic Law, Yale Journal of International Law, vol.40-41, 2015, pp.50, note 36;
[20] Intisar A. Rabb, Reasonable doubt' in Islamic Law, in Yale Journal of International Law, vol.40-41, 2015, pp.50, note 36;
[21] R. Peters, Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century, Cambridge University Press, 2006, pp.67-68 ;
[22] Meunié, Jacques, Le prix du sang chez les Berbères de l'Anti-Atlas, 1960, No. 1, pp. 323-326 ;
[23] Ali Kazemi-Rached, L'Islam et la réparation du préjudice moral, Genève, Droz, 1990;
[24] Ibidem;
[25] Ibidem;
[26] Ibidem;
[27] Ibidem;
[28] Meunié, Jacques, Le prix du sang chez les Berbères de l'Anti-Atlas, 1960, n° 1, pp. 323-326;
[29] Ibidem;
[30] Ibidem;
[31] Ibidem;
[32]Ibidem;
[33] Ali Kazemi-Rached, L'Islam et la réparation du préjudice moral, Genève, Droz, 1990;
[34] Ibidem;
[35] Ali Kazemi-Rached, *L'Islam et la réparation du préjudice moral* » Genève, Droz, 1990;
[36] Jacques El Hakim, *Les droits fondamentaux en droit pénal islamique*, *in Les droits fondamentaux: inventaire et théorie générale*, Université Saint-Joseph, Beyrouth, November 2003;
[37] Mohammed Salam Madkoar, in cadrul *The Effect of Islamic Legislation on Crime Prevention in Saudi Arabia. Proceedings of the Symposium held in Riyadh.* (9-13 octobre 1976) Riyad, Arabia Sauditã, simpozion organizat de United Nations Social Defense Research Institute ;

divine or individual rights that threaten social peace or the security of individuals [38].

Apart from whipping, no corporal punishment can be given under *ta'zīr*[39] [with the exception of the Malachites - Muslim Sunnis following madhhab (a legal-religious school founded in Medina in 796 AD by Mālik ibn Anas) where amputation of the right hand is practiced in case of forgery of documents][40].

In practice, because of *shubha* (doubt), often expressed, about hudud crimes, the ta'zīr's sentences were, by far, the most common[41]. Lawyers have often tried to impose limits on *kadis'* discretion[42].

Thus, according to jurisprudents, the maximum number of blows varies between 10 (for some Shafists and Hunbalites[43] – Sunni Muslims belonging to certain juridical-religious schools founded by Abdullah Muhammad ibn Idrīs as-Shāfi'ī and Muhammad ibn Hanbal) and 39 (according to Abu Hanifa, 699-767 [44]) or 79 (Abu Yusuf, 731-798)[45].

**2.1.4. Qissas**

The Qissas category (القصاص) is autonomous in relation to the two previous ones and would, according to Jacques El Hakim, be in line with a survival of private revenge shifted into retaliation. This category is used for murder or bodily injury. In these cases, the victim or his or her legal heirs may choose to enforce reprisals or to receive damages (called "diya" for murder and "arche" for bodily injury)[46]. Exercising reprisals or collecting the allowance does not exclude a correction (ta'zīr) that would be made by public authorities in the case of a voluntary offense[47].

**2.2. Sanctions**

The Qur'an defines the punishment applicable to each "had", and Sunnah (Sunnis) adopted rules for other crimes whose punishment was not foreseen in the Qur'an. Qur'an punishments are usually performed in public, but with the covering of the body parts that do not need to be displayed publicly.[48]

**2.2.1. Whipping**

The punishment by whipping is stipulated for non-marital sex, false accusation, alcohol consumption and other offenses from the correction category.

Jurists offer different sanctions according to the Madhhabs (legal-religious schools). According to a hadith reported by Abû Burda al-Ansari [49], Prophet Mohammed forbids the exceeding of 10 blows when the punishment to be applied is not defined in the Qur'an or in Sunnah.

The Qur'an provides 100 whips for sex outside of marriage. The Malachites, however, allow over 100 blows, while other schools present this number as a limit that cannot be overcome [50]. There are 80 strikes stipulated for false testimony [51] and 40-80 strikes for alcohol drinking [52]. The number of whips varies between 10 and 100.[53]

**2.2.2. Amputation and crucifixion (in case of armed robbery)**

Based on Sura 5, paragraph 33 of the Qur'an [54], jurists indicate four fixed sentences for armed robbery (or banditism): capital punishment, crucifixion, transverse amputation (one hand and the opposite leg), or exile[55].

Shiism believes that the state (represented by the ruler or judge) may establish one of these sanctions in accordance with their own will.

The Malachite School sets fixed penalties according to the gravity of the offense: exile if there was intention, but the theft was not carried out, amputation if it was theft; crucifixion or capital punishment if, in addition, there was a homicide.

Other schools affirm a strict correspondence between sentences and the nature of armed robbery (the judge cannot exceed the maximum punishment etablished)[56]. Thus, if the theft was not completed, exile

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[38] Jacques El Hakim, *Les droits fondamentaux en droit pénal islamique in Les droits fondamentaux: inventaire et théorie générale*, Centrul de Studii Arabe, Université Saint-Joseph, Beyrouth, November 2003;

[39] R. Peters, *Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge Univ. Press, 2006, p.66 ;

[40] *Ibidem*;

[41] *Ibidem*;

[42] R. Peters, *Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge Univ. Press, 2006, p.67 ;

[43] R. Peters, *Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge Univ. Press, 2006, p.67 ;

[44] *Ibidem*;

[45] Hadith, Buhâri, Muslim, abû Dâvûd, Tirmidhî, Nasâî si Ibnu Mâja, in chapter «*Hudûd*» ;

[46] Jacques El Hakim, *Les droits fondamentaux en droit pénal islamique* in *Les droits fondamentaux : inventaire et théorie générale*, Université Saint-Joseph, Beyrouth, November 2003;

[47] Jâmi'ul Ahkâm'il Qur'ân, Qurtubî ; (Qur'an. XXIV, : 4-5) ;

[48] Jacques El Hakim, «*Les droits fondamentaux en droit pénal islamique*» *in Les droits fondamentaux : inventaire et théorie générale*, Centrul de Studii Arabe, Université Saint-Joseph, Beyrouth, November 2003 ;

[49] «*Nobody can be punished by more than 10 whips except hudûd !*», Hadith, Buhâri, Muslim, Abû Dâvûd, Tirmidhî, Nasâî and Ibnu Mâja;

[50] Abdel-Kader Odé, *Le Droit pénal islamique comparé au droit positif*, 3rd edition, Cairo, 1964, no. 585;

[51] Jâmi'ul Ahkâm'il Qur'ân, Qurtubî ; Cor. XXIV;

[52] Abdel-Kader Odé, *Le Droit pénal islamique comparé au droit positif*, 3rd edition, Cairo, 1964, no. 585;

[53] R. Peters, *Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge Univ. Press, 2006, p.58<

[54] *Ibidem*;

[55] Ibidem;

[56]Ibidem;

may be replaced by imprisonment until the perpetrator's repentance is detected; cross-amputation if there is a theft of a good with a minimum value (nisab) or, according to some Chafeists and Malachites, if there was rape or sexual assault; death penalty when a man died (not theft) and ultimately crucifixion for armed robbery having led to death.

Hanafi, however, believes that in the latter case, the head of the state may impose the simple amputation of both hands rather than the death penalty associated with the crucifixion [57]. Ultimately, these strict punishments do not apply if the victim is close to the perpetrator.

According to certain jurists who dissociate crucifixion from capital punishment, the tortured (the crucified) can receive food and drinks and must be executed by the end of the third day.

This sentence may also be imposed as a result of a crime in the ta'zir category, without being followed by execution.[58]

**2.2.2. Death penalty**

Death penalty is stipulated for apostasy [59] (which corresponds to an abandonment of Muslim religion), rebellion, insurrection, murder or sometimes adultery [60].

**2.2.3. Sanctions for the correction of the offender**

The sanctions for correction are left to the judge's discretion. Therefore, he may choose the most appropriate way to apply the penalty depending on the circumstances, the severity of the offense and the personality of the perpetrator. The judge may choose imprisonment, fines or moral sanctions. Moral punishments are warnings (ظعولا), reprimand (خيبوتلا), threat (with punishment) (ديدهتلا) or the perpetrator's public exposure. As these punishments are not defined in the Qur'an and Sunnah, judges have the right to apply more lenient sanctions.[61]

**2.2.4. Specific sanctions**

Sexuality outside marriage is considered *zinā* and strictly condemned (hudud).

The term "*zinā*" can cover both adultery and simple prostitution or acts homosexuality. Penalties range from exile for one year, from 50 to 100 whips, to even stoning.[62] The criteria for proving the crime are, however, very strict (for the most serious sentences, four separate witnesses and four depositions), leading to the enforcement of these sentences very rarely encountered before the 20th century; also the false witness (*qadhf*) is severely punished (jurists rely on Surah 24, 4, which prescribes 80 whips)[63]. A monetary compensation (equivalent to the dowry that would have been paid) is often accepted.

**2.2.5. Adultery**

Adultery in Islam for women involves having sex with someone other than the husband[64].

For men, adultery is to have sex with someone other than the wife.

The penalty is exile for one year. Under strict conditions, whipping (from 50 to 100 blows) may be applied, followed by a one-year interdiction. The Qur'an (Surah 24: 2) only refers to whipping [65], hadith-based stoning. For the last two sentences to be executed, it takes four witnesses who must be able to testify that sexual penetration has taken place and, according to most legal-religious schools. The punishment does not apply to the person who refuses the act [66].

According to the Chafite School, if the perpetrator who testified to the deed tries to escape during stoning, he must be allowed to flee Mâiz [67] on the basis of hadith.

**2.2.6. Fornication**

Fornication in Islam refers to the fact that there are sexual relations between two unmarried persons of opposite sex, the penalty being public flagging if four witnesses can testify that sexual penetration has occurred, and the deed has been admitted four times [68]. In the latter case, the penalty is not applied to the second person if the latter denies the act [69].

**2.2.7. Homosexual relations**

Men who have homosexual relationships (sodomy) are punished or even executed. Women are not executed (because there is no sexual penetration) but must be morally punished. There are significant differences regarding the penalties to be applied to people who have had a homosexual relationship. They range from a hundred whip blows [70] to the throwing from the highest bridge in the city. This latter punishment is included in law books, but jurists claim that there is no known case of applying this form of punishment.

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[57] Ibidem;
[58] http://islamqa.info/fr/ref/41682;
[59] Ibidem;
[60] Abdel Kader Odé, *Le droit pénal islamique comparé au droit positif*, 3rd edition, Cairo, 1964 ;
[61] *Jâmi'us-Sahîh* al Bukhârî Hadith no. 57 ;
[62] R. Peters, *Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge Univ. Press, 2006, p.61 ;
[63] Ibidem;
[64] Kitab al hudud, no. 4198 in *Sahih Muslim ;*
[65] Kitab al hudud, no. 4198 in *Sahih Muslim*;
[66] Kitab al hudud, nr 4209 in *Sahih Muslim ;*
[67] *Büyük Şâfîi Fıkhı*. Dr. Mustafa el-Hin, Dr. Mustafa el-Buğa, Ali eş-Şerbeci. Hudûd, *La peine pour la relation extra-conjugale — Comment appliquer la peine ?;*
[68] Jâmi'ul Ahkâm'il Qur'ân, Qurtubî; Cor. XXIV;
[69] Kitab al hudud, nr. 4209 in *Sahih Muslim ;*
[70] Büyük Şâfii Fıkhı. Dr. Mustafa el-Hin, Dr. Mustafa el-Buğa, Ali eş-Şerbeci, p.162 ;

**2.2.8. The apostate**

The apostate, the one who renounces Muslim belief, is punished by death in all jurisprudence schools. However, according to the *Hanefit* ritual, women who give up Muslim religion is not executed, but is imprisoned until she regains her Islamic religion[71].

**2.2.9. Blasphemy**

Any blasphemy is punished. There is no canon about this, unless it is about a pregnant woman, where the punishment is not the death sentence, but the guilty person is punished by 100 blows.

**2.2.10. Piracy**

Piracy must be punished by amputation of the hand. To be considered theft, it needs to meet strict conditions[72]: the theft has been committed in secret (as opposed to object theft), it targets a low-value mobile asset (*nisab*) - the Hanafite school does not, in fact, retain the theft crime if its object is a food product [73]; the stolen object does not belong in part to the "*thief*" (a soldier who appropriates his pre-war warrant prey before being divided will not be considered a thief);

Aisha, Prophet Mohammed's wife, would have said that the Prophet would have explained that the theft of any object less than 1/4 dinars in value should not be punished[74]. Also, if someone steals from a close relative, the sentence is not enforced.

Punishments according to Malachite and Chafeite rituals: at the first theft, the right hand is cut off, at the second the left leg, at the third the left hand, and finally the right leg [75]. If, despite these facts, the perpetrator is still able to steal and does steal, that perpetrator must be executed.

The punishment according to the Hanafite and Hanbalite rituals: the right hand is cut for the first theft, and if there is a second theft, the left foot is cut off.

**2.2.11. Alcohol**

It is forbidden for a Muslim to drink, transport, sell, produce or serve alcohol. According to rituals, this condemnation comes from an extension of the ban on consuming wine (present in the Qur'an). Anyone who drinks, transports, sells, produces or serves alcohol is punished by 80 whips. The whipping for this crime is not based on a verse or hadith but was introduced at the request of Mohammed's successors. In principle, whiplash counts cannot exceed 10 unless it is based on a recommendation from Prophet Mohammed, a situation where 100 blows can be applied.

All the offenses and punishments presented seem very strange, if not even barbarian, for the time and the age in which we live, but they have strong historical roots granting them justification and validity in the context of the socio-cultural space in which they apply.

## 3. Particularities of Criminal Law in the U.S.A.

The United States has by far the highest incarceration rate in the world. According to a Pew Centre study conducted in 2009, one in one hundred American adults is imprisoned and one in forty-five is released. For a European observer, one can identify the hardness of the American criminal system.

For example, for a first conviction, for a minor deed, the defendant sometimes receives a brief period of detention or conditional release. But the magnitude of the sanctions increases considerably if the defendant in indicted in one or more criminal cases, whether on serious facts or not.

For crimes such as drug sale worth $ 15 (10 Euros), they are frequently charged with five to ten years in prison for re-offending. The major problem is that little money is spent on rehabilitating detainees. Many times, their prolonged incarceration is described as long-term "storage". However, we know that a prolonged period of imprisonment prevents reintegration and risks to destabilize detainees or even to make them become more dangerous.

For crimes classified as violent or potentially violent, sentences are the most ruthless. More burglaries can lead to more than a dozen years of imprisonment. Life sentence is regularly imposed in murder cases, regardless of attenuating circumstances, such as the young age of the accused or his or her mental disorder.

The persons convicted for sexual crimes, similar to those for which they accused Dominique Strauss-Kahn, may be closed for decades. They must then register with the sex offenders register, a blacklist that can be accessed by the general public.

With regard to the death penalty, a court ruling made it inapplicable in New York State, despite the opposition of the Republicans.[76]

The difference is, however, that in a country that promotes human rights and equality of opportunity, wealthy people usually escape draconian sentences because of their social status and the provision of good and costly lawyers that not anyone can afford . Harsh punishments are applied to the needy, especially to Blacks and Latinos, but also to many white people in disadvantaged environments, the so-called "profound America" [77].

The large budget allocated for mass incarceration could be used to develop crime prevention programs to improve public schools. Criminal cases are overwhelmingly resolved through agreements between the prosecutor and the accused, in order to obtain a

[71] Şeyh Abdurrahmân El-Cezîrî, Dört Mezhebin Fıkıh Kitabı ; Kitâb'ul Fiqh alâ al Mazhâhib'ul arba'a ; vol. VII, p. 125-130 ;

[72] R. Peters, *Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-First Century*, Cambridge University Press, 2006, p.56 ;

[73] Tafsir d'al qortobi du verset 5:38;

[74] Şeyh Abdurrahmân El-Cezîrî, Dört Mezhebin Fıkıh Kitabı ; Kitâb'ul Fiqh alâ al Mazhâhib'ul arba'a ; vol. VII, p. 158-159 ;

[75] *Ibidem*;

[76] Amnesty International Report, 2017;

[77] Ibidem;

more lenient sentence, especially because the recognition of guilt in front of a jury leads to a greater punishment than if it were "unofficially" punished. Given the severity of the sentences, few defendants take the risk of going to trial.

It is true that serious crimes deserve severe sentences to discourage crime and protect society. In addition, the death penalty - a fundamental violation of human rights - is being enforced in many states, and we may say it is a peculiarity of the American system. Politicians, prosecutors and judges do not pay too much attention to the socio-political and human consequences of such a repressive system [78]. Lawyers claiming that the application of overly long sentences dehumanizes justice are rarely taken seriously.

Political leaders pay little attention to studies showing how their policies are counterproductive and costly. Some Americans, especially the progressive and intellectual, oppose this criminal system, though they do not realize it is a repressive system incomparable with any other democracy.

Delinquency and criminality are social problems that can be easily resolved, but there seems to be little political will in the United States, just like in France to solve such problems [79].

An interesting case is that of Dominique Strauss-Kahn who managed to regain his freedom in return for a $ 1 million deposit. The payment of a $ 1 million deposit for DSK made it possible to ensure that the accused, although free in his moves, will appear at all the hearings he was summoned to. If he does not comply with this obligation to present himself every time he is summoned, he loses the total amount of the deposit. On the other hand, if he respects the agreement imposed by the bail, the deposit is automatically returned to him, regardless of whether he is found guilty or not. In the case of Strauss-Kahn, this obligation also involved a $ 5 million deposit that the defendant has to pay to the court if he does not comply with all the conditions regarding home arrest, bracelet wearing, his apartment monitoring by a guard at his expense [80], etc.

The eighth amendment to the Constitution of the United States declares that "no excessively high bail will be required, neither excessive fines will be imposed, nor unrestrained and brutal punishment will be enforced." The amount of the deposit is fixed by a judge at the first hearing. The magistrate takes into account the nature and circumstances of the case, the accusation brought, the social and family environment, family resources, personality, and criminal record.

In the case of Strauss-Kahn, he himself offered a one-million-dollar deposit. The question is: is this a frequent practice? According to Jean-Eric Branaa, lecturer at University Paris 2, American law specialist, "... this is almost the rule for two reasons: the first is of an economic nature because US prisons are full, the second is based on the presumption of innocence - it will always be preferable to leave an innocent person go free rather than in prison Very rarely have defendants the amounts requested in cash in a short time This is why they can demand bail guarantees called " bonds". The defendant must provide bonds in a guarantee deposit, such as 40% of the cash value of the bail or a property at least equal to the total amount owed. In exchange the guarantor, the issuer of the bonds, submits to the court a contract by which he agrees to pay the guarantee if the defendant does not appear at the hearings. These contracts are largely funded by insurance companies capable of providing the available capital.

A peculiarity in the US criminal law is also the introduction of cultural elements into the trial. The introduction of cultural elements can be done: before the trial, when deciding whether or not the person should be prosecuted; during the trial, in order to eliminate an element of criminal prosecution, to support an established defence, such as consent or provocation, to mitigate the sentence. This type of defence is accessed, among other things, by immigrants charged with serious violence against a woman. An example is the 1984 case of Kong Pheng Moua, who lived in the United States for six years, married Xiong, a woman of the same cultural background she had forced to sexual acts. Xiong then complained to the police and accused him of abduction and rape. In his defence, Moua claimed that they had followed a traditional marriage practice, "*marriage of capture"* meaning that even if marriage was made by free consent, the woman had to resist to show her virtue to the man. Moua explained that he did not realize that Xiong's resistance was real. The old idea that a woman, saying "no" to a man, actually does not really believe in refusal is still widely accepted in many cultures. Men who are accused of rape frequently invoke the cultural element, but this must also be supported by evidence. They seek to perpetuate the cultural practices that keep their women in a subordinate position.

The court rejected the allegations of rape and kidnapping and retained only the sequestration: Moua was sentenced to 120 days in prison and fined to pay $ 1,000 - State v. Moua, summary of file no. 315972-0.

Feminist organisations objected to this judgment and filed a complaint with the State Judiciary Conduct Commission requesting an investigation[81]. Mr. Yen, Prosecutor Brooklyn Holzman said: "*There must be one standard of justice, and it should not depend on the origin of the accused person's culture. It cannot be admitted that the existence of barbarous customs in different parts of the world excuse the criminal behaviour in the US"*.

[78] Amnesty International Report, 2017;
[79] Ibidem;
[80] LeFigaro.fr;
[81] A. D. Renteln, The Cultural Defense, op. cit., p. 480;

What is noteworthy is that by invoking certain cultural, traditional, even barbaric practices, a more favourable sentence can be obtained in the circumstances in which the deed can even be murder. An American who kills his wife or boyfriend can successfully use a culture-based defence that can result in a more favourable indictment and a more lenient punishment.

This type of defence is not called "cultural", but it is based on deep-rooted cultural assumptions about what is or is not a reasonable behaviour of two individuals.

The resort to the cultural argument may allow an immigrant who has murdered his wife (Dong Lu Chen, People v. Chen, no 87-7774, Supreme Court, New York County)[82] "*in the heat of passion*" to get an easier conviction compared to an American for the same deed.

More and more US law no longer treats women as the property of their spouses, and doctrine is no longer worded in terms of "honour": we speak of "passion" or "extreme emotional suffering." But the law did not cease to show indulgence to the deceived husband, who may even kill his wife, since he defends himself by invoking the fact that he was provoked.

The vast majority of US jurisdictions now accept broader definitions of the term provocation: judges are much more attentive when it comes to ruling a homicide verdict and consider a wider range of provocative behaviours

It should be noted that about half of American jurisdictions continue to try in terms of "*provocation*" and "*passionate fir*e" and that nearly twenty states have abandoned these categories only to replace their terminology with "*extremely emotional"* (Cynthia Lee, MPC 1962). In addition, the argument of the provocation is not obviously neutral from the point of view of gender, both in its formulas and in its impact. Thus, it is said that the current formulations refer to the male model of a sudden and temporary loss of self-control, in the context of a unique confrontation, limited in time, between two men of more or less equal power.

About 9% of murder cases committed in the United States are committed between partners, that is, as defined by the Department of Justice, between spouses or lovers, past or present. Men represent more than 90% of those arrested for murder (all categories), and nearly three-quarters of the victims of homicide are women.[83] It seems that men have more chances than women to invoke the argument of provocation: according to some authors, "it is difficult to find situations where a woman has benefited from an easier sentence based on this argument after killing her husband or her fiancée " [84]

Victoria Nourse, after fifteen years of jurisprudence involving the categories of "passion fire" and "extreme emotional distress", also shows that the courts have extended the doctrine of provocation to include not only the adultery of the wife, but also the "infidelity of a fiancée dancing with another person, of an ex-girlfriend who dates someone else, of a former wife who started a new relationship a few months after the final divorce trial" [85]. The American courts believe that the victim of this "*betrayal*" the man, deserves a much higher degree of compassion and indulgence before the law than that for a woman.

In the light of the above, one can argue that „*defence through culture*" could have the effect of protecting patriarchal practices among minorities and that, even beside this first factor, some more commonly established means of defense in the criminal trial support these practices?

Brian Barry claims: "*If it is justified to allow people to respect their norms / cultural traditions, they cannot be barred from the proper exercise of justice, it must be understood that the latter cannot admit the acquittal of those who violate the law, only by using the cultural reason*"[86].

It is essential that, in order to offer equal treatment to minority members, one acknowledges the "*defence through culture*", but this does not imply that those who invoke it are right. One of the roles played by cultural elements in criminal trials is to illustrate the accused's mood by highlighting his origin cultural context which constitutes the context of his actions. But this cultural framework can very well reflect the patriarchal norms, which will be strengthened by the successes achieved in the courts through the defence established on the basis of cultural arguments. The use of these arguments by immigrants, not only in the US but also in the EU, will have the same effect as their use by members of the majority: to favour male violence against women.

All in all, the issue raised by some cases of "*defence through culture*" refers not only to the norms and practices of minority cultures, but also to those of majority cultures in Western societies. The problem will not be solved by merely rejecting or accepting the defence through culture in its entirety - what is necessary is the re-evaluation of the norms and doctrines of the majority culture. This problem of intercultural resonance and mutual reinforcement of norms between majority and minority cultures is not limited to the problem under scrutiny but is found in many other contexts - beyond the Criminal Law.

[82] Dick Polman, *When is Cultural Difference a Legal Defense ?*;
[83] John Kaplan, Robert Weisberg, Guyora Binder, *Criminal Law*;
[84] *Ibidem*;
[85] Dixon v. State (Ark, 1980);
[86] Brian Barry, *Culture and Equality*, 2001;

## 4. Particularities of criminal law in Italy

The first criminal code of United Italy was the 1839 Criminal Code of the Kingdom of Sardinia, which was subsequently replaced by the 1859 Criminal Code, extended to the rest of the peninsula after Italy's unification. However, from 1861 to 1889, two separate criminal codes coexisted because Tuscany continued to use its own code (which provided for the abolition of the death penalty in 1859 after it had been reintroduced in 1853). The normative unification took place through the Zanardelli Code, which bears the name of the Minister of Justice, Giuseppe Zanardelli, promulgated on June 30th, 1889 and come into force on January 1st of the following year.

The criminal code currently in force in Italy is the result of a five-year legal process since the promulgation of the law of December 4th 1925, with which the government was delegated to amend the then-valid criminal code (the so-called Zanardelli code) , until October 19th 1930, the day when the new Italian criminal code, technically executed under Manzini, was promulgated, and the Regio Decree of October 19th 1930, no. 1398, published in the Official Gazette of October 26th 1930, no. 251 came into force on July 1st 1931. The Royal Decree of Promulgation contains the signatures of the King of Italy Vittorio Emanuele the Third, the Head of the Government Benito Mussolini and the Minister of Justice Alfredo Rocco; this is why the Criminal Code is called the Rocco Code[87].

Although it has been amended over the years, following the Constitutional Court's judgments, the 1930 code is still in force. Numerous sectoral reforms are often uncoordinated. Numerous study committees have drafted reports and pleaded for the approval a new criminal code, and several political parties criticized the Rocco Code[88]; furthermore, the academic world and legal practitioners have repeatedly expressed their views on the achievement of a modern criminal code that fully respects constitutional principles.

The Code was largely modernized and cleansed by the most authoritarian provisions of fascist origin, which, after the founding of the Republic, proved to be in conflict with the Constitution. This has happened both through partial reforms and by decisions of illegality ruled by the Constitutional Court. However, some important changes have already been made: for example, all death sentences have been abolished.

An organic reform of the criminal code has never been launched. After the fall of fascism, the doctrine of criminal law (Pannain, Delogu, Leone) considered impossible the restoration of the 19th century Zanardelli Code and even opposed a zero-based reform, claiming that the rigorous technical system of the Rocco Code was necessary to immunize it , in the basic aspects. In the following decades, many reforms have taken place, but they have been partial and disconnected from one another without having a unique model. All this led to the loss of the logical consistency and logic of the criminal code.

Decades after the entry into force of the Constitution, the need for a more modern code, inspired not only by constitutional principles, but also by international conventions and the theme of new rights, has been widely felt and the projects have been presented and institutional reforms (commissions of Ministries Pagliaro and Grosso, from 1988 and 2001). The new Code of Criminal Procedure promulgated in 1988 entered into force on October 24th 1989.

A peculiarity of the Italian Criminal Code refers to crimes relating to mafia associations and groups, Art. 416 bis of the Criminal Code and Article 41-bis.

The law in question aims to protect public order, threatened by the use of intimidating force and the subsequent condition of subjugation and conspiracy of the silence that arises from it.

The offense in question is a permanent offense that is consumed when a partnership is actually created that is likely to disrupt public order or when the organisational structure assumes the hazard characteristics.

The Mafia method is outlined on the active side for associates to use the intimidating force arising from the mafia association and, on the passive side, for the situation of subjugation and silence that this intimidating force causes in the community to induce unwanted behaviours, even through the use of real threats or violence.

It is sufficient for the association to enjoy a certain fame of violence, the potential for oppression, to develop a real, concrete and stable power in the community through intimidation. The user of the intimidating force must, however, "use" or at least allow the passive subject to understand that he is a member of the association.

It is important to stress that the danger to public order is given by the very existence of the mafia association, regardless of the purposes it pursues. The association may also have legitimate activities.

The concept of "belonging" to a mafia association, which is relevant to the implementation of preventive measures, includes behaviours that, although it cannot be attributed as "participative", are incorporated into action, with associative purposes, excluding situations of mere contiguity or association to the criminal group.[89]

Article 41-bis refers to a legislative provision of the Italian Republic provided for by the Italian penitentiary system. It is part of the Gozzini Law approved on October 10th 1986 and published in the Official Gazette on October 16th 1986.

The provision was introduced by the Gozzini Law, which amended the Law no. 354 of July 26th 1975, (concerning the Italian penitentiary system) and

[87] *Gazzetta Ufficiale del Regno d'Italia* No.251 of 26 Oct.1930, first part;
[88] Critiche al Codice Rocco, Corriere.it, 19 June 2001;
[89] Criminal invalidation, United Section, sentence no. 111 of 4 January 2018;

originally referred only to situations of revolt or other serious emergencies in Italian prisons.

Following the Capaci massacre of May 23rd 1992, when Giovanni Falcone, his wife and his entire escort lost their lives, one introduced by decree-law no. 306, dated June 8th 1992, (the so-called Martelli-Scotti anti-mafia decree), converted into Law no. 356 of August 7, 1992, a second paragraph of the article, which allowed the Minister of Justice to suspend for serious reasons of public order and public security the treatment rules in the penitentiary for detainees belonging to the criminal organisation of the Mafia. While discussing the extension of the law, Leoluca Bagarella, in a teleconference during a trial in Trapani, reads a statement against article 41-bis, accusing politicians of failing to honour their promises (referring to Totò Riina).

A letter signed by 31 Mafia heads is made public, with some warnings to their lawyers who, after becoming MPs, have forgotten them. Then, an escort is attributed to some of these attorneys, including to Dell'Utri.

In 1995, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CP) visited the Italian prisons to verify the conditions of detention of persons subject to the regime under Article 41a. In the opinion of the delegation, this particular case of the detention regime was the most difficult of all those taken into account during the inspection. The delegation saw the restrictions as extreme and defined them as inhuman and degrading. Detainees have been deprived of all activity programs and have been found essentially detached from the outside world. The prolonged duration of the restrictions has caused harmful effects that have led to changes in social and mental faculties, often irreversible.

The norm was temporary: its effectiveness was limited to a period of three years after the entry into force of the conversion law. Its effectiveness was extended for the first time until December 31st 1999, the second time until December 31st 2000 and the third time until December 31st 2002. Ten years after the Capaci massacre of May 24th 2002, the Council of Ministers proposed a bill to amend Articles 4-bis and 41-bis which was subsequently approved by the Parliament as Law no. 279 of December 23rd 2002 (the amendment of Articles 4-bis and 41-bis of Law No 354 of July 26th 1975 on prison treatment), abrogating the transitional provision that sanctioned the temporary nature of this discipline and stipulating that the ministerial provision may not be less than one year and may not exceed two years and that subsequent extensions may only have one year each; the heavy prison regime has been extended to those convicted of terrorism and subversion.

The Article 41-bis regime applied for very long periods, even to persons who have not been finally convicted, it is considered by some jurists to be unconstitutional, but so far Constitutional Court rulings (with reference to Article 27 of the Constitution of the Italian Republic) and of the European Court of Human Rights (under the European Convention for the Protection of Human Rights and Fundamental Freedoms) confirmed the legitimacy of the provision.

An American judge refused to extradite Mafia head Rosario Gambino in 2007 because, in his opinion, Article 41a would be similar to torture. In 2013, the Constitutional Court declared illegitimate the limitations regarding the talks with the defence attorney.

The regime is applied to prisoners individually and seeks to prevent their communication with outside criminal organisations, the contacts between members of the same criminal organisation in prison and the contacts between members of different criminal organisations, as well as avoiding offenses and guaranteeing public security and order even outside prisons.

## 5. Particularities of the Chinese Criminal Law

The constitutive elements of the crimes under Chinese law are the same as in French law.

We consider the requirement of a legal element, a material element and an intentional element. The intentional element is of great importance in Chinese criminal law because it determines the classification of crimes.

In China, the notion of public order covers both public orders, as it is conceived by most Western countries, and the protection of socialist ideology.

Public order in the traditional sense of the term is protected in China by incriminating several categories of offenses, including crimes against citizens' personal and democratic rights, crimes against public security, material damage, public order offenses. Certain acts that represent the responsibility of civil liability in EU countries are sanctioned because of the importance given to them in the Chinese tradition.

No provision of the Code penalizes political offenses or crimes of opinion. But the protection of socialist ideology is ensured by the criminalisation of acts affecting the security of the state, repression is promptly made for all actions aimed at overthrowing the socialist system and those related to violations of sovereignty, territorial integrity and security of the People's Republic of China. Articles 102 through 113 of the Criminal Code list are not limited to those acts that include: incitement to desertion, espionage, and incitement of the masses to rebellion. The Chinese Criminal Code punishes various acts that harm the socialist economic order. These include financial fraud, tax and customs fraud, smuggling and infringement of intellectual and industrial property rights.

Certain perfectly legal economic activities in most modern legal systems may be considered to prejudice the socialist economic order. In 1988, a television import contract between a French company

in the field and a subsidiary of the Chinese Aviation Ministry was considered a huge fraud affecting the economy. The commercial agent employed by the French company, who received a commission and received a substantial deposit on behalf of his employer, was jailed for smuggling and misappropriation.

He was in a position to receive the death penalty because, being of Chinese nationality, he could not benefit from the preferential treatment of expatriates. The Chinese authorities involved in signing the contract were fired and arrested for smuggling. Criminal liability and the sanctions imposed depend on the personality of the offender and on the seriousness of the deeds.

In China, the age for criminal liability is 16 years. But juveniles under the age of 14 are punished for certain offenses considered to be seriously detrimental to public order, such as intentional homicide, serious injury, drug trafficking, rape etc. The sanctions applied are lower than those prescribed by the law. Like in most legal systems, mental patients who are not aware of the scope of their actions are declared irresponsible.

Similarly, force majeure and self-defence are exonerated from liability.

In any case, Article 3 of the Criminal Code stipulates that unintentional offenses are punished only in the cases provided by the law.

Most unintentional offenses are punished, but sanctions are much more lenient. For example, in case of intentional murder, the punishment is death, life imprisonment or imprisonment for at least 10 years. If mitigating circumstances are used, the penalty ranges from 10 years to 3 years of imprisonment (Article 232 of the Criminal Code). On the other hand, when homicide is involuntary, the penalty ranges from 3 to 7 years of imprisonment. If there are mitigating circumstances, the punishment ranges between 3 years and 6 months of imprisonment (Section 233 and 45 of the Criminal Code). For any offense, the accused may benefit from attenuating circumstances, the main cause of the reduction or even the exemption of punishment in minor offenses being voluntary surrender.

The Chinese Criminal Code provides for five main sanctions and three accessory punishments.

The main sanctions are: (i) release for three to two years of a penalty without imprisonment obligating the convicted person to report on his activities and obtain authorisation for all trips; (ii) detention from one month to six months in a detention facility where the sentenced person is engaged in a remunerated activity; (iii) imprisonment from 6 months to 15 years; (iv) life imprisonment; (v) death penalty that has been enforced since 1982 for economic crimes. People's courts may, in an ancillary manner, rule either a fine or the deprivation from political rights for a period of one to five years, or total or partial confiscation of property.

The judicial system is divided by Article 3 of the Code of Criminal Procedure between the public security bodies responsible for the preparatory investigation and the preventive detention, the People's Prosecutor’s Office that approves the arrest, verifies legality and executes the public action.

The public security body intending to make an arrest must obtain the authorisation of the Tribunal or of the Prosecutor's Office. In case of refusal, it may request a review. It is also the only power at its disposal when the prosecutor's office refuses to initiate criminal proceedings after a preliminary investigation. In case of emergency, the public security body may detain the persons caught or suspected of serious crimes without being authorised to do so. In this case, it must inform the Prosecutor's Office within three days and, if the latter does not authorise the arrest, within three days, the detained person must be released immediately.

Detention during the preliminary investigation may not exceed two months. If the investigation cannot be completed after this period, the Prosecutor's Office may grant an additional period of one month.

This was the case with the aforementioned import contract.

The commercial agent was detained for 12 months without the People's Court having been notified with any charges. A first indictment for misappropriation of funds was handed over to the tribunal after four months of detention. The court rejected it for lack of evidence, a new indictment was filed after three months. Despite the rejection of the second indictment, only a release of "medical guarantee" was obtained 5 months later. This release was made possible by the prisoner's acquisition of French citizenship as a spouse of a French citizen.

The right to defence is supported by the Code of Criminal Procedure; in addition, the law of 2001 and 2008 on the exercise of the profession of lawyer has reaffirmed and strengthened the rights of lawyers in criminal proceedings to ensure their defence for the client.

The criminal proceedings are accusatory, the debate being between the accused, the prosecutor and possibly the civil party. The usual methods of evidence are recognised. Magnetic records, which are very common in China, have probative force even when they were made without the knowledge of the interlocutor.

The presumption of innocence is not recognised by the Code of Criminal Procedure. The defendant's lawyer has the capacity to provide evidence to recognise the defendant’s innocence. In practice, the defendants' lawyers are often appointed by the Tribunal. Their mission is to encourage their "client" to admit the facts in order to facilitate the manifestation of truth and to benefit from the judges’ lenience.

In any case, when the judges deliberate, they have the obligation to communicate the decision to the parties within five days. On the other hand, when the decision is postponed to a subsequent hearing, the copies of the judgment must be sent to the parties immediately. The appeal period applies only after the date of receipt of the ruling.

Despite the relative independence of judges from the prosecutor's office, experience has shown that, as far as economic crimes are concerned, it is difficult for the accused to establish good faith.

Over the last decade, there has been an important debate on crimes against state security, Criminal Law, capital punishment and rights of the defendant in criminal proceedings, which have had all the positive consequences in criminal law. Therefore, it is important to note that the Chinese Criminal Law has considerably evolved and has made much progress; one can only hope that it will meet both the requirements of China's social evolution as well as those of the international context.

The brief presentation of the peculiarities comprised in the Criminal Law of four different legal systems reveals major discrepancies in addressing and treating the same type of crime, the fact that what is allowed in a legal system is severely or even worse sanctioned in another.

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# CYBERTERRORISM: THE LATEST CRIME AGAINST INTERNATIONAL PUBLIC ORDER

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**Abstract**

*Cyberterrorism has become the latest global threat that highlights security leaks in the digital world and its outcomes.*

*Nowadays economic and social context as well as the advances in the field of information technology facilitated individuals, private entities and governments to become increasingly interconnected through computer structures.*

*Cyber-attacks have seen an alarming development, and they have been successfully used in paralyzing activities, such as rail, naval and air traffic, being even used by some state entities in military and economic espionage.*

*Moreover, cyber-attacks have been able to block activities of state institutions, corporations, financial and banking institutions, cross-border trading companies, as well as individuals, viewed as single end users of products or services.*

*Thus, it would be an understatement to say that cyber terrorism has become a worldwide menace; it is a live global phenomenon that spreads fear whilst being impressively effective in terms of seriousness and widespread damages.*

*Given the significance of this global negative phenomenon with potential devastating effects, depending on the severity with which it manifests, cyberterrorism has been chosen as the subject matter of this paper.*

*The aim of the paper is to go into the depth of this global phenomenon, starting from the economic, political, social and technological factors that favored the emergence and hasty development of cyber-terrorism.*

**Keywords:** *cyberterrorism, cybercrime, international public order, Internet, victim*

## 1. Introduction

In the current social and economic background and taking into account the progress in the field of information technology, individuals and private and governmental entities, in the course of their current activities, are increasingly interconnected by means of IT structures.

There were many cases when cyberattacks have been able to block the activities of state institutions, corporations, financial and banking institutions, cross-border trading companies, by taking on different proportions on individuals, considered as *ut singuli* in the capacity of final users of certain products or service.

Furthermore, in 2017, cyberattacks increased alarmingly, being successfully used in activities carried out in order to block transportation means, respectively rail, naval and air traffic, being used by certain state entities in military and economic espionage.

It should be noted that, given their damaging effects, cyberattacks have begun to be preferred even by terrorist organizations in place of classical assaults, with an even greater impact on society, being able to affect a wider range of individuals (natural persons/legal entities) by means of the immediate effect of these types of criminal activities.

Therefore, the protection of the information systems integrity has become, both for the states and for the individuals, a real concern, *on the one hand*, by the need to provide networks for effective protection of information systems, and, *on the other hand*, at legislative level, by creating a regulatory framework that includes the widest range of illicit activities in order to prevent and protect information systems from "*cybercrime*" activities.

## 2. Cybercrime and cyberterrorism

In order to be classified as cyberterrorism, virtual space activity must have a '***terrorist'*** component, which means that it must include terror and have a political motivation. Therefore, we have to make the distinction between terrorism that uses information technology as weapon or target and terrorism that simply exploits information technology, this side being the most visible and intensely used at the time being.

At this level, a distinction should be made between *cybercrime* and *cyberterrorism*, the essential tiebreak criterion being represented by the "*terrorist component"*.

The notion of "cybercrime" defines all the deeds committed in the area of information technologies, within a certain time period and on a certain criterion. As any social phenomenon, cybercrime represents a system with own properties and functions, distinct from those of the constituent elements in terms of quality.

Although at the international level there is no unanimously accepted legal definition on cyberterrorism, a number of definitions have been formulated at the conventional level, among which we will mention that of the US Federal Bureau of

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Investigation, which is the most eloquent: cyberterrorism is a phenomenon that is "*a premeditated, politically motivated attack against information, computer systems, programs and data which results in violence against noncombatant targets by subnational groups or clandestine agents*"[1].

Cybercrime is one of the fastest-evolving branches of the criminal spectrum, given its specificity, namely:

- the speed that perpetrators can exploit in committing cybercrime through internet;
- the comfort these perpetrators can enjoy at the shelter of anonymity in committing a wide range of illicit activities that do not know physical or virtual boundaries;
- the magnitude of the consequences of these unlawful actions and
- the potential benefits that can be gained from the commission of such crimes.

As far as the European Space is concerned, an important step in identifying, qualifying and attaining criminal responsibility for cyberattacks was made by the adoption of the Directive on attacks against information systems ("*Directive 2013/40/EU*") in 2013, establishing minimal rules on the definition of criminal offences and penalties in the field of the attacks against information systems and providing operational measures to improve cooperation between authorities.

Although Directive 2013/40/EU has led to significant progress in terms of the criminalization of cyberattacks at a comparable level in all Member States, the improvement of the way it is implemented by the national transposition regulations is possible by updating them with the continuous evolution of the cybercrime, this process being certainly achievable with the assistance of the European Commission (the "*Commission*").

Directive 2013/40/EU of the European Parliament and of the Council of August 12th, 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA of the Council, published in the Official Journal of the European Union L 218/8 of August 14th, 2013.

Furthermore, as of 2018, the Commission has been adopting concrete proposals to facilitate rapid cross-border access to electronic evidence, nowadays practical measures being taken to improve cross-border access to electronic evidence for criminal investigations, including the financing for training on cross-border cooperation, the development of an electronic platform for the exchange of information within the European Union and the standardization of forms of judicial cooperation between Member States (*Joint Communication to the European Parliament and the Council: Resilience, Deterrence and Defence: Building strong cybersecurity for the EU*[2].

At the international level, according to INTERPOL, cybercrime can be classified into two major categories of cybercrimes, namely:

- *Advanced cybercrime* (or high-tech crime) – sophisticated attacks against computer hardware and software;
- *Cyber-enabled crimes* – many "*traditional*" crimes have taken a new turn with the advent of the Internet, such as crimes against children, financial crimes, theft, fraud, illegal games, sale of counterfeit medicines and even terrorism.

According to the INTERPOL data, cybercrimes have seen an impressive evolution, their authors changing their profile with the evolution of the crimes: from individuals or small groups, cybercrimes are nowadays committed by complex cybercriminal networks bringing together individuals from across the globe in real time to commit crimes on an unprecedented scale. Such organized criminal groups use increasingly the internet as a means to facilitate their activities and to maximize profit in the shortest time possible[3].

Most importantly, cybercrime is characterized by internationality and a rapid evolution, both at the organizational level in what concerns the perpetrators and at the level of crimes complexity, leading to worsening the consequences resulting from the commission of such crimes, therefore, the security of IT networks and systems appears to be a necessity for any of the "*potential victims*".

## 3. Relevant international documents on cyberterrorism

Foremost, the Resolution 2133 (2014) adopted by the United Nations Security Council within its 7101st meeting of January 27th, 2014 is one of the most important text to have ever been drafted on cyberterrorism. This document refers to the general phenomenon of terrorism, including the manifestation of cyberterrorism, as follows: "*reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed and further reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts*". It also reveals, among other things, that: it "*reaffirms its resolution 1373 (2001) and in particular its decisions that all States shall prevent and suppress the financing of terrorist acts and refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of member of terrorist*

[1] White, Kenneth C., *Cyber-terrorism:Modern mayhem*, U.S.Army War College, 13 March 2015;
[2] Available here: http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52017JC0450&from=EN);
[3] Please see: https://www.interpol.int/Crime-areas/Cybercrime/Cybercrime;

*groups and eliminating the supply of weapons to terrorists*."

Another significant document is the Report that the United Nations Office on Drugs and Crime (UNODC) published in 2012, in Vienna. This Document aimed at helping and advising countries in the fight against '*terrorists'* using Internet (cyberterrorism) to plan attacks, to recruit and to make propaganda.

In respect of cyberterrorism as a Psychological Weapon in *Modern War*, Army corps general Fabio MINI, former commander of the General Staff of UN Command for South Europe, coordinator of *Comando Interforce for Balkan operations*, commander of UN peace operations in Kosovo-KFOR stated that: "*The war has changed, we can no longer be tributaries of the concept of traditional war when they shot each other. The war has changed not only because the people directly involved in this process and those collaterally interested are numerous, but especially because control systems are multiple: we no longer refer to traditional weapons, but to a multitudine of other types of weapons. A fundamental weapon of the modern war is the PSYCHOLOGICAL WEAPON, the weapon of influence being exerted on all and by all means, especially by computer, IT means […]. In 45 years of career, working all around the world, I have seen a lot of aspects that cannot even be described […]*"[4].

## 4. The notion of cyberterrorism

The concept / notion of cyberterrorism was certified for the first time in November 1794;

Initially, it defines the "*doctrine des partisans de la Terreur*", the doctrine of partisans of terror, representing the exercise of power by means of intense and violent struggle against those who acted and manifested against the revolutionaries – the French Revolution. It was a way of exercising power, not a way of acting against it, as defined today.

The term evolved during the nineteenth century and currently defines not a state action (the revolutionary state), but an action against it (terrorism). Its use, in anti-governmental respect, is attested in 1866 in Ireland and in 1883 in Russia (the nihilist movement-doctrine or attitude, based on denying all values, beliefs and opinions.

As François-Bernard Huyghe stated, "*Terrorism, in a modern sense, is born simultaneously with the emergence of current media institutions*"[5].

"*Criminal acts of political or other purposes intended or calculated to provoke a state of terror in the general public, from a group of persons, regardless of the reasons behind such political, philosophical, ideological, racial, ethnic, religious or any other kind are unjustifiable and condemnable*" (the United Nations).

### 4.1. Cyberterrorism – definition

"*Cyberterrorism*" is a controversial term, which is difficult to be defined, especially due to the lack of clear clarifications on terrorism itself.

Certain authors define it as being "*the multitude of attacks against information systems in order to destroy them and to generate a state of alarm and panic*". According to this limited definition, "*it is difficult to identify all actions and activities of cyberterrorism*".

As Kevin G. Coleman (*The Technolytics Institute*, article 6/23/2017) detailed, "*Premeditated actions / activities aimed at destabilizing information media / systems, with the intention of causing social, ideological, religious, political or any other kind of damage, with the ultimate goal of intimidating individuals or a group of individuals in order to force them or other groups / groups of individuals; to act / react in a certain sense*".

## 5. Cyberterrorism – the context of occurrence

The issue of cyberterrorism actually came into being with the events of September 11th, 2001, when the US administration announced it would implement a new defense strategy.

One month after the events of September 11th, 2011, US President George W. Bush signed *The Patriot Act, (i.e. "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001"*), the first global document that provides for legislation on terrorist activities[6].

The Patriot Act is an exceptional law the provisions of which initially extended for 4 (four) years. In July 2005, The American Congress permanently endorsed 14 of the 16 provisions.

After a long dispute, the American Congress, during the winter of 2005-2006, permanently endorsed most of the tasks assigned to the police and security forces.

Briefly, The USA Patriot Act:

- strengthens the power of government agencies– FBI, CIA, NSA and the army, thus reducing the right of defense;
- introduces the status of 'enemy combatant' and "*illegal combatant*";
- provides that any kind of intervention within an information system can be assimilated to a terrorist act;
- authorizes FBI to intercept all electronic messages and to preserve any trace of web navigation of persons suspected of terrorism or of contact with a

[4] Please see: www.libertaegiustizia.it;
[5] *Think tanks: Quand les idées changent vraiment le monde,Vuibert*, 2013;
[6] Amitai Etzioni, How Patriotic is the Patriot Act?:Freedom Versus Security in the Age of Terrorism, Routledge, 2004;

person suspected of terrorism;

- authorizes the phone interception of any person suspect of having close or distant links with a person suspected of terrorism. In August 2006, a federal judge found the inconvenience of telephone interceptions and ordered the cancellation of the secret interception program run by the National Security Agency (NSA).

Under these circumstances, associations for the protection of human rights started strong advertising campaigns on the consequences of the US Patriot Act, such as: attenuation of the right to defense or the violation of the right to privacy by authorizing electronic interceptions of any kind and telephone interceptions. They draw the attention on the risk of the agencies to interfere in the act of justice.

"*The problem is that all these derogatory procedures introduced in the name of the fight against terrorism have ended up by becoming rules. If they prove to be effective in combating this monster, which is the terrorism, therefore being used to fight against it in several areas, they have ended up contaminating the whole criminal law*"[7].

## 6. European Regulation. VIGIPIRATE

Starting with 2002, the European Union starts to issue framework decisions "*inviting*" Member States to adjust national legislation to the concept of prevention and fighting against terrorism.

For example, France adopted the VIGIPIRATE – an anti-terrorism plan drawn up in 1978 after the attack of Orly, of May 20th, 1978, and the taking of hostages at the Embassy of Iraq in Paris. The plan was completely rebuilt after the events of September 11th, 2001 and is continuously maintained at red level after the attacks of London.

VIGIPIRATE is a set of measures applied in any context and circumstances: *"…even in the absence of precise threat signals*".

In 2007, the latest version of VIGIPIRATE plan was released, founded on a clear principle: *"terrorist threat must be considered permanent"*. This instrument was updated in 2016.

In 2006, the Law on combating terrorism (LCT) presented by the Ministry of Foreign Affairs of the Republic of France, based on the articles of The USA Patriot Act, widen the obligation to preserve traffic data, even in case of '*cybercafés*'[8]

The law allows intelligence services operating in the field of preventing and combating terrorism to obtain access to the control of the information media – electronic surveillance – in the lack of a judicial authorization.

The surveillance on the internet is thus placed outside the judicial control.

VIGIPIRATE represented the source of inspiration for the European legislation in the field.

The amendments of 2014: widen the area of the operators involved – territorial communities and economic operators; decodes part of the plan of measures; restores the action plan[9].

Figure 1


**Source**: https://upload.wikimedia.org/wikipedia/commons/thumb/f/f0/Vigipirate-web-07_-_en.png/800px-Vigipirate-web-07_-_en.png

## 7. Regulations on prevention and combating terrorism in Romania

Terrorism offences are regulated, in the Romanian criminal law, by Law no. 535/2004 on the prevention and combating terrorism.

Such provisions are included in the current Criminal Code, in Title IV, as being the offences

[7] Christophe André, Maître de conférences à l'Université Versailles-Saint-Quentin (UVSQ). Il dispense également un cours de Droit de la répression à l'IEP de Paris;

[8] Tristan Nitot, Surveillance: Les libertés au défi du numériques:comprendre et agir;

[9] Please see: https://www.gouvernement.fr;

"*committed for the purpose of seriously disrupting public order, by intimidation, by terror or by creating a state of panic*".

As far as cyber space and its reference relations are concerned, the Romanian legislator did not at any time question the existence of terrorist actions.

The computer and the cyber media are considered by the lawmaker as simple instruments by which terrorist offences and acts can be committed.

The amendments of 2018 of Law no. 535/2004 refer to, *inter alia*, the notion of terroism: *"Terrorism is the ensemble of actions and/or threats that represent a public danger affect life, body integrity or human health, the ensemble of social relations, material factors, international relations of the states, national or international security, are politically, religiously or ideologically motivated and are committed for one of the following purposes: intimidating population or a segment of it, by producing a strong psychological impact, compelling a public authority or international organization to fulfill, not to fulfill or to refrain from the fulfillment of certain act, serious destabilization or destruction of fundamental political, constitutional, economic or social structures of a state or international organization".*

Terrorist propaganda materials are defined as follows: "*any material on hard copy, on audio, video media or other information data, as well as any other form of expression that makes the apology of terrorism or exposes or promotes ideas, concepts, doctrines or attitudes to support and promote terrorism or terrorism entity"*.

The legislator provides the offences which are taken into account in this field, as follows:

a) the offences of homicide, second degree murder and first-degree murder, bodily injury and serious bodily injury, as well as illegal deprivation of freedom, all provided by the Criminal Code;
b) the offences provided by art. 106-109 of Government Ordinance no. 29/1997 on the Aerial Code, republished;
c) the offences of destruction provided by the Criminal Code;
d) the offences of non-observance of the regime of arm and ammunition, non-observance of the regime of nuclear materials and other radioactive matters, and of non-observance of the regime of explosives, provided by the Criminal Code;
e) production, acquisition, possession, transportation, supply or transfer to other persons, directly or indirectly, chemicals or biological arms, and research in this field or development of such arms;
f) introducing or spreading into the atmosphere, on the soil, into the subsoil, or into water, products, substances, materials, micro-organisms or toxins that are likely to jeopardize the health of persons or animals or the environment;
g) threatening with the commission of the acts in a)-f).

Other offences are provided by Articles 33-39 of the same law – offences assimilated with terrorist acts (Article 33), acts of terrorism committed on the board of ships or aircraft (Article 34), the deed of a person who leads a terrorist entity (Article 35), making available to a terrorist entity movable or immovable assets (Article 36), terrorist threats (Article 37) and terrorist alarming (Article 38), the administration of the assets belonging to a terrorist entity (Article 39).

## 8. Cyber Space Attacks

The main actions performed by ISIS, Al Qaeda and Hamas groups were mainly focused on propaganda, fundraising by cryptocurrency, as well as recruiting by social media and messaging applications (especially those protected by cryptography, such as *Telegram*);

If we analyze ISIS groups, these activities are declining, especially after the loss of '*capital'* Raqqa in Syria. Nevertheless, despite the forced abandonment of their neuralgic center for the production of information materials for propaganda purposes, the external communication of '*black flags'* was not completely disrupted, because of cells dispersion and their renewed autonomy allowed the maintenance of an operational continuity.

By analyzing action methods: *propaganda, fundraising and recruiting*, these are activities generally addressed to a mass audience and are therefore transmitted through the social media.

Nevertheless, Deep Web and Dark Web are spaces where certain actions are performed, such as such as the sale of arms – as in case of the attacks of Paris, in 2015.

Military equipment and materials pose a limited risk of being intercepted by the authorities on the internet. Jihadist terrorism, mentioned in the annual report of TIC presented by Eitan Azani, Deputy Executive Manager of the *International Institute for Combating Terrorism*, uses fundraising activities by means of cryptocurrency that guarantees the anonymity of the payer.

Several campaigns, such as Jahezona, of the Akhbar al-Muslim site or of Aaaq Foundation, remain alive and contribute to maintaining the work of the Islamic State.

The Isis-coins.com website invites users to change circulant currency on the territory of the caliphate – now dismantled – into virtual currency.

The existence of encrypted messaging applications facilitates communication: in addition to classical applications, some programmers who support Jihadists developed an encryption program called '*Muslim crypt'*, distributed by Telegram MuslimTech channel.

As far as the propaganda carried out in the *social media* is concerned, ISIS is committed to teach militants to protect online identity, as Bahaa Nasr, the manager of Lebanese project *Cyber Arab* explains.

The Justpaste.it platform provides manuals of the Caliphate in order to use Vpn (such as: http://justpaste.it/2ip); or advice collection on information security, from browser navigation to mobile phone (such as: http://justpaste.it/itt3).

The Global Islamic Media website uses source instruments and "*Islamize*" them: among them, an encrypted messaging program with Arabic and English tutorials.

ISIS has been lately focused on software and encryption programs for Android and Symbian that encrypts files, text messages, and emails.

Scott Terban, expert in cyber security and terrorism declared for '*Il Espresso'* that: "*Besides classical propaganda, the main IT activity of ISIS is to personalize such programs (encryption). Malware Hunters of Citizen Lab of the University of Toronto found in December evidence of the software delivered by e-mail to the anti-ISIS Syrian activists behind site «Raqqah is Slaughtered Silently». The program, if downloaded as a harmless attachment, can locate the victim. It is a rudimentary instrument, not as sophisticated as the one used by the pro-Assad Syrians (who have violated «Le Monde» Twitter profile by exploiting OpFrance visibility, but that are not part of the cyber jihad). ISIS is, therefore, the number one suspect"*.

In June 2017, hundreds of thousands of computers of Europe, America and Asia were hit by one of the most aggressive cyberattacks in history, performed by one of the most advanced malware programs ever created.

The scope of the hackers was above all the networks and systems of the medium and large companies including TNT, Reckit-Benkiser, Maersk and others. Hackers hit victim devices by using a redemption program, a program that, after infecting target computers, delete the entire content, unless the owner agrees to pay a redemption.

According to estimations, NotPetya (the name of the ransomware), costed companies more than EUR 1 billion, including the amounts paid and the damages caused to the production activities. NotPetya expands by exploiting a vulnerability in Windows operating systems: according to the investigations performed by ESET, the antivirus software manufacturer, the attack started in MEDoc servers, a program extended in Ukraine for the management of tax payments.

## 9. Forecasts

Ariel Levanon, vice-president of Cyber & Intelligence group stated that "*The challenge of Western intelligence agencies is not only to find terrorists, but to fully understand their capacity and motivation. Performing cyberattacks and transmitting messages over the Internet will, in fact, become more and more simple, with the increase in digitization of every aspect of life. At the same time, it will be more and more difficult to ensure the protection of the cyber space. It is expected that in the next five years, terrorist attacks in Western countries take place against the transport system and it is expected that an IT component support these attacks. There are no realistic solutions that do not take much time. It is essential to protect the information ecosystem by legal regulations, by the involvement of private companies, but above all, by teaching these problems in school*".

According to computer security experts, ransomware is one of the fastest cyberattacks to be multiplied in the future.

The European Union, by Directive 541/ 2017, included attacks against information systems in the category of "*terrorism offences*", by adopting a third legislative approach.

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# ANALYSIS OF THE INCREASING ROLE OF NGOS IN INTERNATIONAL PUBLIC LAW

**Patricia Casandra PAPUC***

**Abstract**

*In this paper we offer an analysis of the increasing role of NGOs in international public law and assess whether NGOs can be considered subjects of international law.*

*We give a brief overview of how modern NGOs came into being in the 19th century, and how they gained prominence on the world stage with the growth of international public law in the 20th.*

*Using the examples of Interpol and the International Federation of the Red Cross, we give our view on the debate concerning whether these as NGOs can be considered subjects of international law.*

*As we subscribe to the definition of professor Besteliu that NGOs must be a creation of „legal personalit[ies] registered in the domestic legal order of a state" we come to the conclusion that, although the importance of NGOs has grown tremendously in an international legal context, currently no NGO can be subject of international law.*

**Keywords:** *NGOs, international public law, United Nations, Interpol, International Federation of the Red Cross*

## 1. Introduction

As Non-Governmental Organisations (NGOs) are growing in size and scope around the world, so is the academic interest on the area. Within the legal field of studies, and in particular that of international public law, this leads to some interesting questions and debates addressing the role NGOs are playing in this context.

The purpose of this paper is to offer an analysis of the increasing role NGOs take on in international public law. We will offer this analysis by giving a brief overview of how NGOs have been incorporated as actors on the international scene. Furthermore, we will explore the extent of this incorporation by answering the question: can NGOs be considered subjects of international law?

In order to do this, we will look at the origin of NGOs and try to offer a definition of NGOs before analysing how NGOs and international public law have grown alongside each other throughout the 20th century, looking to the creation of the League of Nations and the United Nations.

Finally, we will weigh in on the debate on whether NGOs can ever be considered subjects of international law. Currently, some scholars argue that Interpol and the International Federation of the Red Cross are examples of this. However, in this paper we will argue that this is not the case since NGOs can only be indirect contributors to the creation of new norms and not to any actual law.

## 2. The historical context that led to the establishment of NGOs

Entities resembling what today would be considered NGOs have always existed in one form or another because people have always been part of associations designed to support different ideals, whether they are social, political or economic.

Because of this we cannot know for sure exactly when the first non-governmental organisation was formed, but what we do know is that NGOs became known in the middle of the 19th century.

According to Szazi Eduard (*NGOs:* first known NGOs are from the 19th century. One

fought against slavery (The Anti Slavery Society) and another fought for the right to life (The International Committee of the Red Cross).

NGOs had an important role also in creating international public law, for example the NGOs that did lobbying for the creation of the *Institute of International Law*[1].

The Institute of International Law also promoted the creation of an Arbitration Court which advised countries on signing numerous treaties, among which we can mention the *Hague Peace Conferences.*[2]

The Peace Conferences in The Hague were perfect occasions for NGOs to lobby in order to support

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[1] The Institute of International Law was founded in Gent, on the 8th of September 1973 by eleven famous lawyers. The institute is a learning platform and the mission of this platform is to promote the progress of international law. The Institute was also offered the Nobel Prize for Peace. More informations can be consulted here: http://www.idi-iil.org/en/

[2] The Peace Conferences from the Hague (1899 and 1907) represent a number of treaties and international declarations which were signed during the two peace conferences. Together with the Geneva Conventions , the Hague Conventions represent the first treaties that explain the rules of how to conduct war and war crimes are forbidden for the first time in history. More informations can be seen here: https://www.britannica.com/event/Hague-Conventions

their causes; lobbying still being one of the main tools that NGO use in order to accomplish their mission.

A very important moment for NGOs in international law is the moment when the

League of Nations was created.

NGOs have collaborated with the League of Nations in various fields such as: education, refugees, minority issues, finances and many more.

In the 20th century, NGO have also had a contribution in drafting important international conventions, from human rights, to the environment and many others.

The most important moment for NGOs was the moment when they were formally recognised by the United Nations. Article 71 of the UN Charter mentions that: „*The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned."*

An interesting fact is that in the preliminary version of the UN Charter there was no provision describing the collaboration between the UN and private entities, but the lobbying groups insisted so much on this provision that it was finally included during the San Francisco Conference where the UN Charter was signed.

As a consequence of this, the NGO concept started becoming used by the UN and from the 1970s it became a concept used and known at a global level.

However, even if the NGO concept is used at a global level, there is still no universal definition of it.

So in the next part of the article we plan to present the most important definitions that have been given to NGOs in time and we will also try to give our own definition of the concept.

## 3. Attempts to define NGOs

Throughout history there have been many attempts to define NGOs.

The Encyclopaedia of Public International Law defines the NGO as: „*a private organisation not established by a government or intergovernmental agreement, which are capable of playing a role in international affairs by virtue of their activities, and whose members enjoy independent voting rights*"[3]

In Stromquist's opinion, NGOs: „*do not belong to state structures, they are voluntary organisations that belong to civil society which operate in the field of services for groups or disadvantaged group of people socially speaking, for the implementation of programs aimed at consolidating local communities and promoting sustainable development in collaboration with the state or other entities*".[4]

On the other hand, P. Wahl defines NGOs as: „*voluntary associations, independent from the state and from political parties, charitable and non profit, which accept members regardless of race, ethnicity, religion and sex*"[5]

The International Law Dictionary defines an NGO as a „*private international organization that serves as a mechanism for cooperation among private national groups in international affairs*"[6]

The World Bank defines NGOs as: "*private organizations that pursue activities to relieve suffering, promote the interests of the poor, protect the environment, provide basic social services, or undertake community development*"[7]

NGOs are defined from a sociological perspective as: *"self-governing, private, not-for-profit organizations that are geared toward improving the quality of life of disadvantaged people. They are neither part of government nor controlled by a public body"*.[8]

As we already mentioned it is very difficult to give a definition to NGOs. But there are some characteristics of what NGOs cannot be. For example NGOs cannot be criminal organisations.

Lester Salamon and Helmut Anheier mentioned 7 criteria to define NGOs in their paper: „ *Social Origins of Civil Society"*[9]:

- Institutionalise
- State separation
- Non distribution of profit
- Autonomy

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[3] Sabattini, Francesca, *„The Role of NGOs in International Law"*, paper 2013/2014, pag 3, document available at: https://tesi.luiss.it/13185/2/sabattini-francesca-sintesi-2014.pdf

[4] Cace, Sorin, Nicolăescu, Victor, Anton, Andrei, Nicoleta, Rotaru, Smaranda, *„Organizațiile Non Guvernamentale și Economia Socială"*, Expert Publishing Hourse, Bucharest, Romania, 2001, pag 26 , available at: http://www.catalactica.org.ro/files/organizatiile_neguvernamentale_si_economia_sociala.pdf

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[6] Charnovitz, Steve, *„Two centuries of participation: Ngos and international governance"*, 18 Mich, J INT„1 L 183 (1997), pag 5, available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1466&context=mjil

[7] *„Types and Roles of Non Governmental Organisations Commerce Essay"*, published on the 5th of December 2016*"*, available at :https://www.ukessays.com/essays/commerce/types-and-roles-of-non-governmental-organizations-commerce-essay.php

[8] Cakmak, Cenap, *„Civil Society Actors in International Law and World Politics: Definition, Conceptual Framework, Problem"*, pag 9, document available http://wwwdata.unibg.it/dati/corsi/68030/38344-CIVIL%20SOCIETY%20ACTORS%20IN%20INTERNATIONAL%20LAW%20AND%20WORLD%20POLITICS.pdf

[9] *„Social Origins of Civil Society"*,work which was quoted at this article: https://www.scribd.com/doc/75662984/Rolul-organizatiilor-neguvernamentale

- Volunteering
- Not having a religious mission
- Not being part of a political party

According to professor Besteliu, an international non-govermental organisation can be defined as: „ *an international association created by a private or a mixed initiative, groups of natural or legal persons with different nationalities, which has a legal personality registered in the domestic legal order of a state and which does not pursue lucrative goals*".[10]

We subscribe to the definition given by professor Besteliu. Furthermore, we would also add the 7 criteria described above by Salamon. In our opinion, the members of an NGO must also have the same goal in mind.

## 4. NGOs in the UN system

NGOs have been playing a key role in the UN system for some time now.

We now plan to present the most relevant legal documents that describe the role of NGOs in the UN system.

The first document which created a formal structure between the United Nations and NGOs was article 71 from the UN Charter.

### 4.1. Article 71 from the UN Charter

Article 71 of the United Nations Charter: „*The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations… Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.*"

Even if also during the League of Nations NGOs were consulting the member states of this organisation, still the introduction of article 71 in the UN Charter represents a very important step in our opinion. It is the first multilateral treaty where the international community recognises the importance of NGOs in international relations.

### 4.2. ECOSOC Resolution 1296/1968

From the preamble of the ECOSOC Resolution 1296 the UN makes its intention of growing its partnership with NGOs clear: „*Recognising that arrangements for consultation with non-governmental organisations provide an important means of furthering the purposes and principles of the United Nations, Considering that consultations between the Council and its subsidiary organs and the non-governmental organisations should be developed to the fullest practicable extent*".[11]

According to this ECOSOC Resolution, the role of NGOs can be divided into three categories:

a) NGOs which are covering part of the activities conducted by ECOSOC;
b) NGOs which have a special mandate and which are only interested in some activities conducted by ECOSOC, where they can have relevant contributions;
c) NGOs that are in the roster system; these types of NGOs can be consulted ad hoc.

### 4.3. ECOSOC Resolution 1996/3

This ECOSOC Resolution defines NGOs as: „*any international organisation not established by a governmental entity or by an intergovernmental agreement.*" [12]

The ECOSOC Resolution 1996/31 explains the types of consultations that exist between NGOs and the UN: the general consultative status, the social consultative status and including the NGOs in the roster. What is then the difference between them?

The first category refers to the general consultative status. This type of status applies to big NGOs, which have various activities regulated by ECOSOC.

The second category refers to special consultative status. This type of status only applies to NGOs that have some skills, in some of the activities which are regulated by ECOSOC.

The third category refers to including NGOs in the UN roster. The NGOs which are included in the roster can have occasional contributions to the work conducted by ECOSOC.

## 5. The role of NGOs in international law

The role of NGOs is becoming more and more important in international law. According to Charnovitz from Yale University „*This is especially true in environmental affairs where NGOs regularly take part in multilateral conferences and monitor the implementation of treaties*".[13]

The importance is also recognised in the 1993 Vienna Declaration which stresses „*the important role of NGOs in the promotion of all human rights and in humanitarian activities at national, regional and international levels […] to the promotion and*

[10] Article 71 of the The United Nations Charter, the document is available here: http://legal.un.org/repertory/art71.shtml

[11] ECOSOC Resolution 1296 (XLIV) adopted on 23rd of May 1968, document available here: https://www.globalpolicy.org/component/content/article/177/31832.html

[12] ECOSOC Resolution Nr 1996/31, document available here: http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm

[13] Charnovitz, Steve, „ *Two centuries of participation: Ngos and international governance*, 18 Mich, J INT„1 L 183 (1997), pag 3, document available at : https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1466&context=mjil

*protection of all human rights and fundamental freedoms*"[14]

The lobbying activities by NGOs have increased in the last 20 years within the UN system. We can give examples such as The Rio Declaration on Environment and Development,[15] World Conference on Human Rights,[16] World Conference on Women,[17] United Nations Conference on Human Settlements,[18] The Fourth Conference on Landmines,[19] and World Summit on Sustainable Development.[20]

Furthermore, the *Cardoso Report* [21] reiterates the importance of the partnership between the UN and NGOs. There are voices who claim that NGOs have to be included in the daily activity conducted by the General Assembly but also other important events.

The Cardoso Report also mentions the importance of involving civil society more in the General Assembly and the Security Council.

Because our aim in this paper is to emphasise the increasing role of NGOs in international public law, in the next part of the paper we plan to present the Red Cross and the Interpol.

Both the Interpol and the Red Cross are considered by some to be subjects of international law, together with states and intergovernmental organisations. We do not agree with this argument but we do consider that these NGOs represent the best examples of NGOs which help develop international law.

### 5.1. Interpol

The status of Interpol as an NGO is disputed within the academic community. The debate centres around the membership structure of the organisation; while some treat Interpol as an intergovernmental organisation, others argue that it is a non-governmental organisation because its members are official police bodies (which are public legal persons of national law) and not states directly (public legal persons of international law). For the purposes of this paper, we subscribe to the view that Interpol is an NGO for this reason.[22]

Interpol's role is to facilitate the work conducted by police forces across the globe. In order to achieve this, Interpol has a complex infrastructure.

The mission of Interpol is to connect police departments from across the globe and help them communicate and share information in the most efficient way possible. Interpol's motto reads: *„Connect the police for a safer world"*.[23]

As we said before, Interpol is considered by some as a subject of international law. It is considered a subject of international law because it ensures mutual assistance between all the authorities working in criminal law, and which are creating a new criminal law framework across the globe.

Interpol could not function without the protection given by international law. Its daily activities are conducted under the framework of its constitution, a legal document which was agreed upon by the founding states in 1956 and which has binding force.

Interpol's constitution defines its scope, objects and reiterates the importance of police cooperation across the globe.

The constitution also defines and explains the structure of the organisation, its budget and its partnership with other organisations, focusing also on the respect for the Universal Declaration of Human Rights.

Because the respect for human rights is such an important thing for the Interpol, it collaborates frequently with other international criminal tribunals in order to process the data of people in the most lawful way possible.

Furthermore, the Interpol also collaborates with other entities in order to achieve its mission. We can give the example of the United Nations or the European Union, not to mention the help offered by the signatory sates, which signed among themselves different documents meant to facilitate the trade of sensitive information.

Without this support the Interpol could never accomplish its mandate.

Also, according to its constitution, the Interpol can sign international agreements on its own behalf; this right has been used by the organisation in the past.

However, even if the Interpol is contributing to the creation of international public law norms, due to the structure already described, we do not consider this sufficient for the organisation to be a subject of international law.

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[14] Marcinkute, *Lina* „ *The Role of Human Rights NGOs : Human Rights Defenders or State Sovereignty"*, the Baltic Law and Politics Journal, , pag 9, document available at : https://www.degruyter.com/downloadpdf/j/bjlp.2011.4.issue-2/v10076-011-0012-5/v10076-011-0012-5.pdf

[15] The Rio Declaration on Environment and Development http://www.unesco.org/education/pdf/RIO_E.PDF

[16] World Conference on Human Rights, more informations on this website: https://www.ohchr.org/en/aboutus/pages/viennawc.aspx

[17] World Conference on Women, more informations on this website: http://www.un.org/womenwatch/daw/beijing/

[18] United Nations Conference on Human Settlements, more informations on this website:: http://www.un.org/en/events/pastevents/UNCHS_1996.shtml

[19] The Fourth Conference on Landmines, more informations on this website: https://www.africa.upenn.edu/Urgent_Action/apic_12296.html

[20] World Summit on Sustainable Development, more informations on this website: https://sustainabledevelopment.un.org/milesstones/wssd

[21] Rossi, Ingrid, „*NGOs in International Law: Has regulation come to a halt*? *"* , The International Law Institute, 2008, article which can be consulted at the following website:https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP123e.pdf

[22] Runjic, Ljubo, „*The legal nature and status of Interpol in the context of contemporary international law"*, Conference paper: 22nd International Scientific Conference on Economic and Social Development – „ *Legal Challenges of Modern World "*, at Split, Croatia (June 2017)

[23] Interpol website: https://www.interpol.int/About-INTERPOL/Vision-and-mission

### 5.2. The International Federation of the Red Cross

The International Federation of the Red Cross is an independent and neutral organisation which offers assistance to victims of arm conflicts as well as other types of violence.

The International Federation of the Red Cross is formed by the Red Cross and the Red Crescent and its members consist of national Red Cross societies.

The International Federation of the Red Cross is regulated through the Geneva Conventions from 1949, the Geneva Protocols and the Statute of the organisation.

The main activities of this organisation are to organise humanitarian actions meant to respond to different emergencies across the globe, while respecting international humanitarian law.

## 6. Conclusion

NGOs started getting prominence in the 19th century with the establishment of recognised civil society groups fighting for causes such as the abolition of slavery and, noticeably, the international Red Cross movement.

With the introduction of intergovernmental organisations in the 20th century (most importantly the League of Nations followed by the United Nations) and, as a consequence, of modern international law, NGOs started enjoying special status under these new legal frameworks. In 1945 the UN Charter became the first official document to recognise NGOs in an international context.

However, the definition of an NGO to this day is still not clear, with various definitions are used for different purposes. Core to the argument we use in this paper is that NGOs are a construct of legal personalities of national law which is what separates them from intergovernmental organisations.

As we have seen in this paper, the closest definition of NGOs as established in international law comes from the ECOSOC Resolutions. However, this definition only works by way of exclusion („*no governmental entity or intergovernmental agreement*") and does thus not offer a definition as such, but it relates nicely to our argument that NGOs are separated from intergovernmental organisations on these exact terms.

The ECOSOC Resolutions also identify the different ways in which NGOs can enter into partnership with UN agencies and thus play an important part in the increasing role of NGOs in international public law.

This leads to the discussions we have addressed as to *how* big a role NGOs play in international public law and more specifically: if NGOs can now be considered subjects of international public law. In this context, some scholars have argued that two NGOs specifically present an example of this, namely the International Federation of the Red Cross and Interpol.

However, as we have argued in this paper, we do not share this view as subjects of international law must be a construct of legal personalities of international law, and both Interpol and the Red Cross are per definition not. And seeing as these two are the most prominent examples of NGOs which by some are considered subjects of international law, we can conclude that, according to the arguments we put forward in this paper – and although NGOs have enjoyed an increasingly special status within international law for several centuries now – NGOs can still not be considered subjects of international law.

Further research in this topic would monitor future legal developments in the area of NGO mandates and compositions, as well as changes to the creation of international public law.

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# THE REALIZATION OF THE FUNDAMENTAL GUARANTEES RIGHTS, A CONSEQUENCE FOR ENSURING OF A GOOD ADMINISTRATION - SELECTIVE ASPECTS

**Cătălin-Radu PAVEL**[*]

**Abstract**

*The aim of the present study is to analyse the realization of the fundamental guarantees rights as a consequence for ensuring of a good administration. The objectives of this study were to analyse the fundamental guarantees rights: the right of a person aggrieved by a public authority, the petition right and the correlation with ensuring of a good administration. In this research we have highlighted the importance of granting the two fundamental rights, named in the doctrine guarantees rights and the contribution to the developing of a good administration of the state in the favour of the citizens, bringing value to the citizens in a democratic state.*

**Keywords:** *fundamental rights, guarantees rights, petition right, the right of a person aggrieved by a public authority, good administration*

## 1. Introduction

The purpose of this study is to analyse some selective aspects referring to the realisation of the fundamental rights that are guarantees as a consequence of ensuring good administration.

The study is structured as follows: several selective aspects have been analysed with regard to the right of a person aggrieved by a public authority, the right of petition and the correlation with ensuring good administration.

The subject matter is important because ensuring the good administration of the state to the benefit of its citizens brings value for citizens in a democratic state.

The present paper intended to approach the subject matter with an analysis of the importance of granting the two fundamental rights, named in the doctrine guarantees rights.

As regards the relation between this paper and the already existent specialized literature, the analyses conducted so far have dealt less frequently with the topic approached here, which is the analysis of the guarantees rights and the correlation with ensuring good administration.

## 2. The right of a person aggrieved by a public authority

The right of a person aggrieved by a public authority provides the constitutional guarantees for any citizen who, having been aggrieved with regard to his rights or a legitimate interest by a Romanian public authority, irrespective of the authority concerned, through an administrative act or by the non-settlement of a request within the term provided by law, may request and is granted legal protection through his fundamental right to obtain the recognition of the claimed right or legitimate interest, the annulment of the act and the reparation of damage.

The citizen is granted equal constitutional protection for prejudices caused by miscarriages of justice. Therefore, a person aggrieved through miscarriages of justice has the right to take action against the state in order to be compensated for the damage suffered. The magistrates who acted in bad faith or serious neglect in the course of their duties are in turn liable in relation to the state for the damage caused to aggrieved persons.

The right of a person aggrieved by a public authority, "*granted by Article 52 of the fundamental law of Romania, together with the right of petition, previously analysed by this study, form the class of rights that are guarantees".*[1]

The rights-guarantees ensure the protection of the manifestations of citizens' will in relation to public authorities and also of other rights, freedoms and citizen interests, thus ensuring the good administration of the state to the benefit of its citizens.

In the Constitution of Romania, the right of a person aggrieved by a public authority was brought under regulation by Article 52: *(1) A person aggrieved with regard to a right or a legitimate interest, by a public authority, through an administrative deed or by the non-settlement of a request within the time limit provided by law, is entitled to obtain the recognition of the claimed right or legitimate interest, the annulment of the deed and the reparation of damage. (2) The conditions and limitations related to the exercise of this right are provided for by an organic law. (3) The State has patrimonial liability for any damage caused by*

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[1] C.R. Pavel, *Considerații teoretice privind realizarea drepturilor garanții*, in Revista Română de Criminalistică no. 1/2017, Vol. XVIII, Bucharest, p. 2475.

*miscarriages of justice. The liability of the State is determined under the law and does not eliminate the liability of the magistrates who acted in bad faith or serious neglect."*

In our opinion, the legal protection of the right of a person aggrieved by a public authority is provided through the right of free access to justice granted by Article 21 of the Constitution of Romania.

The guarantees of a person aggrieved with regard to a right or a legitimate interest have been governed by an organic law, namely the Romanian Law of Administrative Dispute 554/2004[2].

A doctrine author[3] stated with regard to the right of a person aggrieved by a public authority that *"the category of jurisdictional guarantees which protect the citizen against public authorities, whichever they might be, may include the right of a person aggrieved by such an authority through an administrative deed."*[4]

Another author[5] showed that "*for a definition of the concept of "fundamental rights", the following have been considered: (a) the fundamental rights are subjective rights of the citizens; b) these subjective rights are essential to citizens' life, freedom and dignity, and indispensable to the free development of human personality; c) the fundamental rights are established by the Constitution and granted by the Constitution and by the laws.*"

With regard to the *institution of administrative dispute*, our opinion is that it "*represents the citizen's guarantee, granted by the state to restrain any possible abuses by the public authorities for protecting the citizens' rights and freedoms."*[6]

Examining an exception of unconstitutionality, the Constitutional Court of Romania found that, according to Article 52 of the Constitution, "*a person aggrieved with regard to a right or a legitimate interest, by a public authority, through an administrative deed or by the non-settlement of a request within the time limit provided by law, is entitled to obtain the recognition of the claimed right or legitimate interest, the annulment of the deed and the reparation of damage. In the opinion of the Court, this constitutional text should be correlated with the constitutional provisions of Article 21, which govern the free access to justice and those of Article 126 para. (6) first sentence, according to which, the judicial review of the administrative deeds of public authorities, by means of administrative dispute, is guaranteed."*[7]

The Constitutional Court of Romania, in settling the exception, held that in the judicial phase where the claimed right or legitimate interest is recognised, the aggrieved person should have all legal prerogatives and constitutional guarantees granted by Article 21 para. 3 and Article 6 Right to a fair trial of the Convention for the Protection of Human Rights and Fundamental Freedoms. The right to a fair trial should be interpreted in the light of the principle of the rule of law, which assumes the existence of an effective legal remedy enabling citizens to assert their civil rights (*Judgment of 12 November 2002 in the Case Běleš and others v. The Czech Republic, paragraph 49).*

At the same time, the Constitutional Court of Romania considered that "*the right of access to a court of law should be "practical and effective"*. The effectiveness of the right of access requires that an individual "*must have a clear, practical opportunity to challenge an act that is an interference with his rights"* (*Judgment of 4 December 1995 in the Case Bellet v. France, paragraphs 36 and 38*). Therefore, the effectiveness of the right of access to a court requires that the exercise of such right is not affected by legal or factual obstacles or impediments, which are likely to question its very substance."[8]

Moreover, the Constitutional Court of Romania held that *"within the context of the constitutional regulation of the rights of persons aggrieved by a public authority and of the inherent guarantees of this right, it is crucial to determine the passive procedural capacity of the law subjects that issue acts of public power, because this is one of the admissibility criteria for an administrative dispute action. Therefore, the Court holds that Article 2 para. (1) letter b) of the Law of Administrative Dispute 554/2004 defines the "public authority" as being any of the bodies of the state or of the administrative-territorial units which acts, within a public power regime, to fulfil a legitimate public interest."*[9]

In conclusion, the Constitutional Court of Romania found that *"the single article point 2 sub-point 4 of the law for the approval of the Government Extraordinary Decree no. 21/2015 violates the right to a fair trial of a person aggrieved with regard to a right or a legitimate interest by a public authority, stipulated by Article 21 para. (3) of the Constitution and Article 6 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the legislator not having met its obligation to take legislative measures which enable the enforcement of court decisions. The Court held that, in accordance with its own jurisprudence and that of the European Court of Human Rights, the legislator has the responsibility to find appropriate means to ensure the*

[2] Law of Administrative Dispute 554/2004 in force as of 06.01.2005, with its subsequent changes and additions, based on its publication in the Official Gazette of Romania, Part I, no. 1154 of 07.12.2004.

[3] G. Iancu, *Drept constituțional şi instituții politice,* 3rd edition, C.H. Beck, Bucharest, 2014, p. 294-295.

[4] G. Iancu, *Proceduri Constituționale, Drept procesual constituțional,* Editura Monitorul Oficial, Bucharest, 2010, p. 133.

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[7] Decision of the Constitutional Court no. 889/16.12.2015, published in the Official Gazette of Romania no. 123 of 17.02.2016.

[8] Ibid.

[9] Ibid.

*effectiveness of court decisions, by adopting legislative measures which are intended to reduce the duration of and simplify the enforcement procedure, while observing the constitutional requirements of the rule of law. However, in this case, by adopting the criticised regulation, the legislator intervened in the civil lawsuit, in the enforcement phase of a judgment pronounced by a court of law, depriving the jurisdictional act which has the authority of res judecata of its legal effects. By preventing the enforcement of a court decision, the legislator disregards the principle of balance and separation of powers of the state, consecrated by Article 1 para. 4 of the Constitution, which devolves on the authorities of the state the obligation to exercise their legal and constitutional duties in the framework and within the limits provided for by the Fundamental Law. By adopting the criticised regulation, the legislating authority acted ultra vires, going beyond its constitutional competences to the detriment of the judicial authority."*[10]

The right of a person aggrieved by a public authority has been granted in the Constitution of the Republic of Moldova by Article 53: "*(1) The person aggrieved with regard to a right by a public authority, through an administrative deed or by the non-settlement of a request within the time limit provided by law, is entitled to obtain the recognition of the claimed right or legitimate interest, the annulment of the deed and the reparation of damage. (2) The State has patrimonial liability, under the law, for damages caused by miscarriages of justice in criminal trials by the investigation bodies and the courts of law."*

With reference to Article 53 of the Constitution of the Republic of Moldova, according to a first author[11], the right of a person aggrieved by a public authority was "*granted through the establishment of some control over the administrative acts, and also of the patrimonial liability of the state for damages brought to persons by illegal acts or errors made by public servants. The fundamental right previously stated is a constitutional guarantee for other constitutional rights and freedoms, a type of legal support for the exercise of various forms of control on the activity of public authorities.*"

In the Republic of Moldova, in order to grant the right of a person aggrieved by a public authority, a fundamental right provided for by Article 53 of the Constitution of the Republic of Moldova, on 10 February 2000, the Parliament of the Republic of Moldova adopted the Law of Administrative Dispute 793 – XIV, published in the Official Gazette of the Republic of Moldova no. 57-58/375 of 18.05.2000, a law which "*is based on the establishment of jurisdictional control on the activity of the public administration authorities."*[12]

The Parliament of the Republic of Moldova adopted, on 25 February 1998, the Law 1545-XIII on the reparation of the damage caused by illicit actions of the criminal prosecution and preliminary inquiry bodies, the prosecutors and the courts of law, which was published in the Official Gazette of the Republic of Moldova no.50-51/359 of 04.06.1998.

The Constitutional Court of the Republic of Moldova, in the settlement of a case, revealed that *"the exercise of the constitutional right of a person to have the damage caused by a public authority repaired comes under the scope of the constitutional principles of universality, equality and free access to justice. By virtue of these principles, the citizens of the Republic of Moldova benefit from the rights and freedoms consecrated by the Constitution and other laws and have the obligations provided by them; the respect for and the protection of the individual is a primary duty of the State; any person is entitled to effective satisfaction from the competent courts of law against those acts which violate his rights, freedoms and legitimate interests; no law can restrict the free access to justice (Article 15, Article 16 para. (1), Article 20 of the Constitution)."*[13]

A second author[14] from the Republic of Moldova, with regard to the fundamental article, held that *"the right of a person aggrieved with regard to a right by an illegal act by a body of the state to ask the competent bodies, under the law, to annul that act and to repair the damages is in close connection through its content with the right of petition; this right also appears as a general judicial guarantee of the exercise of fundamental rights. On the grounds of this right, the citizen has the freedom to approach the competent bodies against any grievance by a body of the state, a legislating body, a body of the administration, or a judicial or prosecution body. The citizen may ask the competent bodies both to annul the act and, implicitly, to repair the damage; the request may be addressed both to the issuing body and to its superior body. If the law allows the reparation of damage, the request may also be addressed to other state bodies which are declared competent."*

The constitutional regulation of the right of a person aggrieved by a public authority refers to *all administrative acts issued by the public authorities*; its constitutional legal force *not being limited to acts issued by executive authorities*. It does not apply to laws issued by the Parliament; however, it applies to administrative deeds issued by the Parliament. The regulation has no applicability in the area of court

[10] Ibid.

[11] B. Neagu, N. Osmochescu, A. Smochină, C. Gurin, I. Creangă, V. Popa, S. Cobăneanu, V. Zaporojan, S. Țurcan, V. Șterbeț, A. Armeanic, D. Pulbere, *Constituția Republicii Moldova, Comentariu*, Arc, Chișinău, Republic of Moldova, 2012, p. 209.

[12] Ibid., p. 211.

[13] Decision of the Constitutional Court of the Republic of Moldova no. 37 of 05.07.2001 for the control of the constitutionality of the provisions of Article 43 of the 2001Budget Law 1392-XIV of 30 November 2000, published in the Official Gazette of the Republic of Moldova no. 81/30 of 20July 2001.

[14] T. Cârnaț, *Drept Constituțional,* 2nd edition (reviewed), Chisinau, Moldova, 2010, p. 307.

decisions, but is applicable to administrative deeds issued by the courts of law, prosecutors or other structures of the state.

The right of a person aggrieved by a public authority was granted by Article 52 of the Constitution of Romania, which provided for the possibility for the aggrieved person either to obtain the recognition of the claimed right or legitimate interest or the annulment of the act and the reparation of damage. Aggrieved persons may realise their rights by exercising the right of free access to justice under Article 21 of the Constitution of Romania.

## 3. The petition right

The right of petition is a fundamental citizen right which grants *a right to demand and to make requests before the authorities of the state*. This right to demand, being an essential right, warrants the existence and the observance of all other fundamental citizen rights and ensures the good administration of the state for the benefit of its citizens.

The right of petition grants the citizen's civil liberties.

One of the first iconic documents where we can find the historical sources of human rights is *Magna Carta [15] (Magna Carta Libertatum)*, a document issued in England in 1215.

Based on our research, the right of petition was the first fundamental human right acknowledged by Magna Carta in 1215. Therefore, we have found in the content of the aforesaid document, in Chapter 61 (in other translations Chapter 70 – author's note), that *a petition announcing an act of injustice should be settled within 40 days*.[16]

Another British document which is among the first constitutional provisions, namely *The Bill of Rights[17]*, acknowledged, in 1689, in Article 5, that the *citizens who brought petitions to the king would not be condemned or accused for making them*.*[18]*

On 15 December 1791, the First Amendment to the Constitution of the United States[19] was adopted, which is part of the Bill of Rights that *granted the citizens' right of petition for having the injustices repaired[20]*.

We can find among other British documents containing some of the first constitutional rules: *The Petition of Rights[21]*, adopted in 1628, *which attempted the exercise of control by the Parliament over the British armed forces[22]*. *The control of the regime of finances[23]* was established in 1698 by *The Bill of Rights*. *A first attempt to establish the independence of justice[24]* was brought under regulation by *The Act of Settlement[25]* in 1701.

Later, other documents were also issued in the Great Britain, as constitutional sources, like *The Parliament Act[26] (1911)* and *The Representation of the People Act[27] (1949)* with regard to the British election system.

The right of petition falls into the category of fundamental citizen rights, freedoms and duties according to the Constitution of Romania[28].

In the author's opinion, *"the right of petition has the value of a right-guarantee, being a person's right to appeal to the state thorough its administrative bodies anytime when its intervention is required."[29]*

The Romanian doctrine held that *"through the right of petition, citizens are in a direct relation to the authorities of the state, at their own initiative, and they have the opportunity to settle both personal problems, and issues of a general interest."*[30]

In the contemporary legal system, the right of petition, as a fundamental right in Romania, is governed by Article 51 of the Constitution of Romania republished in 2003: "(1) Citizens have the right to address to the public authorities through petitions formulated in the name of their signatories. (2) Legally established organisations have the right to address petitions exclusively in the name of the groups they represent. (3) The exercise of the right of petition is free of charge. (4) Public authorities have the obligation to answer petitions within the terms and in the conditions established by the law."

Article 47 of the 1991 Constitution of Romania was not changed by the Reviewing Law 429 of 2003, its form being replicated by the 2003 Constitution of Romania.

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[15] F. Lieber, On Civil Liberty and Self-Government, Philadelphia, Lippincott, Grambo and Co, 1853, Reproduction by Forgotten Books, London, Great Britain, 2015, Volume II, pp. 178-201.
[16] Ibid., p. 190
[17] Ibid., pp. 221-227.
[18] Ibid, p. 224.
[19] E.S. Tănăsescu, N. Pavel, *Constituția Statelor Unite ale Americii,* All Beck, Bucharest, 2002, pp. 53-86.
[20] Ibid, p.72.
[21] E.S. Tănăsescu, N. Pavel, *Documente constituționale ale Regatului Unit al Marii Britanii și Irlandei de Nord*, All Beck, Bucharest, 2003, pp. 56-62.
[22] Ibid, p. 24.
[23] Ibid.
[24] Ibid.
[25] Ibid, pp. 89-95.
[26] Ibid, pp. 96-101.
[27] Ibid, p. 24.
[28] Constitution of Romania, reviewed in 2003, published in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003.
[29] C.R. Pavel, *Evoluția istorică a dreptului la bună administrare,* in Revista Studii Juridice Universitare, no. 1-2, Year VI, Chișinău, 2013, Institute for Research into the Protection of Human Rights, p. 232.
[30] Ibid.

The right of petition was considered by a first author[31] *"a right of first generation"* because the appeal to this right has as consequence an action by the approached public authorities and not only a confirmation that the citizens' petitions have been received.

The right of petition was qualified as "*a right-guarantee, meaning a right by means of which, in fact, effective legal protection is ensured for other rights and legitimate interests too, at the same time with the protection of a particular form of citizen manifestation."*[32]

A second author[33], held about the right of petition that it is part of "*the main human rights (...) which is free of charge"*.

A third author[34] affirmed that *"The right of petition, (...) is one of the most important organised guarantees of the fundamental rights and freedoms, being classified as a right-guarantee for all rights and freedoms of the citizens."*

The same author[35] held, about the right of petition, that *"is one of the most important organised guarantees of fundamental rights and freedoms, being classified as a right-guarantee for all rights and freedoms of the citizens."*

The right of petition was characterised as *"a citizen right with tradition in the Romanian legal system, falling into the category of rights that are guarantees, being also a general legal guarantee for other rights and freedoms."*[36]

The right of petition is granted at EU level by Article 44 of the Charter of Fundamental Rights of the European Union[37]: *"*Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament*."*

In our opinion, the right of petition *has the characteristic of being unique in respect of its scope and the legal effects it generates. Through its effects, it guarantees all the fundamental rights and freedoms of the citizens.*[38]

The Constitutional Court of Romania, with regard to the right of petition, provided by Article 51 of the Constitution, *"has held in its jurisprudence that this is a right benefiting citizens individually or groups of citizens, no matter if these groups are ad-hoc or organised in the forms provided by law. On the other hand, the free access to justice, provided for by Article 21 of the Constitution, means that any person may appeal to justice for the protection of his rights, freedoms and legitimate interests, and no law may restrict the exercise of this right."*[39]

In other cases, the Constitutional Court of Romania analysed the aspects related to the charge of some legal fees in the course of the act of justice: *"with regard to the alleged violation of constitutional provisions referring to the just assignment of fiscal duties, the Court remarks that this cannot be held, because the criticised provisions are just an application of those provided for by the Constitution, and the expenses incurred in the act of justice are public expenses, to which the citizens have the obligation, pursuant to Article 56 of the Constitution, to contribute through taxes and fees, determined under the law."*[40]

Any citizen may exercise his right of petition and, in parallel, his right to appeal to justice or the right of a person aggrieved by a public authority, whether by formulating a complaint based on Article 21 or a petition based on Article 51 of the Constitution of Romania: *"the formulation of a complaint based on Article 2781 of the Code of Criminal Proceedings is not such as to prejudice the right of the person to approach the public authorities with petitions, consecrated by Article 51 of the Constitution, or the right of a person aggrieved with regard to a right or a legitimate interest, by a public authority, through an administrative deed or by the non-settlement of a request within the time limit provided by law, to obtain the recognition of the claimed right or legitimate interest, the annulment of the deed and the reparation of damage, according to Article 52 of the Constitution."*[41]

The constitutional dispute court has made, with regard to the right of petition, a clear distinction between any type of request or noticed addressed to the courts of law in civil matters, granted by Article 21, and the right of petition: *"the approach of the courts of law under Article 4 para. (1) second sentence of Law 221/2009 by any natural person or legal person concerned, or ex officio by the prosecution office attached to the tribunal competent in the area of residence of the concerned person, after the death of the person, for the purpose of compensation for the moral prejudice suffered as a result of the conviction is not an aspect of the right of petition. And this is because*

[31] Ibid, p. 512.
[32] Ibid.
[33] V. Gionea, N. Pavel, *Curs de drept constituțional*, Scaiul, Bucharest, 1996, p. 66.
[34] G. Iancu, *Drepturile, libertățile și îndatoririle fundamentale în România*, Praxis, C.H. Beck, Bucharest, 2003, p. 365.
[35] G. Iancu, *Proceduri constituționale, Drept procesual constituțional*, Editura Monitorul Oficial, Bucharest, 2010, p. 150.
[36] I. Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice,* 15th edition, *Volume I,* C.H. Beck, Bucharest, 2016, p. 186.
[37] The Charter of Fundamental rights of the European Union was published in the Official Journal of the European Union, Romanian version, C83/02/30 March 2010.
[38] C.R. Pavel, *Aspecte selective cu privire la garantarea dreptului de petiționare,* in Materials of the International Scientific Symposium "The forensic investigation of violent crimes", Association of Romanian Criminalists, Bucharest, 2017.
[39] Ibid.
[40] Decision of the Constitutional Court of Romania no. 389 of 24 March 2011 published in the Official Gazette of Romania, Part I no. 471 of 05.07.2011.
[41] Ibid.

*the right of petition takes the form of requests, complaints, notices and proposals in connection with the settlement of personal or group issues which do not involve the way of a legal action, and to which public authorities have the obligation to respond within the terms and in the conditions determined under the law, while the citations, which initiate a civil law suit, are settled based on the specific rules of legal actions."*[42]

The Constitutional Court of Romania held about the appeal to citizens' subjective rights that "*the approach of the courts of law for appealing to a subjective right disregarded or violated or for the realization of an interest which may be obtained only through a legal action is not an aspect of the right of petition, but it is governed by rules specific to court activity."*[43]

Therefore, the Constitutional Court of Romania provided an accurate definition with regard to citizens' rights to address to the public authorities with petitions and the obligations of the latter to respond. Moreover, the Constitutional Court also pronounced a decision on citizens' right of free access to justice, which should not be mistaken for the right of petition and which entitles citizens to appeal to justice for the protection of their rights, freedoms and legitimate interests.

The right of petition, being a fundamental right, has the characteristic of a legal guarantee, benefitting on one hand from the systems warranting the constitutional provision and, on the other hand, from the legal guarantee of a subjective right, ensuring the good administration of the state to the benefit of citizens.

The right of petition is part of the category of rights-guarantees, rights which provide legal protection for the citizen and ensure the good administration of the state to the benefit of its citizens. The right of petition ensures a citizen's right to address to a public institution and to receive an answer within the term provided by law.

## 4. Correlation with ensuring good administration

In our opinion, the right of petition and the right of a person aggrieved by a public authority, known in the doctrine as rights-guarantees, are rights that ensure the good administration by the public authorities for and to the benefit of citizens. Therefore, with their guarantee as fundamental rights, they serve as basis and foundation for all fundamental human rights.

In our view, a strong correlation has been found between the rights that are guarantees and ensuring good administration.

The right of petition ensures and guarantees the right of any citizen to petition and, correlatively, the obligation of the public authorities to respond to that petition within the terms and in the conditions stipulated by the organic law. Depending on the type of petition, the legislator provided for various ways of settlement. Petitions may be formulated as different types of requests, complaints, proposals or notices. In the Constitution of Romania, the right of petition is free of charge. Therefore, the right of petition *ensures the legal protection of the citizen, of all fundamental citizen rights generally*[44] and, particularly, the good administration of the state.

The right of a person aggrieved by a public authority ensures, generally, the protection of all fundamental citizen rights and, particularly, the good administration. The two rights, the right of petition and the right of a person aggrieved by a public authority respectively, make the class of rights-guarantees, as they are referred to in the doctrine.

In our opinion, approaching the subject of good administration in a state governed by the rule of law, to the benefit of its citizens, is a topical legal matter. Approached at constitutional level, in our opinion, the good administration is ensured by the realization of right-guarantees. Therefore, granting the right of petition and the right of a person aggrieved by a public authority provides legal protection to all fundamental citizen rights, ensuring in this way the good administration of the state to the benefit of its citizens.

The rights-guarantees, namely the right of petition and the right of a person aggrieved by a public authority, are guaranteed and provided similarly in the Constitution of Romania and the Constitution of the Republic of Moldova.

A person aggrieved by a public authority, with regard to a right or a legitimate interest, is entitled to the recognition of the claimed right or legitimate interest, the annulment of the act and the reparation of damage.

Good administration has been an ongoing concern of international bodies.

Therefore, with the entry into force of the Lisbon Treaty, the *"Charter of the Fundamental Rights of the European Union*[45] *became legally binding, and this led to some substantial reinforcement of the role of the rule of law in the governance of the European Union".*[46]

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[42] Decision of the Constitutional Court of Romania no. 672 of 31 May 2011 published in the Official Gazette of Romania, Part I no. 580 of 17.08.2011.

[43] Decision of the Constitutional Court of Romania no. 296 of 08 July 2003 published in the Official Gazette of Romania, Part I no. 577 of 12.08.2003.

[44] C.R. Pavel, *Aspecte selective cu privire la garantarea dreptului de petiționare*, Materials of the International Scientific Symposium "The forensic investigation of violent crimes", Association of Romanian Criminalists, Bucharest, 2017.

[45] Charter of the Fundamental Rights of the European Union, published in the Official Journal of the European Union C 83 of 30 March 2010, p. 389-403.

[46] C.R. Pavel, *Dreptul la bună administrare – un drept garanție împotriva deciziilor administrative arbitrare în spațiul Uniunii Europene*, in Revista Studii Juridice Universitare, Year VII, no. 1-2, Institute for Research into the Protection of Human Rights, Chișinău, 2014, p. 278.

The right to good administration was consecrated *expressis verbis* by Article 41 of the Charter of the Fundamental Rights of the European Union.

It represented therefore a stage in a journey which started decades ago. Before, it had been the jurisprudence of the Court of Justice which determined the Union to respect the fundamental rights. Now, "the *Charter brings together in a single, coherent and legally binding instrument the fundamental rights which are bonding upon the EU institutions and bodies"*[47].

In the European Union, *the protection of fundamental rights is granted both at national level by the constitutional systems of its Member States,* which precede the Charter and have a more developed jurisprudence, *and at EU level, by the Charter. The Charter applies to the actions of all EU institutions and bodies.*

Another document adopted at European level is the Recommendation[48] CM/Rec (2007)7 of the Committee of Ministers of the member states of the Council of Europe with regard to good administration.

The Preamble of the Recommendation held as considerations for its adoption that public authorities have the obligation *to provide citizens with services, instructions and rulings, and that when the public authorities are required to take action, they must do so within a reasonable period.*

Other considerations in the Preamble of the Recommendation hold that *maladministration*[49], *whether as a result of official inaction by the public administration* (silence of the administration in our doctrine, the author's note), *or delays in taking action or taking action in breach of official obligations, must be subject to sanctions through appropriate procedures, which may include judicial procedure*.

The Recommendation also held among its considerations that *good administration must be ensured by the quality of legislation*, which must be clear and accessible, and the services of public administration must meet the basic needs of society.

The principles of the right to good administration have also been identified in Article 2 of the International Covenant on Civil and Political Rights[50], being set out in its thesis.

The right-guarantees "*ensure the protection of the manifestations of the citizens' will in relation to public authorities and also of other rights, freedoms and citizen interests"*[51], thus ensuring the good administration of the state to the benefit of its citizens.

In French administrative law, the phrase *mission of the administration* or *mission administration* is used to identify the duty of the administration to devise and contribute to the implementation of solutions intended to provide answers to novel problems, considered, rightfully or not, as impossible to be solved only by appealing to the techniques of classical administration[52]. Next, the author states: *The ambiguity of this type of administrative action arises from the fact that the Mission Administration needs a suppleness of intervention which, generally, makes it benefit from a legal regime which departs, to a variable extent, from the common administrative law, modelled by the law and the judge in order to guarantee the rights of those subject to administration and the requirements of the general interest.*

*Antonie Iorgovan*[53], in a focused formulation, defined *public administration "as the ensemble of activities of the President of Romania, the Government, the central autonomous administrative authorities, the local autonomous administrative authorities, and, as appropriate, their subordinate structures, by means of which, within the regime of public power, the laws are fulfilled or, within the limits set by the law, the public services are delivered"*.

As viewed by the author named above, the phrase *the laws are fulfilled* has at least the following significances: a) the law is the ceiling of public administration; b) the principle of lawfulness is a fundamental principle of public administration; c) the application of the law also involves the adoption of regulatory documents by the administration; d) the regulatory administrative documents has less legal force than the laws and are ranked depending on the position and the competence of the issuing body; any individual act or any material operation (paving a street, transportation of people, directing the traffic, the constraint to medical treatment in case of transmissible diseases, blocking goods which do not meet quality standards, sacrificing animals so as to prevent the spread of epizooty, issuing an authorisation, applying a sanction, etc.), is a practical execution of the law. In other words, the fulfilment of the law involves both an activity concerned with the organisation and preparedness of the execution, of a regulatory nature (dispositions, circulars, instructions from the

[47] Ibid.

[48] Recommendation CM/Rec(2007)7 was adopted by the Committee of Ministers on 20 June 2007 at the 999bis Reunion of the delegates of the ministers from the member states of the Council of Europe, available on https://wcd.coe.int/ViewDoc.jsp?p=&id=1155877&Site=CM&direct=true, accessed on 20 March 2019.

[49] The notion of "maladministration" in the Preamble of the Recommendation CM/Rec(2007)7 adopted by the Committee of Ministers on 20 June 2007 at the 999bis Reunion of the delegates of the ministers from the member states of the Council of Europe, available on http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17133&lang=en, accessed on 20 March 2019.

[50] International Covenant on Civil and Political Rights was adopted on 16 December 1966 by the United Nations General Assembly. Romania signed the Covenant on 27 June 1968 and ratified it with the Decree no. 212/1974, published in the Official Bulletin of Romania number 146 of 20 November 1974, and it became effective on 20 November 1974.

[51] C.R. Pavel, *Considerații teoretice privind realizarea drepturilor garanții*, in Revista Română de Criminalistică nr. 1/2017, Vol. XVIII, Bucharest, p. 2475.

[52] Raymond Guillen, Jean Vincent, *Lexique de termes juridiques*, 8ᵉédition, Dalloz, Paris, 1990, p.22.

[53] Antonie Iorgovan, *Tratat de drept administrativ*, Volume I, 4th edition, All Beck, Bucharest, 2005, p. 82.

government downwards), and an activity involving the execution in a concrete situation (issuance of unilateral acts, conclusion of contracts, carrying out material operations).

The author named above also defined *public administration* in *a formal organic sense* and *in a functional material sense*[54].

*In the formal organic sense*, the mentioned author evoked the following authorities: *the President of Romania, the Government, the ministries and other bodies directly subordinated to the Government, autonomous specialised central bodies, institutions subordinated to the ministries; the prefect; local specialised bodies subordinated to the ministries and managed by the prefect; autonomous local bodies (the county council, the local council, the mayor) and their subordinate institutions.*[55]

*In a functional material sense*, the notion of public administration *evokes legal documents and material operations by means of which the law is executed, either through the issuance of subsequent rules, or through the organisation or, as appropriate, the direct provision of public services.*[56]

*Verginia Vedinaş*[57] defined public administration as the "*ensemble of activities carried out by the administrative authorities of the state, the local autonomous authorities, the inter-community development associations and bodies providing public services and public utility bodies of local or county interest, by means of which, within the regime of public power, the law is executed in a material, practical sense or by the issuance of regulatory documents of a lower legal force than the law, or by means of which public services are delivered".*

*Dana Apostol Tofan*[58] stated about *public administration* that it represents *"the central notion of administrative law",* and with reference to the *notion of administration*, she set out that *"it is a fundamental notion also for the science of administration, which analyses it in its multiple senses, its complex content comprising the imperatives: to provide for, to organise, to lead, to coordinate and to control".*

Considering the existence of the most parallelisms between the organisational structuring of public administration in Romania and in France, this study has held from the French administrative doctrine the following definition, which determines the content of the concept or notion of public administration.

*Professor Jean Rivero*[59] defined administration as "*the activity through which public authorities proceed, using the prerogatives of public power if necessary, to satisfy the needs of the public interest".*

An analysis of the Constitution of the Republic of Moldova[60] identified the notion of *right to administration*, governed by Article 39, according to which: *"(1) Citizens of the Republic of Moldova are entitled to participate in the administration of public affairs directly, as well as through their representatives. (2) Any citizen is ensured, under the law, the access to a public position."*

We have also identified in the Constitution of the Republic of Moldova, besides the rights that are guarantees, namely the right of petition (Article 52) and the right of a person aggrieved by a public authority (Article 53), the right to administration (Article 39), which is legally protected by the two rights-guarantees.

Therefore, the good administration was guaranteed in the Republic of Moldova at constitutional level by the provisions of the right to administration as a fundamental citizen right.

If we compare the two constitutions, of the Republic of Moldova and of Romania, we can see that the right to administration, as a fundamental right, is not found in the Constitution of Romania.

In the opinion of an author[61], *"the citizens of the Republic of Moldova are entitled to participate in the administration of public affairs directly, as well as through their representatives. The specifications necessary in this context are concerned with: 1) the condition of being a citizen of the Republic of Moldova; 2) the definition of public affairs; 3) the direct participation to administration; 4) the participation in administration through representatives."*

Article 39 grants the right to administration only to citizens of the Republic of Moldova. With regard to the notion of *"public affairs"*, the same author defines it as follows "*the notion of public affairs is identified with that of business (positions, duties, competences, prerogatives, etc.) of public authorities, the activity of which is represented by the ensemble of activities of the Parliament, the Government, the President of the Republic of Moldova, of central and local public administrative authorities, as well as of their subordinate structures, by means of which the laws are fulfilled and public services are delivered. The category of public affairs also includes issues raised at the level of public interest, meaning activities which satisfy some social needs. Precisely, the right to participate in the administration of public affairs means the right to occupy positions (posts, ranks) in the public*

[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] VerginiaVedinaș, *Drept administrativ*, 8th edition reviewed, Universul Juridic, Bucharest, 2014, p. 38.
[58] Dana Apostol Tofan, *Drept administrativ*, Volume I, 3rd edition, C.H. Beck, Bucharest, 2014, p. 18.
[59] Jean Rivero, *Droit administratif*, 6th edition, PrécisDalloz, Paris, 1973, p. 13.
[60] Constitution of the Republic of Moldova of 29 July 1994 published in the Official Gazette no. 1 of 27 August 1994.
[61] B. Neagu, N. Osmochescu, A. Smochină, C. Gurin, I. Creangă, V. Popa, S. Cobăneanu, V. Zaporojan, S. Țurcan, V. Șterbeț, A. Armeanic, D. Pulbere, *Constituția Republicii Moldova, Comentariu*, Arc, Chișinău, Republic of Moldova, 2012, p. 163.

*authorities, where activities of a general (public) nature take place."*[62]

Any citizen of the Republic of Moldova is entitled to participate in public affairs and may elect representatives. This is a constitutional provision of the right to administration which, in turn, confers to the citizen the right to appoint representatives based on the right to vote, freely expressed. The democracy of a state governed by the rule of law is so ensured, the representatives of the state being elected by the free vote of the people.

In our opinion, good administration is the result of good public administration. For the identification of a definition of the concept of good administration, we have conducted an analysis of the doctrine in the matter.

A first author[63] said that *"there is not a universally valid definition of good administration, beyond the regulatory texts which refer to this concept."*

The same author held that *"the principle of good administration is an old and well-founded idea. Its specific content has developed gradually, so that, at present, this is one of the key concepts of modern administrative law."*[64]

The same author also mentioned with regard to good administration: *"administrative institutions have the obligation to exercise the rights and responsibilities which are conferred to them by laws and other regulations based on the concept of law, so as to avoid any rigid application of legal provisions (...) institutions must adapt the legal rules to the social and economic realities."*[65]

A second author[66] affirmed that *"Although there is no express provision with regard to the right to good administration in the domestic legislation, the elements of this right are contained, the majority of them, by the provisions of the fundamental law."* The same author held in the article previously quoted that with *the correlation of fundamental provisions* in the Constitution of Romania, namely: Article 16 Equality of rights, Article 21 Free access to justice, Article 24 right to defence, Article 31 Right to information, *Article 51 Right of petition, Article 52 Right of a person aggrieved by a public authority*, Article 115 Legislative delegation, Article 120 Basic principles, *the right to good administration is guaranteed*, these fundamental rights being essential components of the right to good administration.

A third author[67] mentioned about the right to good administration that *"it is a complex legal institution and has the legal nature of a fundamental right, with a general content which includes a multitude of attributes referring to the organisation and functioning of the administration, recognised as freestanding rights. Therefore, in relation to the state, the right to good administration is asserted as a sum of obligations which the state has in connection with the organisation of public administration, on one hand, and for guaranteeing the effectiveness and compliance with the law of the activity of the public administration, on the other hand."*

In our opinion, *good administration is ensured by the realization of the rights-guarantees*. Therefore, *the rights-guarantees ensure the realization of good administration*. The protection of the citizen's rights before public authorities is realised at constitutional level through *the correlation between the right of petition and the right of a person aggrieved by a public authority*.

The right of a person aggrieved by a public authority is *the constitutional guarantee* which underlay the adoption in Romania of Law 554/2004[68], namely the Law of Administrative Dispute.

The right of petition ensures the right of citizens to *address to a public authority and to receive an answer*. The right of petition is *the constitutional guarantee* which underlay the adoption of Government Decree no. 27/2002 [69] on the activity of settling petitions, approved with changes and additions by Law 233/2002.

The right of petition is a legal guarantee of all fundamental rights. Its realisation ensures a citizen's right to request, to formulate a petition, understood as the *"request, complaint, notice or proposal, formulated in writing or through electronic mail, which a citizen or a legally established organisation may address to the central and local public authorities and institutions, to the decentralised public services of the ministries and other central bodies, to national companies and societies, to companies of local or county interest, as*

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[62] Ibid, p. 164.

[63] R. Carp, *În direcția unui drept administrativ european? Buna administrare potrivit normelor cu și fără forță constrângătoare ale Consiliului Europei și Uniunii Europene*, in Revista de drept public, no. 4/2010, C.H. Beck, p. 2.

[64] T. Fortsakis, *Principles governing good administration*, European Public Law, vol. 11, issue 2, 2005, p. 207, apud. R. Carp, *În direcția unui drept administrativ european? Buna administrare potrivit normelor cu și fără forță constrângătoare ale Consiliului Europei și Uniunii Europene*, Revista de drept public, no. 4/2010, C.H. Beck, p. 2.

[65] Ibid.

[66] V. Vedinaș, S.C. Ambru, *Bazele constituționale ale dreptului la o bună administrare*, in E. Balan, C. Iftene, D. Troanta, G. Varia, M. Văcărelu, *Dreptul la o bună administrare. Între dezbaterea doctrinară și consacrarea normativă*, Comunicare.ro, Bucharest, 2010, p. 46.

[67] E. Albu, *Dreptul la o bună administrație în jurisprudența Curții Europene a Drepturilor Omului*, in Curierul Judiciar, C.H. Beck, nr. 12/2007, p. 129.

[68] Law of Administrative Dispute 554/2004, with its subsequent changes and additions, published in the Official Gazette of Romania, Part I, no. 1154 of 07.12.2004.

[69] Government Decree no. 27/2002 on the activity of settling petitions, approved with changes and additions by Law 233/2002, published in the Official Gazette of Romania, Part I, no. 84 of 01.02.2002.

*well as to autonomous companies, hereinafter called public authorities and institutions."*[70]

In practice, several types of petitions and how they should be settled by the public authorities have been brought under regulation, *guaranteeing in this way the right of citizens to address to any public authority and establishing correlatively the obligation of those authorities to respond within the legal term to citizens' petitions*.

The right of a person aggrieved by a public authority ensures the constitutional guarantees of a citizen who, having been aggrieved with regard to his rights or a legitimate interest by a Romanian public authority, irrespective of the authority concerned, through an administrative act or by the non-settlement of a request within the time limit provided by law, may request and is granted legal protection through his fundamental right to obtain the recognition of the claimed right or legitimate interest, the annulment of the act and the reparation of damage.

The person aggrieved by a public authority has the guarantee of legal protection provided by the constitutional provision, irrespective of the public authority which aggrieved that person, and to that end the Constitutional Court of Romania held that "*Article 2 para. (1) letter b) of the Law of Administrative Dispute 554/2004 defines the «public authority» as being any of the bodies of the state or of its administrative-territorial units which acts, within a regime of public power, to satisfy a legitimate public interest."*[71]

In our opinion, with the *"interdependence with the right to good administration consecrated at European level by the Charter of the Fundamental Rights of the European Union, there are at national level, under the aegis of fundamental rights, inscribed in texts of a higher legal values, the right of petition and the right of a person aggrieved by a public authority."*[72]

At the same time, there is also a provision at constitutional level for citizens' protection in case of dame caused by miscarriages of justice. The right of a person aggrieved by miscarriages of justice to take action against the state for recovering the damage suffered is so ensured. The magistrates who acted in bad faith or serious neglect in the course of their duties are in turn liable in relation to the state for the damage caused to aggrieved persons.

## 5. Conclusions

In our opinion, the right of petition and the right of a person aggrieved by a public authority, known in the doctrine as rights-guarantees, are rights that ensure the good administration by the public authorities for and to the benefit of citizens. Therefore, being granted as fundamental rights, they serve as basis and foundation for the legal protection of all fundamental human rights.

The right of petition ensures and guarantees the right of any citizen to petition and, correlatively, the obligation of the public authorities to respond to that petition within the terms and in the conditions stipulated by the organic law. Depending on the type of petition, the legislator provided for various ways of settlement.

The right of petition is a fundamental citizen right which grants *a right to demand and to make requests before the authorities of the state*. This right to demand, being an essential right, warrants the existence and the observance of all other fundamental citizen rights and ensures the good administration of the state for the benefit of its citizens. The right of petition guarantees the citizens' civil liberties.

The right of a person aggrieved by a public authority ensures, generally, the protection of all fundamental citizen rights and, particularly, the protection of good administration.

The right of a person aggrieved by a public authority ensures the constitutional guarantees of the citizen who, having been aggrieved with regard to his rights or a legitimate interest by a Romanian public authority, irrespective of the authority concerned, through an administrative act or by the non-settlement of a request within the time limit provided by law, may request and is granted legal protection through his fundamental right to obtain the recognition of the claimed right or legitimate interest, the annulment of the act and the reparation of damage.

The right of a person aggrieved by a public authority, together with the right of petition, previously analysed by this study, form, according to the Romanian doctrine, the class of rights-guarantees.

The rights-guarantees ensure the protection of the manifestations of the citizens' will in relation to public authorities and also of other rights, freedoms and citizen interests, thus ensuring the good administration of the state to the benefit of its citizens.

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[71] Decision of the Constitutional Court no. 889/16.12.2015, published in the Official Gazette of Romania no. 123 of 17.02.2016.

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# SELECTIVE ASPECTS ON THE EVOLUTION OF THE REGULATIONS REGARDING THE JUDICIARY IN THE ROMANIAN CONSTITUTIONS AND IN THE ROMANIAN LAW 100 YEARS AFTER THE GREAT UNION

**Nicolae PAVEL**[*]

**Abstract**

*This study has the following title: Selective aspects on the evolution of the regulations regarding the judiciary in the Romanian constitutions and in the Romanian law 100 years after the great union*

*Using a Key- Scheme, the following parts of the study are analyzed successively, called: 1. Preamble. 2. The identification of the constitutional regulations on the judiciary in the Romanian constitutional system - selective aspects. 3. Romanian doctrinal references on the judiciary. 4. Judicial references on the judiciary in the decisions of the Constitutional Court of Romania. 5. Conclusions.*

**Keywords:** *the judiciary, the Romanian constitutions, the doctrinal references, the Constitutional Court decisions.*

## 1. Preamble

The object of study of this research will be circumscribed to the scientific analysis of the four great parts thereof, i.e.: 2. The identification of the constitutional regulations on the judiciary in the Romanian constitutional system - selective aspects. 3. Romanian doctrinal references on the judiciary. 4. Judicial references on the judiciary in the decisions of the Constitutional Court of Romania. 5. Conclusions.

For the purposes of this study, it is worth highlighting the approach on the regulations on the the judiciary in the constitutional system starting with the first document with constitutional value, i.e. *the Developer Statute of the Paris Convention of 7/9 August 1858* until this day, i.e. the *Constitution of Romania of 2003, the republished form of the Constitution of Romania of 1991*.

Considering this generous topic of study of over 145 years of constitutional evolution of the regulations on *the judiciary* in Romania we should point out since the very beginning the *need of a diachronic approach of this topic* by identifying all the Romanian Constitutions which regulated the constitutional regime during this period.

Moreover, we should also point out that during the stated period, Romania had several forms of government, i.e., monarchy, people's republic, socialist republic and semi-presidential republic.

For a full but not exhaustive coverage of the area of study, we present a selection of the doctrinal and jurisprudential references to *the judiciary.*

On the other hand, it is important to mention here that the jurisprudence of the Constitutional Court of Romania contributed to the constitutionalization of the judiciary ever since its establishment.

According to the bibliographic research, *the judiciary* is new in point of formulation, but it is not new in point of its existence. Starting from this axiom, and paraphrasing K. Mbaye[1] we may say that: „The history of *the judiciary* overlaps the history of humankind".

The proposed study opens due to this approach a complex and complete view, but not exhaustive, in the current sphere of the judiciary.

In our opinion, the field under analysis is important for the constitutional doctrine, for the parliamentary law doctrine, for the comparative law doctrine, for the general theory of law, for the legislative activity of elaboration of the normative acts, for the legislative technique as well as for the research activity in the field covered by the theme of the study.

Even if the regulation and theorization of *the judiciary* goes back in time to the first constitution written in Romania, the theoretical interest to resume it is determined by the fact that the current specialized literature has not always paid enough attention to the three aspects, normative, theoretical and jurisprudential concerning *the judiciary*, analysed here.

We used the phrase *the judiciary* recalling of the famous theory of the separation of power in a state released by John Locke (*Traité du government civil*, 1690). This theory was later elaborated and consecrated by Montesquieu in his *De l´esprit des lois* (1748), a work which brought its author the title of father of the classical theory of the separation of powers in the state.

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[1] Baye K. M., *Les droits de l'homme en Afrique*, Manuel UNESCO, A. Pedone, Paris, 2002, p.651.

## 1. The identification of the constitutional regulations on *the judiciary* in the Romanian constitutional system - selective aspects.

### 1.1. Developer Statute of the Paris Convention of 7/9 August 1858[2]

A special attention should be paid to the *Developer Statute of the Paris Convention of 7/19 August 1858*. In our opinion, *the Statute* may be considered a Constitution, considering the provisions of art. XVII which set out the following: "All civil servants, without exception, when taking office, *should pledge allegiance to the Constitution and laws of the country and faith to the Lord"*.

The systematic analysis of the normative content of the Statute shows that it contains no regulation concerning *the judiciary*.

### 1.2. The Romanian Constitution adopted at 29 June 1866[3]

It should be noted that the Fundamental Law of Belgium of 1831 was an inspiration for the constitutions of other states among which the Romanian Constitution adopted at 29 June 1866.

The systematic analysis of the normative content of the Constitution shows that in Title III entitled *On the powers of the state*, the following fundamental principle concerning the *judiciary* is consecrated, under the following phrasing: "The judiciary is exercised by Courts and Tribunals. Their decisions and sentences are pronounced under the laws and executed in the name of the Lord".

### 1.3. The Constitution of Romania of 29 March 1923[4]

At the onset of the study we should specify that the Fundamental Law of Romania of 1866, remained effective for 57 years, though meanwhile important economic and political transformations occurred.

The systematic analysis of the normative content of the Constitution shows that in Chapter IV, Title III, entitled *On the judiciary*, the following fundamental principles concerning the *judiciary* are consecrated, under the following phrasing:

1. *Art. 101.* **–** No jurisdiction can be set up except under the power of a certain law. Extraordinary commissions and tribunals cannot be set up under any name and any word whatsoever with a view to certain trials, either civil or criminal, or in order to judge certain persons.
2. *Art. 102.* – There is only one Court of Cassation and Justice for the entire Romanian State.
3. *Art. 103.* – It is only the Court of Cassation in united sections that has the right to judge the constitutionality of the laws and to declare as unenforceable those laws which are contrary to the Constitution. The judgement on the unconstitutionality of the laws is limited only to the case on trial.

The Court of Cassation will pronounce just like in the past on the conflicts of assignments.

The right of cassation appeal is constitutional.

4. *Art. 104.* - The judges are irremovable under special conditions set by the law.
5. *Art. 105.* – The jury is set in all criminal matters and for the political and press crimes, except for the cases set forth by this Constitution.

The action for damages resulting from press facts and crimes cannot be filed before the same jurisdiction where the offense was committed.

6. *Art. 106.* – Military justice is organized under a specific law.
7. *Art. 107.* – Special authorities of any kind, having assignments of administrative litigation, may not be established.

Administrative litigation is within the scope of the judiciary, according to the special law.

The injured person, either due to an administrative act of authority or due to a management act made by breaking laws and regulations, either by bad intention of the administrative authorities to settle the claim of a right, may file a petition to the courts for the recognition of his right.

The bodies of the judiciary judge whether the act is illegal or not, they may cancel it or may pronounce for civil damage until the date of restoration of the injured right, also having the power to judge the claim for damages, either against the administrative authority summoned to court, or against the guilty civil servant.

The judiciary has no authority to judge government acts or the military headquarters acts.

### 1.4. The Constitution of Romania of 28 February 1938[5]

In the preamble of this study we should point out that the Fundamental Law of Romania of 1923 remained effective for 15 years.

Under the historical conditions of 1938, the new Constitution Draft was subjected to plebiscite on 24 February 1938. The Constitution was promulgated and was published in the Official Gazette Part I, no. 48, from February 27, 1938.

From the systematic analysis of the constitutional content of the Constitution, it follows that this in Art. 73 - Art. 78 of Chapter V of Title III, titled *About Judicial Power*, establish the following fundamental principles regarding the judiciary, under the following form:

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[2]Muraru I., Iancu G.,*The Romanian Constitutions, Texts, Notes, Comparative Presentation*, Actami Publishing House, Bucharest, 2000, pp. 7-27.

[3] *Ibidem*, pp. 29-60.

[4] *Ibidem*, pp. 61-92.

[5] *Ibidem*, op. cit. 93-119.

1. Art. 73. - No jurisdiction can be established except in the power of a law.

Commissions and extraordinary courts cannot be created, under any appointment and word, in view of certain processes, whether civil or criminal, or for the trial of certain persons

The jury is abolished.

2. Art. 74 - For the entire Romanian State there is only one Court of Cassation and Justice.
3. Art. 75 - Only Court of Cassation and Justice in united sections has the right to judge the constitutionality of laws and to declare those that are contrary to the Constitution inapplicable. The Judgment of the unconstitutionality of the laws is bordering only to the case

The Court of Cassation and Justice will speak of conflicts of attributions.

Right of appeal in cassation is of order constitutional.

4. Art. 76 – The judges are irremovable. Immovability will be established by a special law which will intervene no later than six months since the promulgation of this Constitution.

In this time, disciplinary sanctions will be applied by the Royal Decree.

5. Art. 77 - Military justice is organized by law.
6. Art. 78 - Administrative litigation is in the fall of the judiciary, according to the special law.

The judiciary has no power to judge acts of government as well the acts of command with military character.

### 1.5. The Constitution of 13 April 1948[6]

The systematic analysis of the normative content of the Constitution shows that in Title VII, entitled *The Judiciary and the Prosecutor's Office* consecrates the following fundamental principles, having the following phrasing:

1. Art. 86. – The courts are: the Supreme Court, one for the whole country, the Courts, the tribunals and the popular district courts.
2. Art. 87. – Special courts for certain branches of activity may be established under the laws.
3. Art. 88. – In all the courts, except for the Supreme Court, the judgement takes place with popular referees, unless otherwise ordered by the law for certain cases.
4. Art. 89. – The first president, the president and the members of the Supreme Court are appointed by the Presidium of the Grand National Assembly of the People's Republic of Romania at the proposal of the government.
5. Art. 90. – The Supreme Court oversees the judicial activity of the courts and judicial bodies, under the laws.
6. Art. 91. - The debates are public, unless otherwise provided by the laws for certain cases.
7. Art. 92. – The right of defence before any court is guaranteed.
8. Art. 93. – The judges of any rank are subject only to the law in the exercise of their duties and enforce the laws equally for all citizens.
9. Art. 94. – A law shall determine the organization and functioning of the courts, as well as the way of appointing and removing the judges of any rank.
10. Art. 95. – In the People's Republic of Romania, the Prosecutor's Office supervises the compliance with the criminal laws, both by the civil servants and by the other citizens.
11. Art. 96 – The Prosecutor's Office watches especially the prosecution and punishment of the crimes against democratic order and freedom, of economic interests, of national independence and sovereignty of the Romanian State.
12. Art. 97 – The Prosecutor's Office consists of a general prosecutor of the People's Republic of Romania and several prosecutors.

    It will be determined by law the organization, assignments and functioning of the prosecutor's office.
13. Art. 98, - The General Prosecutor of the People's Republic of Romania shall be appointed by the Presidium of the Grand National Assembly of the People's Republic of Romania, at the proposal of the government.

### 1.6. The Constitution of 24 September 1952[7]

The systematic analysis of the normative content of the Constitution shows that in Chapter VI, entitled *The courts and the Prosecutor's Office* consecrated the following principles, having the following phrasings:

1. Art. 64. – Justice in the People's Republic of Romania is served through the Supreme Court of the People's Republic of Romania, the regional tribunals and popular tribunals, and by the special courts established under the laws.

The organization, jurisdiction and procedure of the courts are set by the law.

2. Art. 65. – The tribunals defend the regime of popular democracy and the achievements of the working people; ensures popular legality, public property and citizens' rights.
3. Art. 66. – Judgment of the lawsuits in all courts is done with the participation of the popular referees, unless otherwise provided by the law.
4. Art. 67. – The Supreme Court of the People's Republic of Romania is elected by the Grand National Assembly for a five-year term.

The judges and popular referees are elected according to the procedure provided by the law.

[6] *Ibidem*, op. cit. 123-139.

[7] *Ibidem*, op. cit. 143-166.

The appointment of the judges in special courts is determined also under the law.

5. Art. 68. – In the People's Republic of Romania, the judicial procedure is in Romanian, and providing in the regions and districts inhabited by a population of a different nationality than Romanian, for the use of the maternal language of that population.

The parties who do not speak the language of the judicial procedure may get acquainted, through a translator, with the parts of the file, and the right to speak in court and draw conclusions in the maternal language.

6. Art. 69. – In all courts judgement is public, unless otherwise provided by the law.

The accused is guaranteed the right of defence.

7. Art. 70. – The judges are independent and subjected to the law only.
8. Art. 71. – The courts pronounce their decisions in the name of the people.
9. Art. 72. – The Supreme Court of the People's Republic of Romania supervises the judicial activity of all courts in the People's Republic of Romania.
10. Art. 73. – The General Prosecutor of the People's Republic of Romania exercises superior supervision of the compliance with the laws by the ministries and other central bodies, by the local bodies of the state power and administration, by the civil servants and the other citizens.
11. Art. 74. - The General Prosecutor of the People's Republic of Romania is appointed by the Grand National Assembly for a five-year term.

The deputies of the General Prosecutor of the People's Republic of Romania and the prosecutors of the local units of the Prosecutor's Office are appointed by the General Prosecutor for a four-year term.

12. Art. 75. – The General Prosecutor shall be accountable to the Grand National Assembly of the People's Republic of Romania and – in the interval between sessions – to the Presidium of the Grand National Assembly and to the Council of Ministers.
13. Art. 76. – The Prosecution is independent from local authorities, subordinating only to the General Prosecutor of the People's Republic of Romania.

### 1.7. The Constitution of 21 August 1965, as republished[8]

The systematic analysis of the normative content of the Constitution shows that in Title VI, entitled *The Judiciary* and in Title VII, entitled *The Prosecution* the following fundamental principles are consecrated, having the following phrasing:

#### 1.7.1. Title VI – The Judiciary

1. Art. 101.– In the People's Republic of Romania justice is served, under the laws, through the Supreme Court, county courts, district courts and military courts.
2. Art. 102.– Due to their judgement activity, the tribunals and district courts defend the socialist system and the individual rights, educating the citizens in the spirit of compliance with the laws.

The tribunals and district courts aim, by enforcing criminal sanctions, at the correction and re-education of the offenders and at the prevention of new crimes.

3. Art. 103.– The tribunals and the district courts judge the civil matters, the criminal matters and any other matters under their jurisdiction.

In the matters provided by the law, the tribunals and district courts exercise control on the decisions of the administrative or public authorities with jurisdictional activity.

The tribunals and district courts judge the claims of the injured in their rights by administrative acts and may pronounce under the laws on the legality of these acts.

4. Art. 104. – The Supreme Court exercises general review on the judgement activity of al land any tribunal and district court. The exercise of this review is set by the law.

For a unitary enforcement of the laws in their judgement activity, the Supreme Court issues, in its plenary, guidance decisions

5. Art. 105. – The Supreme Court is elected by the Grand National Assembly during the legislature, in its first session.

The Supreme Court functions until the election of the new Supreme Court in the following legislature.

6. Art. 106. – The Supreme State Council shall account for its activity to the Grand National Assembly, and between sessions, to the State Council.
7. Art. 107. – The organization of the district courts and tribunals, their jurisdiction and trial procedure are set by the law.

Judging trials at first instance, at the tribunals, county courts and military courts is done with the participation of popular referees, unless otherwise provided by the law.

8. Art. 108. – The judges and popular referees are elected in accordance with the procedure set by the law.
9. Art. 109. – In the People's Republic of Romania the judicial procedure takes place in Romanian, providing in the administrative and territorial units inhabited by a population other than the Romanian, for the use of the maternal language of that population.

The parties who do not speak the language of the judicial procedure are provided for the possibility of taking note, through a translator, of the pieces of the file, and for the right to speak in court and to draw conclusions in their maternal language.

[8] Republished under art. 11 of Law 19 of 23 October 1986, published in the Official Journal of the People's Republic of Romania, Part I, no. 64 of 27 October 1986.

10. Art. 110. – The judgement takes place in public session, unless otherwise provided by the law.
11. Art. 111. – In the judgement activity, the judges and the popular referees are independent and are subject only to the law.

**1.7.2. Title VII – The Prosecution**

1. Art. 112. – The Prosecution of the People's Republic of Romania exercises supervision of the activity of the criminal prosecution bodies and the punishment enforcement bodies and watches, under the laws, upon the observance of legality, the defence of the socialist system, of the legitimate rights and interests of the socialist organisations, of the other legal persons and of the citizens.
2. Art. 113. – The Prosecution is led by the general prosecutor. The Prosecution bodies are: General Prosecutor's Office, county prosecutor's offices, local prosecutor's office and military prosecutor's offices.

The Prosecution bodies are hierarchically subordinate.

3. Art. 114. – The General Prosecutor is elected by the Grand National Assembly during the legislature, in its first session, and functions until the election of the new general prosecutor in the first session of the next legislature.

The prosecutors are appointed under the law, except as provided by Art. 87 pct. 6.

4. Art. 115. – The General Prosecutor shall be accountable to the Grand National Assembly for the activity of the Prosecutor's Office, and in the interval between sessions, to the State Council.

**1.8. The Constitution of Romania of 8 December 1991**[9]

The systematic analysis of the normative content of the Constitution shows that in Chapter VI, Title III, entitled *the Judicial Authority*, it consecrates the following fundamental regarding: *The Courts – Section I,* at *the Public Ministry – Section 2, and, at the Superior Council of Magistracy – Section 3*, having the following phrasing:

**1.8.1. Section 1 - The Courts**

1. Art. 123: - *Serving justice*
   - Justice is served in the name of the law.
   - The judges are independent and are subject only to the law.
2. Art. 124: - Status of judges
   - The judges appointed by the President of Romania are immovable, according to the law. The President and the other judges of the Supreme Court of Justice are appointed for a 6-year term. They may be re-invested in office. The judges' promotion, transfer and sanctioning may be ordered only by the Superior Council of Magistracy, under the laws.
   - The judge office is incompatible with any other public or private office, except for the teaching positions in higher education.
3. Art. 125: - *The Courts*
   - Justice is served through the Supreme Court of Justice and by the other courts as set by the law.
   - It is prohibited to establish extraordinary courts.
   - The jurisdiction and judgement procedure are established by the law.
4. Art. 126: - *Public character of debates*

The judgement session is public, unless otherwise provided by the law.

5. Art. 127: - *The right to an interpreter*
   - The judicial procedure shall take place in Romanian.
   - The citizens belonging to national minorities and the persons who do not understand or speak Romanian are entitled to take note of the acts and deeds of the file, to speak in court and to draw conclusions, by interpreter; in the criminal trials, such right is ensured for free.
6. Art. 128: - *Use of remedies*

The stakeholders and the Public Ministry may exercise against the court decisions remedies, under the laws.

7. Art. 129: - *Courts police*

The courts shall have special police in their service.

**1.8.2. Section 2 – *Public Ministry***

1. Art. 130: *Role of the Public Ministry*
   - In the judicial activity, the Public Ministry represents the general interests of the society and defends the rule of law, as well as the rights and freedoms of the citizens.
   - The Public Ministry exercises its powers by prosecutors belonging to prosecutor's offices, under the laws.
2. Art. 131: *Prosecutors' status*
   - The prosecutors carry on their activity according to the principle of legality, impartiality and hierarchical control, under the authority of the minister of justice.
   - The prosecutor office is incompatible with any other public or private office, except for the teaching positions in higher education.

**1.8.3. Section 3 – Superior Council of Magistracy**

1. Art. 132: *Structure*

The Superior Council of Magistracy consists of magistrates elected for a 4-year term by the Chamber of Deputies and by the Senate in joint session.

2. Art. 133: *Powers*
   - The Superior Council of Magistracy proposes the President of Romania the appointment of the judges and prosecutors, except for the trainees, under the laws.

In this case, the works are presided without the right to vote, by the minister of justice.

- The Superior Council of Magistracy fulfills the

[9] The text of the Constitution of Romania was published in the Official Journal of Romania, Part I, no. 233 of 21 November 1991.

role of judges discipline council. In this case, the works are presided by the president of the Supreme Court of Justice.

**1.9. The Constitution of Romania of 2003, the republished form of the Constitution of Romania of 1991.**[10]

The systematic analysis of the normative content of the Constitution shows that in Chapter VI, Title III, entitled *The Judicial Authority*, the following fundamental principles are consecrated related to: *The Courts – Section I, the Public Ministry – Section 2, and, the Superior Council of Magistracy – Section 3*, having the following phrasing:

*Warning*. We may see that as compared to the Constitution of 1991 the articles were renumbered and in the case of this section art. 123 of the old Constitution became 124, and this numbering is still maintained for this Chapter.

We also notice in this Chapter that amendments and supplements were made which we will operate in the text.

**1.9.1. Section 1 The Courts**

1. Art. 124: - *Serving justice*

- Justice is served in the name of the law.
- Justice is unique, impartial and equal for everybody.
- The judges are independent and are subject only to the law.

2. Art. 125: - *Status of judges*

- The judges appointed by the President of Romania are immovable, under the laws.
- The proposals of appointment, as well as the promotion, transfer and sanctioning of judges are the jurisdiction of the Superior Council of Magistracy, under its organic law.
- The judge office is incompatible with any other public or private office, except for the teaching positions in higher education.

3. Art. 126: - The Courts

- Justice is served through the High Court of Cassation and Justice and the other courts established by the law.
- The jurisdiction of the courts and the judgement procedure are provided by the law only.
- The High Court of Cassation and Justice shall provide for the interpretation and unitary enforcement of the law by the other courts, according to its jurisdiction.
- The structure of the High Court of Cassation and Justice and its operating rules shall be established under organic law.
- It is prohibited to establish extraordinary courts. Courts specialized in certain matters may be established, with the possibility of participating, as appropriate, of certain persons outside the judiciary.
- Judicial review of the administrative acts of public authorities, through administrative litigation, is guaranteed, except for the act regarding the relations with the Parliament, and the commandment acts of military nature. The administrative litigation courts have the jurisdiction of settling the claims of injured persons by ordinance or, as appropriate, by orders in ordinances declared unconstitutional.

4. Art. 127: - *Public character of debates*

The judgement session are public, unless otherwise provided by the law.

5. Art. 128: - Use of maternal language and of the interpreter in court

- The judicial procedure shall take place in Romanian.
- The Romanian citizens belonging to national minorities are entitled to express themselves in their maternal language before the courts, under the organic law.
- The ways of exercising the right set out by par. (2), including by using interpreters or translations, shall be determined so that not to prevent the good administration of justice nor involve additional expenses for the stakeholders.
- The foreign citizens and the stateless who do not understand or speak Romanian are entitled to take note of all the acts and deeds of the file, to speak in court and to draw conclusions through an interpreter; this rights is ensured in criminal trials for free.

6. Art. 129: - *Use of remedies*

The stakeholders and the Public Ministry may exercise against the court decisions remedies, under the laws.

7. Art. 130: - *Courts police*

The courts shall have special police in their service.

**1.9.2. Section 2 – *Public Ministry***

Role of the Public Ministry

1. Art. 131: *Public Ministry*

- In its judicial activity, the Public Ministry represents the general interests and defends the rule of law and the rights and freedoms of citizens.
- The Public Ministry exercises its powers through prosecutors in the prosecutor's office, under the laws.
- The prosecutor's offices function attached to the courts, manage and supervise the criminal investigation of the judicial police, under the laws.

2. Art. 132: *Status of prosecutors*

- The prosecutors carry on their activity according to the principle of legality, impartiality and hierarchical control, under the authority of the minister of justice.
- The prosecutor office is incompatible with any other public or private office, except for the teaching positions in higher education.

**1.9.3. Section 3 – The Superior Council of Magistracy**

1. Art. 133: Role and structure

[10] The text of the Constitution of Romania was published in the Official Journal of Romania, Part I, no. 767 of 31 October 2003.

- The Superior Council of Magistracy is the guarantor of the independence of justice.
- The Superior Council of Magistracy consists of 19 members, of whom:

a) 14 are elected in the general assemblies of the magistrates and validated by the Senate; they are part of two sections, one for the judges and one for the prosecutors; the first section consists of 9 judges, and the second of 5 prosecutors;
b) 2 representatives of the civil society, experts in law, who enjoy a good professional and moral reputation, elected by the Senate; they participate only in the plenary works;
c) the minister of justice, the president of the High Court of Cassation and Justice and the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

- The president of the Superior Council of Magistracy is elected for a one-year mandate, not renewable, from among the magistrates set out by par. (2) (a).
- The duration of the mandate of the members of the Superior Council of Magistracy is of 6 years.
- The decisions of the Superior Council of Magistracy are made by secret vote.
- The President of Romania participates in and presides the works of the Superior Council of Magistracy.
- The decisions of the Superior Council of Magistracy are final and irrevocable, except as provided by art. 134 par. (2).

2. Art. 134: *Powers*

- The Superior Council of Magistracy proposes the President of Romania the appointment of the judges and prosecutors, except for the trainees, under the laws.
- The Superior Council of Magistracy fulfils the role of court, by its sections, in the line of disciplinary liability of the judges and prosecutors, according to the procedure set forth by its organic law. Under such circumstances, the minister of justice, the president of the High Court of Cassation and Justice and the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice do not have the right to vote.
- The decisions of the Superior Council of Magistracy in disciplinary matters may be challenged at the High Court of Cassation and Justice.
- The Superior Council of Magistracy also performs other duties set forth by its organic law, while fulfilling its role of guarantor of the independence of justice.

## 2. Romanian doctrinal references on the judiciary.

We will select from the Romanian doctrine the opinions of authors with recognized prestige, who studied the judicial power or authority.

### 2.1. The first opinion[11] mentioned for this study analyses *The Judicial Authority.*

The term *justice* has two meanings. In a sense, justice means the judicial bodies, and in the second sense we understand the activity of settling civil, administrative, commercial, criminal, work etc. trials, of applying sanctions, of restoration of rights and violated legitimate interests. In ordinary words, serving justice means making justice

As social life should be led according to the constitution and laws, there should be a function (a power, an authority) which might know and be able to interpret them and correctly enforce them when they are violated, when the rights and freedoms are violated, when the rights and freedoms of citizens are endangered, neglected.

The term *jurisdictional authority (power)* does not diminish the role of justice, but it emphasizes the similarity of content and principles among several activities which are imperative when the laws are not enforced. Justice remains the substantial part of jurisdictional activity.

The fundamental principles according to which justice is serviced are the following: 1. principle of legality, 2. justice is unique, impartial and equal for all. 3. use of official language and of maternal language in justice. 4. right of defence. 5. presumption of innocence. 6. independence of the judge subjecting him only to the law.

The bodies of the judicial authority are set forth by Title VI of the Constitution of Romania, entitled *The Judicial Authority*.

### 2.2. A second opinion[12] mentioned for this study analyzes *The Judicial Authority.*

The Constitution of Romania in Chapter VI (art. 124-134) deals under the term "Judicial Authority" three different institutions: the courts, the Public Ministry and the Superior Council of Magistracy, which form together the judicial authority.

The courts are represented in Romania by a) the High Court of Cassation and Justice; b) courts of appeal; c) tribunals; d) specialized courts; e) military courts; and f) district courts.

1. **The notion of justice has two meanings**. In a wide sense the notion of justice designates the idea of justice, of equity and equality before the law.

In a narrow sense, justice means all institutions by means of which the act of justice is exercised: courts, magistrates, lawyers, bailiffs, etc. from this point of

[11] Ioan Muraru, Elena Simina Tănăsescu, *Constitutional l*aw *and political institutions,* 14th edition, volume II, C. H. Beck Publishing House, Bucharest, 2013, pp. 286-295.

[12] Ștefan Deaconu, *Political Institution, Edition 3,* C. H. Beck Publishing House, Bucharest, 2017, pp. 292-314.

view, justice is a public service exercised by the state specialized institutions.

2. **Judicial power** means only the judges who work in courts.
3. **The irrevocability of judges** is the strongest guarantee of justice independence, of the judge's independence and good administration of the act of justice.
4. **The principles underlying the making of justice** are the following: a) Principle of legality. b) Principle of independence of justice. c) Principle of free access to justice. d) Principle of uniqueness, impartiality and equality of justice for all individuals. e) Principle of the right of defence. f) Principle of the presumption of innocence. g) Principle of usage of official language and of maternal language in court. h) Principle of justice as a state monopoly. i) Principle of sessions' advertising. j) Principle of justice functioning on the hierarchy criterion.

**2.3. A third opinion[13] mentioned for this study analyses the Jurisdictional Authority.**

**2.3.1. Terminology and notions regarding judicial authority**

At the onset of the course we should emphasize the place of judicial authorities in the triad of the separation of powers in the state. Concerning this aspect, the constitutional doctrine expresses the following opinion:

"The evolution of the classical theory of the separation of powers also involved the evolution of the explanations and practices regarding the judiciary. This explains the different terminology used to express this *power* in the constitutions and doctrine, i.e.: the judiciary, the jurisdictional power. The name of judicial authority clearly evokes justice, as a distinct function and as a distinct system".[14]

Moreover, the term *justice* is understood in a dual sense, „In a sense, justice means the system of judicial bodies, and in a second sense we understand the activity of settlement of civil, administrative, commercial, criminal, work etc. trials, of enforcement of sanctions, of restoration of violated legitimate rights and interests".[15]

In addition, „this function was and is entrusted to a distinct authority (power), vested with state powers which give efficiency and must be *independent and impartial*".[16]

Concerning the specifics of jurisdictional activity, constitutional doctrine sets forth the following: „in order for justice to be able to fulfil its mission, it has a certain organization, certain principles. The organization of justice is done by degrees of jurisdiction".[17]

**2.3.2. Fundamental principles according to which justice is made**

With reference to the fundamental principles according to which justice is made, the constitutional doctrine expresses the following opinion: „Justice shall meet certain fundamental requirements. Among these requirement, we may list the following: legality, good administration of justice; access to a court; guarantee of a fair trial; trial advertising; judge impartiality; proportionality in deciding sanctions etc.". [18]

The fundamental principles according to which justice is made, should meet two conditions: they should be principles set forth by the Constitution, or derive from constitutional principles.

The fundamental principles according to which justice is made are the following: 1. Principle of legality. 2. Justice is unique, impartial and equal for all. 3. use of official language and of maternal language in court. 4. right of defence. 5. presumption of innocence. 6. Independence of the judge subjecting him only to the law.

**2.3.3. Bodies of the judicial authority**

The systematic analysis of the normative content of the Constitution shows that judicial authority is designated in Chapter VI, Title III, entitled Judicial Authority, and are regulated in the following order: 1. courts. 2. The Public Ministry. 3. Superior Council of Magistracy.

## 3. Jurisprudential references on the judiciary in the decisions of the Constitutional Court of Romania –selective aspects.

**3.1. DECISION No. 611** of 3 October 2017 regarding the claims of settlement of legal conflicts of constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry — the Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand, such claims formulated by the chairmen of the Senate and of the Chamber of Deputies.

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1. Pending lies the examination of the claims for settlement of the legal conflicts of constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry — the Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand, such claims formulated by the chairmen of the Senate

[13] Nicolae Pavel, *Constitutional law and political institutions,* Part II Political Institutions, Course in IFR Technology, Romanian Tomorrow Publishing House, Bucharest, 2013, pp. 92-97.

[14] Ioan Muraru, Elena Simina Tănăsescu, *Constitutional law and political institutions,* 15th edition, volume II, C. H. Beck Publishing House, Bucharest, 2017, pp. 284-295.

[15] *Ibidem,* p. 267.

[16] *Ibidem,* pp. 267-268.

[17] *Ibidem,* p. 269.

[18] *Ibidem, p*p. 269-270.

and of the Chamber of Deputies. The referrals are based on the provisions of art. 146 ( e) of the Constitution and of art. 11 par. (1) pct. A (e), of art. 34, 35 and 36 of Law no. 47/1992 on the organization and functioning of the Constitutional Court were recorded at the Constitutional Court under no. 9.686 and no. 9.687 of 13 September 2017 and are the object of Case File no. 2.428E/2017, of Case File no. 2.429E/2017 respectively.

2. By the Claim no. I 2.480 of 13 September 2017, The Chairman of the Senate requested the Constitutional Court to rule on the existence of a legal conflict of constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry, a component of judicial authority, on the other hand.
3. The Court considering the claims for settlement of the legal conflicts of constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry — the Prosecutor's Office attached to the High Court of Cassation and Justice , on the other hand, claims filed by the chairmen of the Senate and of the Chamber of Deputies, the opinions of the Chamber of Deputies, the Public Ministry — the Prosecutor's Office attached to the High Court of Cassation and Justice — National Anticorruption Directorate, the documents duly filed, the report drawn up by the Judge Rapporteur, the allegations of the representatives of the present parties, the provisions of the Constitution and of Law no. 47/1992 on the organization and functioning of the Constitutional Court, holds the following:

The Court

4. Finds that there is a legal conflict of constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry — the Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand, generated by the refusal of the chief prosecutor of the National Anticorruption Directorate to appear before the Special Investigation Commission of the Senate and of the Chamber of Deputies to verify the aspects related to the organization of 2009 elections and the result of the presidential poll.

The: Final and binding.

## 4. Conclusions.

Considering the above-mentioned we hold the following ideas here below:

4.1. The aim of the study on the Selective aspects on the evolution of the regulations regarding the judiciary in the Romanian Constitutions and Romanian Law 100 years after the Great Union, was attained. in our opinion.

4.2. In our opinion, the analysed area is important for the constitutional doctrine in the matter, for the doctrine of human rights and for the doctrine of the history of the Romanian state and law.

4.3. Constitutional regulations were successively identified concerning the evolution of the regulations regarding the judiciary in the Romanian Constitutions la 100 years from the Great Union.

4.4. The three parts of the study may be considered a contribution to the extension of research in the matter of the evolution of the regulations regarding the judiciary in the Romanian Constitutions la 100 years from the Great Union, in accordance with the current trend in the matter.

4.5. We further point out that this study opens a complex and complete view, but not exhaustive, in the analyzed field.

4.6. The key-scheme proposed, considering the selective approach of the evolution of the regulations regarding the judiciary in the Romanian Constitutions la 100 years from the Great Union may be multiplied and extended for further research in the matter.

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# OPINION OF ADVOCATE GENERAL WATHELET AND JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN CASE C-673/16, CONCERNING THE CONCEPT OF "SPOUSE" IN EUROPEAN UNION LAW

**Roxana-Mariana POPESCU***

**Abstract**

*The interpretation given by the Court of Justice of the European Union to the concept of "spouse", after Advocate General Wathelet submitted his conclusions, represents a breakthrough on gender equality and same-sex couples concerning the provisions of EU legislation on the right of residence of Union citizens and their family members. The CJEU judgment is a recognition of the rights granted to same-sex couples legally married in a Member State who wish to exercise their freedom of movement and who, thus have the opportunity to be accompanied by their spouses, under the same conditions as those applicable to couples of different sexes. The judgment does not force states to legislate same-sex marriage but requires them to recognise the effects of this type of marriage on their territory solely for the purpose of exercising the derived rights that European Union citizens have).*

**Keywords:** *the concept of "spouse"; European Union Law; Court of Justice of the European Union; case-law; Opinion of Advocate General.*

## 1. Introductory aspects

On 5 June 2018, the Court of Justice of the European Union[1] ruled for the first time on the concept of "spouse" within the meaning of Directive 2004/38[2] in the context of a marriage between two people of the same sex. As Advocate General Melchior Wathelet also observed, the action was "delicate, involving in the case of marriage, a legal institution, within the specific and limited context of freedom of movement of citizens of the European Union"[3]. The Court's definition of the concept of "spouse" will necessarily affect not only the very identity of the men and women concerned - and therefore their dignity - but also the personal and social concept that citizens of the Union have of marriage, which may vary from one person to another, from one Member State to another"[4].

## 2. The context of the request for interpretation of the concept of 'spouse' within the meaning of Directive 2004/38

The need to interpret the concept of "spouse" in the above-mentioned meaning appeared in the context in which the Court of First Instance, District 5, Bucharest requested the Constitutional Court[5] of Romania to rule on that plea of unconstitutionality raised in a litigation for settlement. In that case, Adrian Coman, a citizen with dual citizenship (Romanian and American), lived in New York (United States) between 2005 and 2009, together with Robert Clabourn Hamilton, an American citizen. They were married in November 2010. Between 2009-2012, Mr. Coman lived in Brussels (where he worked at the European Parliament) and Mr. Hamilton stayed in New York.

In December 2012, Mr. Coman and his spouse began administrative proceedings with the Romanian authorities in order to obtain the necessary documents for Mr. Hamilton, who was not a national of the Union[6],

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[1] On the role of the EU Court of Justice jurisprudence in the development of EU law, see Mihaela-Augustina Dumitrașcu, Dreptul Uniunii Europene și specificitatea acestuia, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015, pp. 182-188; Laura-Cristiana Spătaru-Negură, Dreptul Uniunii Europene – o nouă tipologie juridic, Hamangiu Publishing House, Bucharest, 2016, pp. 156-165.

[2] Directive 2004/38/EC of the European Parliament and of the council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, For a comment regarding the Directive 2004/38, OJ L158, 30.4.2004 For a comment regarding the Directive 2004/38, see Augustin Fuerea, *Dreptul Uniunii Europene – principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, pp. 205-219.

[3] Opinion of Advocate General Melchior Wathelet delivered on 11 January 2018, Case C-673/16, EU:C:2018:2, point 2.

[4] Idem.

[5] As stated in the doctrine, "the Constitutional Court of Romania creates the right through its activity" (Elena Emilia Ștefan, *Scurte considerații asupra răspunderii membrilor Guvernului*, Drept Public Journal, no. 2/2017, p. 91). "According to art. 147 of the Constitution, the decisions of the Constitutional Court are binding and have power only for the future" (Elena Emilia Ștefan , *Drept administrativ. Partea I, Curs universitar*, Universul Juridic Publishing house, Bucharest, 2014, p. 36).

[6] A "national" means a natural or legal person having the citizenship or nationality of that State in accordance with its domestic law "(Article 3 (a) of Law no. 157/2005 for ratification of the Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic

to be able, as a member of Mr. Coman's family, to obtain the right to lawfully reside in Romania for a period of more than three months. "On 11 January 2013, the Inspectorate informed Mr. Coman and Mr. Hamilton that the latter only had a right of residence for a period of three months, because, under the Civil Code, marriage between people of the same sex is not recognised, and that an extension of Mr Hamilton's right of temporary residence in Romania could not be granted for the purposes of family reunion"[7]. Following the reply received, Mr. Coman and others brought an action against the Inspectorate "seeking a declaration of discrimination on the ground of sexual orientation as regards the exercise of the right of freedom of movement in the European Union, and requesting that the Inspectorate be ordered to end the discrimination and to pay compensation for the non-material damage suffered"[8]. According to the applicants, the provisions of Art. 277 par. (1), (2) and (4)[9] are unconstitutional as long as they fail to recognise same-sex marriages concluded abroad so that the right of residence cannot be exercised. Therefore, the article invoked "is an infringement of the provisions of the Romanian Constitution that protect the right to personal life, family life and private life and the provisions relating to the principle of equality"[10]. On 18 December 2015, the Court of First Instance, District 5, Bucharest notified the Constitutional Court of Romania to rule on the exception. "The latter court considered that the present case related exclusively to recognition of a marriage lawfully entered into abroad between a citizen of the Union and his or her spouse of the same sex, a national a third country, in the light of the right to family life and the right to freedom of movement, viewed from the perspective of the prohibition of discrimination on grounds of sexual orientation. In that context, that Court had doubts as to the interpretation to be given to several terms employed in the relevant provisions of Directive 2004/38, read in the light of the Charter of Fundamental Rights ('the Charter') and of the recent case-law of this Court and of the European Court of Human Rights on the right to life family. Consequently, it decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling"[11].

## 3. Preliminary questions asked by the Constitutional Court

As we have already stated, the Romanian Constitutional Court started its legal reasoning from the legal instruments of the European Union in force, namely Directive 2004/38 and the Charter of Fundamental Rights.

Article 2 point 2 (a) of Directive 2004/38 provides that "within the meaning of the (...) Directive [...]' (...) "family member" means: the spouse (...)". In addition, Article 7 of the Charter of Fundamental Rights recognises the right to respect for private and family life, home and communications secrecy, where "the right to marry and the right to found a family are guaranteed under the domestic laws governing the exercise of these rights"[12]. As it is well known, European Union law prohibits "discrimination of any kind based on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. Within the scope of application of the Treaties and without prejudice to their special provisions, any discrimination on grounds of nationality shall be prohibited"[13]. The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all Forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories[14]. One of the rights of

of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Republic of Portugal, the Republic of Slovenia, the Republic of Slovakia, the Republic of Finland, Sweden, the United Kingdom (EU Member States) and Bulgaria and Romania on the accession of Bulgaria and Romania to the EU, published in the Official Gazette of Romania, Part I, no. 465 of 1 June 2005.

[7] Point 12 of the Judgment of 5 June 2018, *Relu Adrian Coman and Others v. the General Inspectorate for Immigration and the Ministry of Internal Affairs*, C-673/16, EU:C:2018:385.

[8] *Ibid*., point 13.

[9] Article 277 (1), (2) and (4) of the Civil Code reads as follows: "(1) The same-sex marriage is prohibited. (2) Marriages between persons of the same sex concluded or contracted abroad either by Romanian citizens or by foreign citizens are not recognised in Romania. [...]. (4) The legal provisions on the free movement on the territory of Romania of the citizens of the Member States of the European Union and of the European Economic Area remain applicable".

[10] Point 14 of the Judgment *Relu Adrian Coman and Others v. the General Inspectorate for Immigration and the Ministry of Internal Affairs*, C-673/16, EU:C:2018:385

[11] Point 18 of the Opinion of Advocate General C-673/16, EU:C:2018:2.

[12] Article 9 of the Charter of Fundamental Rights.

[13] Article 21 of the Charter of Fundamental Rights.

[14] Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, apud Elena Emilia Ștefan, *Opinions on the right to non-discrimination*, in CKS e-Book 2015, p.540, http://cks.univnt.ro/cks_2015_archive/cks_2015_articles.html.

citizens of the Member States of the European Union is the freedom of movement and residence within the territory of the Member States. Article 45 (2) of the Charter of Fundamental Rights provides that "freedom of movement and residence may be granted, in accordance with the Treaties, to third- country nationals of legally residing in the territory of a Member State.

In view of those legislative issues, the Constitutional Court wished to find out whether the notion of "spouse" in Art. 2 pt. (a) of Directive 2004/38, in conjunction with Art. 7, 9, 21 and 45 of the Charter of Fundamental Rights also included the same-sex national who was a citizen of a third country to whom a citizen of the European Union was lawfully married in accordance with the law of a Member State other than the host Member State.

Next, the Court requests, if the first question is answered in the affirmative, whether the host Member State must grant the right of residence in its territory for a period of longer than three months to the same-sex spouse of a citizen of the European Union. The question takes into consideration the provisions of Article 3 par. (1)[15] and Article 7 par. (2)[16] of Directive 2004/38, read in conjunction with Art. 7, 9, 21 and 45 of the Charter of Fundamental Rights. If the answer to the first question is in the negative, the Court wishes to know whether the same-sex spouse, from a State which is not a Member State of the Union, of an Union citizen to whom he or she is lawfully married, in accordance with the law of a Member State other than the host State, can be classified as "any other family member" within the meaning of Article 3(2)(a) of Directive 2004/38 or a "partner with whom the Union citizen has a durable relationship, duly attested", within the meaning of Article 3(2)(b) of that directive, with the corresponding obligation for the host Member State to facilitate entry and residence for that spouse, even if that State does not recognise marriages between people of the same sex and provides no alternative form of legal recognition, such as registered partnership. If the answer to this question is in the affirmative, the Constitutional Court raises another question whether the host Member State must grant the right of residence in its territory for a period of longer than three months to the same-sex spouse of a Union citizen under the provisions of Art. 3 par. (2) and Art. 7 par. (2) of Directive 2004/38, read in conjunction with Art. 7, 9, 21 and 45 of the Charter of Fundamental Rights.

## 4. The relevance of invoking the provisions of Directive 2004/38

Before analysing and formulating a possible answer to the questions referred, both Advocate General and the Court of Justice examined whether the provisions of Directive 2004/38 can be relied on in the main proceedings, since, according to Art. 3 par. (1) of the Directive, they are applied to all citizens of the Union who move to or reside in a Member State other than that of which they are a national, as well as to their family members, as defined in point 2 of Article 2 of the directive, who accompany or join them", which means, at a first reading, that Mr. Hamilton cannot rely on the directive in his favour because it" is not capable of constituting the basis of a derived right of residence on him"[17].

The provision of Article 3 par. (1) of the Directive has been the subject of several interpretations given by the Court of Justice, which held on a number of occasions that the provisions of Directive 2004/38 governed only the conditions determining whether a citizen of the Union could enter or reside in Member States other than that of which he was a national"[18] and did not confer a derived right of residence to third-country nationals who were family members of a citizen of the Union in the Member state of which that citizen was a national"[19].

However, the Court held that an obstacle to the freedom of movement and the right of establishment

[15] "1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons: (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen; (b) the partner with whom the Union citizen has a durable relationship, duly attested. The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people".

[16] Article 7(1) and (2) of Directive 2004/38, entitled 'Right of residence for more than three months', states: " 1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed persons in the host Member State; or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or (c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and – have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c). 2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

[17] Judgment *Coman and Others*, C-673/16, EU:C:2018:385, *cited above*, point 21.

[18] Judgment of 10 May 2017, *Chavez Vilchez and Others*, C 133/15, EU:C:2017:354, point 53.

[19] Judgment of 12 March 2014, *O. and B*, C-456/12, EU:C:2014:135, point 37.

would occur "where the Union citizen's residence in the host Member State is sufficiently effective to enable him to start or to live a family life"[20] in that Member State. Thus, "any stay of a Union citizen in the host Member State accompanied by a member of his family who is a national of a non-Member State necessarily implies the grant of a derived right of residence to that family member in the Member State of which that citizen is a national when he returns to that Member State"[21]. If no such derived right of residence were granted, that Union citizen could be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is uncertain whether he/she will be able to continue in his Member State of origin a family life which has been created or strengthened in the host Member State"[22]. That is why, according to the Court, "the spouse of a [Union] national who made use of those rights must, when the latter resides in his country of origin, have at least the same rights of entry and residence as well as those which it would be entitled to [the Union] 's right to have his spouse choose to enter and reside in another Member State"[23]. Accordingly, "the right to freedom of movement and the right of establishment recognised to the Union's national by the Treaties [could] not have full effects if that national [citizen] could be embezzled from exercising them by obstacles in his own country of origin, in the way of her/his spouse's entry and stay".

In the light of these considerations, Advocate General Wathelet, in his Opinion, stated: "Mr. Coman and Mr. Hamilton did, indeed, consolidate a family life while Mr. Coman, a citizen of the Union was residing in Belgium. When they had lived together for four years in New York and, in so doing, founded a family life, their relationship was indisputably consolidated by their marriage, in Brussels, on 5 November 2010"[24]. The fact that Mr. Hamilton did not live uninterruptedly with Mr. Coman in that city, did not (...) make him capable of rendering their relationship ineffective. Thus, in a globalised world, it is not unusual for a couple one of whom works abroad not to share the same accommodation for longer or shorter periods owing to the distance between the two countries, the accessibility of means of transport, the employment of the other spouse or the children's education. That lack of cohabitation cannot in itself have any effect on the existence of a proven stable relationship (...) and, consequently, on the existence of a family life"[25].Therefore, the fact that the Constitutional Court invokes the provisions of Directive 2004/38 is correct and that is why "the questions asked by the referring court remain relevant since the interpretation of the provisions referred to in the request for a preliminary ruling may be useful in resolving the case before the Constitutional Court"[26].

## 5. Interpretation of the notion of "spouse"

Relevant to our approach are the opinion of Advocate General and the answer of the Court of Justice to the first question formulated by the Romanian Constitutional Court, namely whether the notion of "spouse" in Article 2 point (a) of Directive 2004/38, in conjunction with Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights also includes the same-sex national who is a citizen of a third country to whom a citizen of the European Union is legally married under the law of a Member State other than the host State. That is why the study will not analyse the other two preliminary questions.

It should also be noted that the Commission, the Dutch, Romanian, Latvian, Hungarian and Polish governments submitted observations in the file. The Union Executive and the Dutch Government consider that "Article 2 (2) (a) of Directive 2004/38 must be interpreted autonomously and uniformly[27]" in the sense that "a third-country national of the same sex as the Union citizen to whom he is legally married under the law of a Member State is covered by the concept of "spouse". Advocate General Wathelet himself states that "a literal, contextual and teleological interpretation of the term "spouse" used in Directive 2004/38 lead to an autonomous definition independent of the sexual orientation of that term"[28]. On the other hand, "the Romanian, Latvian, Hungarian and Polish Governments consider that this concept is not subject to EU law but must be defined in relation to the law of the host Member State"[29].

The Court's reasoning takes as its starting point the perspective expressed in time that "the rights granted to nationals of Member States include [also] the right to live a normal family life both in the host Member State and in the Member State whose Member State citizenship they possess, and on the occasion of their return to that Member State, they shall benefit from the presence of members of their families with them in the territory of that Member State"[30]. The phrase "members of their families" includes, according

[20] Judgment, *O. and B*, C-456/12, EU:C:2014:135, *cited above*, point 51.
[21] *Idem.*
[22] Opinion of Advocate General Melchior Wathelet, *cited above*, point 25.
[23] Judgment of 7 July 1992, *Singh*, C-370/90, EU:C:1992:296, point 23.
[24] Opinion of Advocate General Melchior Wathelet, *cited above*, point 27.
[25] *Ibid*., point 28.
[26] *Ibid*., point 29.
[27] *Ibid*., point 31.
[28] *Ibid*., point 77.
[29] *Ibid*., point 31.
[30] Judgment *Coman and Others*, C-673/16, EU:C:2018:385, *cited above*, point 31.

to Article 2 (a) of Directive 2004/38, also the spouse, namely "a person linked to another person by marriage"[31]. The Court rightly finds that the concept of 'spouse' in the Directive "is gender neutral and is therefore liable to include the same-sex spouse of the concerned citizen of the Union"[32]. Furthermore, the Court observes that the Union legislature, when referring to a 'family member' as the partner, with whom the Union citizen contracted a partnership registered under the legislation of a Member State, refers to the conditions laid down by the relevant legislation of the Member State in which this citizen intends to move or reside"[33], which is not the case for the "spouse".

In interpreting the notion of "spouse", the Court referred to the observations of the governments which argued that the refusal to recognise same-sex marriages concluded in another Member State constituted a restriction on free movement under the Treaty on European Union[34], but such a restriction was justified by grounds of public policy and national identity provided in the Treaty on European Union, Article 4 (2). With regard to such a comment, the Luxembourg Court pointed out that "the obligation of a Member State to recognise a same-sex marriage concluded in another Member State under the law of that State solely for the purpose of granting a derived right of residence to a third-country national, does not affect the institution of marriage in that first Member State, which is defined by national law"[35]. In other words, the Court assures Member States that the institution of same-sex marriage "is limited to the obligation to recognise such marriages contracted in another Member State under the law of that State solely for the purpose of exercising the rights conferred by Union law on such people"[36].

The Court also resorts to the jurisprudence of the European Court of Human Rights, recalling that "the relationship of a homosexual couple is likely to fall within the notion of "private life" as well as within the notion of "family life" of a heterosexual couple who is in the same situation"[37].

Therefore, the Court considers that a Member State cannot rely on its national law to oppose the recognition in its territory, solely for the purposes of granting a derived right of residence to a third-country national, of the marriage entered into by a citizen of the Union of the same sex in another Member State in accordance with the latter's right"[38], even if the civil status of the persons, which includes rules on marriage, is a matter which falls within the competence of the Member States"[39] (" thus, States are free to provide or not the same-sex marriage"[40]).

However, the Court considers that the refusal by a Member State to recognise, for the sole purpose of granting a derived right of residence to a third-country national, the marriage of that national with a Union citizen of the same sex legally contracted in another State Member State is likely to prevent the exercise of the right of the Union citizen to move and reside freely within the territory of the Member States. "This would make the freedom of movement to vary from one Member State to another according to national provisions governing same-sex marriage"[41].

## 6. Conclusions

According to the conclusions of Advocate General Wathelet, the legal issue that the Court had to deal with in the Coman case, was not the legalisation of same-sex marriage but the free movement of Union citizens. Member States of the Union are free to regulate same-sex marriage, but they have to respect their obligations under the freedom of movement of citizens of the Union. Since Directive 2004/38 does not include any reference to the right of Member States to determine the status of 'spouse', the Court of Justice has had the task of providing that concept with an autonomous and uniform interpretation. According to the Court, the notion of 'spouse' within the meaning of the Directive is based on a marriage-based relationship but remains gender neutral no matter where the marriage was contracted. Consequently, such a person may therefore permanently reside in the territory of the Member State in which his/her spouse established himself/herself as a citizen of the Union after exercising his/her right to freedom of movement.

Therefore, "in a situation where a Union citizen made use of his or her freedom of movement by moving and actually residing (...) in a Member State other than that of which citizenship he or she owns, and established or consolidated , on that occasion, a family life with a third-country national of the same sex to which he is legally bound in the host Member State (...), the competent authorities of the Member State of which the citizen is a Union's national"[42]do not have the power to refuse to grant a right of residence in the territory of that Member State to that national on the

[31] *Ibid*., point 34
[32] *Ibid*., point. 35.
[33] *Ibid*., point 36.
[34] Article 21 (1).
[35] Judgment *Coman and Others*, C-673/16, EU:C:2018:385, *cited above*, paragraph 45.
[36] *Ibid*., point 46.
[37] *Ibid*, point 50.
[38] *Ibid*., point 36.
[39] *Ibid*., point 37.
[40] *Idem*.
[41] Court of Justice of the European Union, Press release no. 80/18 Luxembourg, 5 June 2018, p. 2 (https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-06/cp180080ro.pdf).
[42] The operative part of the judgment in *Coman and Others*, C-673/16, EU: C: 2018: 385, *cited above*, point1.

ground that the law of that Member State does not provide marriage between persons of the same sex. Furthermore, the concept of 'spouse' in Directive 2004/38 must be interpreted as meaning that 'in circumstances such as those at issue in the main proceedings, a third-country national of the same sex as the citizen of the Union, whose marriage to that was completed in a Member State under the law of that State, has a right of residence for more than three months in the territory of the Member State of which the Union citizen is a national"[43].

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[43] *Ibid.*, point 2.

# INTERPRETATION AND ENFORCEMENT OF ARTICLE 148 OF THE CONSTITUTION OF ROMANIA REPUBLISHED, ACCORDING TO THE DECISIONS OF THE CONSTITUTIONAL COURT

**Roxana-Mariana POPESCU***

**Abstract**

*The provisions of Article 148 establish the internal legal framework, at the level of basic law, in order for Romania to acquire the status of Member State with full rights and obligations, of the European Union. Regarding the interpretation and enforcement of the constitutional text, the case law of the Constitutional Court of Romania has evolved, leading to the following conclusion: the Constitution is the only direct reference in constitutional control.*

**Keywords:** *Constitution of Romania, republished; Article 148; decisions of the Constitutional Court; interpretation; European Union law.*

## 1. Introductory aspects

The provisions of Article 148 establish the internal legal framework, at the level of basic law, in order for Romania to acquire the status of Member State with full rights and obligations, of the European Union, taking into account the provisions of Article 49 of the Treaty on European Union that provide that "the conditions of admission and the adjustments required by the Treaties on which the Union is based shall be the subject of an agreement between the Member States and the requesting State. This agreement is subject to ratification by all contracting states[1] in accordance with their constitutional regulations".

Having the marginal name of *Integration into the European Union*, Article 148 of the Constitution of Romania, republished, regulates the following aspects:

- Romania's adhesion to the constituent treaties of the European Union, including the acts revising the constitutive treaties, for the purpose of transferring tasks to the institutions of the European Union, as well as joint exercising with the other member states, of the competences provided in these treaties, is done by law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a two-thirds majority of the number of deputies and senators;
- as a result of adhesion, the provisions of the constitutive treaties establishing the European Union, the acts revising the Treaties, as well as other binding Union regulations, take precedence over the contrary provisions of the national laws, in compliance with the provisions of the act of accession;
- The Parliament, the President of Romania, the Government and the judiciary authority guarantee the fulfillment of the obligations resulting from the act of accession and from the previous provisions;
- The Government delivers drafts of binding documents to the two Chambers of Parliament before they are subject to the approval of the institutions of the European Union.

"The constitutional text of reference is not distinguished through clarity or detail, so it is the task of the Constitutional Court to establish, based on the systematic interpretation of the Constitution, the relations of legal regulations in the two legal systems and how the rules of the European Union law interfere with the constitutional control"[2]. Furthermore, as the doctrine has shown, "due to the lack of specific regulation of the significance/role of some legal institutions in the Constitution of Romania, it is incumbent on the Constitutional Court of Romania to establish, in its jurisprudence, through binding decisions, the way of interpreting constitutional texts"[3].

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[1] Romania adhered to Law no. 157/2005 for the ratification of the Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg , the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the Republic of Bulgaria and Romania on the accession of the Republic of Bulgaria and Romania to the European Union, signed by Romania in Luxembourg on 25 April 2005, published in the Official Gazette of Romania, Part I, no. 465, of 1 June 2005.

[2] Tudorel Toader, Marieta Safta, *Rolul normelor europene în controlul de constituționalitate*, http://www.nos.iem.ro/bitstream/handle/123456789/1134/1-Toader.T_Safta.M.pdf?sequence=1&isAllowed=y, p. 2.

[3] Elena Emilia Stefan, *Scurte considerații asupra răspunderii membrilor Guvernului*, Drept Public Journal, no. 2/2017, p.83.

## 2. Article 148 paragraph (1) of the Constitution republished, according to the interpretation of the Constitutional Court of Romania

As it is known, acquiring the status of EU Member State implies, inter alia, the transfer to the EU institutions of some of the competences exercised under sovereignty[4]. Naturally, EU membership is a result of the candidate's consent and compliance with the provisions included in the pre-accession agreements.

The provisions of Article 148 paragraph (1) of the Constitution of Romania, republished, creates the legal constitutional framework necessary for the accession of Romania to the European Union. Thus, the constituent legislator established the rule according to which "the accession to the European Union is by law, adopted by the joint sitting of the Chamber of Deputies and the Senate, with a qualified majority of two-thirds of the number of members of the Parliament". It should be noted that the option according to which "accession (...) is done by law" is in accordance with the provisions of Article 61 paragraph (1)[5] of the Constitution, which states that "Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country". According to the Constitutional Court, "the accession rule of law is intended to bring to the attention of the supreme representative body not only the importance of joining the European Union, but also the responsibility[6] that is conferred upon the Romanian state, as it acquires membership of the European Union"[7].

As regards the provision referring to the transfer of "tasks to the Community institutions", the Constitutional Court held that Article 148 paragraph (1) "refers to the sovereign exercise of the Romanian State's will to adhere to the constituent treaties of the European Union by a law, the adoption of which is conditioned by a qualified two-thirds majority. The Act of Accession has a dual consequence, namely the transfer of tasks to the Community institutions and, on the other hand, the joint exercise with the other Member States of the powers provided in those Treaties. As regards the first consequence, the Court notes that, by the simple belonging of a State to an international treaty, it diminishes its powers[8] within the limits set by international law"[9]. "But this consequence needs to be correlated with the second consequence of Romania's integration into the European Union. In this regard, the Constitutional Court notes that the act of integration also has the meaning of sharing the exercise of these sovereign tasks with the other constituent states of the international body. Therefore, the Constitutional Court notes that, through acts of transfer of tasks to the structures of the European Union, they do not acquire, through endowment, a "super-competence", their own sovereignty. In fact, the Member States of the European Union decided to jointly exercise certain attributions that traditionally fall within the scope of national sovereignty"[10].

The transfer of some tasks to the Union's institutions and the joint exercising of competences with the other Member States "do not affect the sovereignty of the states but, on the contrary, ensure that it is achieved at a higher level (...) for the benefit of each and every one"[11].

Under these circumstances, Article 148 paragraph (1) contains a "general Community clause"[12] of delegation of tasks, from national to supranational level, a mark specific to the integration system on which the European Union is based. Thus, we note the surprise of the EU's special functioning as an integration (and not cooperative) organization, which borrows elements relating to the federal organization of competences"[13]. In view of the importance of social relations "(involving the transfer of duties (...) and the exercise of common tasks[14] with the other Member States)", the legislator considered it necessary that the law of ratification of the Accession Treaty would be adopted by a special procedure, "which differs from that provided by the Constitution for other international

[4] According to the judgment of the Court of Justice in Luxembourg on 15 July 1964, *Flaminio Costa v. / ENEL*, case 6-64, EU: C: 1964: 66: "by establishing a Community of unlimited duration, with its own institutions with legal capacity, with personality, capable of international representation and, in particular, with real powers derived from (...) the transfer of States' tasks to the Community, the latter have limited their sovereign rights even in restricted areas and thus created a body by law applicable to their own nationals and themselves ",

[5] The former Art. 58 par. (1) in the 1991 Constitution.

[6] About the forms of legal liability, see Elena Emilia Stefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Prouniversitaria Publishing House, Bucharest, 2013, p. 94 et seq.

[7] Decision CCR no. 148 of 16 April 2003 on the constitutionality of the legislative proposal for the revision of the Romanian Constitution, published in the Official Gazette of Romania, Part I, no. 317 of 12 May 2003.

[8] According to the Constitutional Court, "from this first point of view, Romania's membership to the United Nations Organization, the Council of Europe, the Organization of the States of the European Community, the Central European Free Trade Agreement, etc. or Romania's status as a party to the Convention for the Protection of Human Rights and Fundamental Freedoms or other international treaties has the significance of a restriction of the powers of state authority, a relativization of national sovereignty "- CCR Decision no. 148 of 16 April 2003, *cited above.*

[9] Decision CCR no. 148 of 16 April 2003, *cited above*.

[10] *Idem.*

[11] Mihai Constantinescu, Ioan Muraru, Antonie Iorgovan, *Revizuirea Constituției. Explicații și comentarii*, Rosetti Publishing House, Bucharest, 2003, p. 132.

[12] Simina Tănăsescu, *Despre autoritatea constituțională a unui tratat european*, in "Despre constituție și constituționalism – Liber Amicorum Ioan Muraru", Hamangiu Publishing House, Bucharest, 2006, p. 310.

[13] Mihaela-Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, 2nd edition, reviewed and added, Universul Juridic Publishing House, Bucharest, 2015, p. 209.

[14] *Idem.*

treaties"[15]. The regulation of such a special procedure leads to the idea that "in the internal legal order, the legal act by which Romania adheres to the European Union has a juridical power inferior to the Constitution and constitutional laws, but superior to the organic and ordinary laws"[16].

## 3. Article 148 paragraph (2) of the Constitution republished, in the light of the decisions of the Constitutional Court of Romania

The accession to the EU implies a number of consequences. One of these consequences follows from the judgment[17] of the Court of Justice in Luxembourg ruled in 1978, in which the Court ruled that, under the "principle of the supremacy of Community law[18], the provisions of the Treaty and the acts of the directly applicable institutions have the effect, with the mere fact of their entry into force, not only to determine the inapplicability of any provision contrary to that of the existing national legislation, but also - to the extent that those provisions and acts form an integrant part, with the national law of the Member States rank higher than the internal rules of the legal order applicable in the territory of each Member State - to prevent the adoption of new national legislation in force in so far as they are incompatible with Community rules"[19].

The priority of European Union law to the domestic law of the Member States was settled by way of case law in *Costa / Enel*[20]. According to the Luxembourg Court of Justice, "the incorporation of Community provisions into the law of each Member country and, more generally, the meaning and spirit of the treaty have as a corollary the impossibility of states to prevail against an accepted legal order on the basis of reciprocity, a subsequent unilateral measure which cannot be relied upon in that way".

The interpretation of the Luxembourg Court requires the integration of the acquis of the European Union into national law, as well as the "determination of the relation between Community and national law"[21]. The solution proposed by the Constitution of our country is to implement the EU law in the internal legal order and to establish the rule of priority enforcement of EU law to the contrary provisions of the internal laws, in compliance with the provisions of the act of accession. Thus, according to Article 148 paragraph (2), "as a result of accession, the provisions of the Treaties establishing the European Union and other binding Community rules shall take precedence over the contrary provisions of national laws, in compliance with the provisions of the act of accession". The Constitutional Court notes that "this provision brings no prejudice to the constitutional provisions regarding the limits of the revision or other provisions of the Basic Law, being a particular enforcement of the provisions of the present Article 11 paragraph (2) of the Constitution"[22], according to which "the treaties ratified by the Parliament, according to the law, are part of the national law[23]".

It should be noted that, regarding the notion of "internal laws", the Constitutional Court, in its decisions, made a distinction between the Constitution and the other laws[24], thus pointing out that the provisions of Article 148 paragraph (2) do not take into account constitutional regulations. Thus, according to the Court, "constitutional provisions are not declaratory, but constitute mandatory constitutional rules without which the existence of the rule of law cannot be conceived. (...) The Basic Law is the framework and the extent to which the legislator and other authorities can act"[25]. In the view of the Constitutional Court, the enforcement in the internal legal order of European Union law without distinguishing between the Constitution and the other internal laws would mean that the Basic Law would be in a lower place than the legal order of the European Union because it would lose the binding legal force only by the inconsistency between its provisions and those of the European Union. At the same time, the Constitutional Court also noted the observation that "the accession to the European Union cannot affect the supremacy of the Constitution over the entire legal order"[26]. The Constitutional Court states that this would be impossible to accept because it would amount to "denying that the expression of the people's will is the Constitution itself"[27].

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[15] Simina Tănăsescu, *cited above*, pp. 310-311.

[16] Ioan Muraru, Elena-Simina Tănăsescu (coord.), *Constituţia României. Comentariu pe articole*, C.H.Beck Publishing House, Bucharest, 2008, p. 1433.

[17] Judgment of the Court of 9 March 1978, *Simmenthal*, Case 106/77, EU:C:1978:49.

[18] Of the European Union at present.

[19] Judgment of the Court, *Simmenthal*, EU:C:1978:49, *cited above*, point 17.

[20] *Cited above*.

[21] Decision CCR no. 148 of 16 April 2003 on the constitutionality of the legislative proposal for the revision of the Romanian Constitution, published in the Official Gazette of Romania, Part I, no. 317 of 12 May 2003.

[22] Decision CCR no. 148 of 16 April 2003, *cited above.*

[23] Details on the consideration of treaties and international conventions sources of administrative law, see: Elena Emilia Stefan, *Drept administrativ Partea I, Curs universitar*, second edition, reviewed and updated, Universul Juridic Publishing House, Bucharest, 2016, p. 34 and seq.

[24] The same distinction is made, at the level of the Basic Law, also by art. 20 par. (2) the final sentence providing the enforcement of international rules as a matter of priority, unless the Constitution or domestic laws contain more favourable provisions.

[25] CCR Decision no. 80 of 16 February 2014 on the legislative proposal on the revision of the Romanian Constitution, published in the Official Gazette of Romania, Part I, no. 246 of April 7, 2014.

[26] Judgment of 11 May 2005, K 18/04, ruled by the Constitutional Court of the Republic of Poland.

[27] Idem.

The Constitutional Court "established that binding acts of the European Union were regulations interposed in the framework of constitutional control"[28]. However, there is not one among the attributions of the CCRs concerning the enforcement of the "European Union rules to clarify or establish their content"[29]. "The competence to ensure the interpretation of Union law for the purpose of uniform enforcement at the level of all Member States lies with the Court of Justice of the European Union, which, as a Union jurisdiction authority within the meaning of Article 19 paragraph (3) section b) of the Treaty on European Union, shall give a preliminary ruling, at the request of the national courts, on the interpretation of Union law or on the validity of acts adopted by the institutions"[30]. The legal effects of the preliminary ruling of the Court of Justice of the European Union have been established by jurisprudence. Thus, "the Luxembourg Court held that such a ruling, bearing on its interpretation or validity of an act of the European Union, was binding on the court making the reference for a preliminary ruling and the interpretation, in common with the European provisions it interpreted, was also vested with authority vis-à-vis other national courts, which cannot give their own interpretation to those provisions"[31]. At the same time, "the effect of the preliminary rulings is direct, in the sense that nationals of the Member States have the right to rely directly on European regulations before national and European courts and on retrospective grounds, in the sense that the interpretation of a rule of law of the European Union in a preliminary reference clarifies and specifies its meaning and scope since its entry into force"[32].

The Constitutional Court acknowledges, however, that, due to the place that the European Union's regulations occupy, according to Article 148 par. (2) of the Constitution, in relation to its domestic law, it is "called upon to invoke in its case law the binding acts of the European Union[33] whenever they are relevant to the case, as long as their content is not unequivocal and does not require an interpretation of its own"[34]. However, the Constitutional Court is not competent to rule on issues related to "potential collisions between the domestic and relevant European Union legislation in different areas"[35], because the issue it is brought before "is not a matter of unconstitutionality, but of enforcement of the law, in the jurisdiction of the court ". *Per a contrario*, "the Court of Justice of the European Union has no jurisdiction to rule on the validity or invalidity of national law"[36].

What it is worthy to be kept in mind is that Romania does not accept the priority of enforcing European Union law based on the jurisprudence of the Court of Justice, but based on its own constitutional provisions.

## 4. Article 148 paragraph (3) of the Constitution republished

According to Article 148 paragraph (3), Romania's accession to the acts of revision of the constitutive treaties of the European Union is made by a law passed at the joint sitting of the Chamber of Deputies and the Senate, with a two-thirds majority of the deputies and senators. Unlike the situation regulated in paragraph (1) of the same article (the situation that applied prior to the acquisition by Romania of the status of EU Member State), the situation in para. (3) is different because this time, the status of Romania as a Member State of the European Union is taken into account because the Constitutive Treaties of the European Union are reviewed only by the Member States[37].

## 5. Article 148 paragraph (4) of the Constitution republished, according to the decisions of the Constitutional Court of Romania

The provisions of par. (4) of Article 148 state that "the President of Romania, the Parliament, the Government and the judiciary authority guarantee the fulfillment of the obligations resulting from the act of accession" and have the competence to guarantee the fulfillment of the obligations resulting from the acts of accession "and the implementation of the constitutional provisions of the Union and the mandatory regulations derived from them. "In this sense, the Government is constitutionally empowered to guarantee the fulfillment of Romania's obligations towards the European Union by the means at its disposal"[38].

[28] CCR Decision no. 80 of 16 February 2014, cited above.

[29] Tudorel Toader, Marieta Safta, Constituția României (decizii C.C.R., hotărâri C.E.D.O., hotărâri C.J.U.E., legislație conexă), 2nd edition, Hamangiu Publishing House, Bucharest, 2016, p. 462.

[30] CCR Decision no.1.039 of 5 December 2012, published in the Official Gazette of Romania, Part I, no.61 of 29.01.2013.

[31] Idem.

[32] Idem.

[33] For more detailes about the acts of the European Union, see Augustin Fuerea, Dreptul Uniunii Europene – principii, acțiuni, libertăți, Universul Juridic Publishing House, Bucharest, 2016, pp. 45-50.

[34] Decision CCR no. 383 of 23 March 2011, published in the Official Gazette of Romania, Part I, no. 281 of 21 April 2011.

[35] Decision CCR no. 300 of 3 March 2009, published in the Official Gazette of Romania, Part I, no. 188 of March 26, 2009 and CCR Decision no. 729 of May 7, 2009, published in the Official Gazette of Romania, Part I, no. 401 of 12 June 2009.

[36] Decision CCR no. 350 of June 24, 2014, published in the Official Gazette of Romania, Part I, no. 571 of July 31, 2014.

[37] Romania implemented the provisions of that paragraph when it adopted the ratification law of the Treaty of Lisbon, ratified by Law no. 13/2008, published in the Official Gazette of Romania, Part I, no. 107 of 12 February 2008.

[38] Tudorel Toader, Marieta Safta, *Constituția României..., cited above,* p. 462.

However, when it comes to the power of the Government to regulate by means of emergency ordinances, the Constitutional Court ruled that their use "for the purpose of harmonizing the national legislation with the Community law in the situation in which the infringement procedure was imminent before the Court of Justice was fully constitutional[39].

In a case in which the Court held that there was a dispute between the Government and the authors of the objection of unconstitutionality regarding the directive applicable to the contractual and / or institutional public-private partnership, the violation of the provisions of Article 148 of the Constitution was invoked. The Court appreciated that the uncertainty present in the case in question "was given by the fact that the legislature failed to fulfill its obligation to indicate, in the criticized law, the acts of the European Union which are transposed through it, which is inadmissible. Irrespective of the applicable directive[40] (...), the Court noted that both contain conditions which coincide almost to detail with regard to the unilateral amendment or termination of the contract, while the text of Art. 38 paragraph (1) of the law on public-private partnership is unconstitutional] contains a normative solution that tends to evade these conditions. Consequently, the legislative solution contained in the criticized text represents a violation by the Parliament of the provisions of Article 148 paragraph (4) of the Constitution, which regulates its role as guarantor of the fulfillment of the obligations resulting from the act of accession. As a result, the Court admitted, in part, the objection of unconstitutionality formulated and found that the provisions of Article 38 para. (1) of the Public-Private Partnership Law were unconstitutional"[41].

According to the Constitutional Court's opinion, expressed in Decision no. 64/2015[42], "disagreements of the provisions of Art. 86 par. (6) the first sentence of Law no.85 / 2006 with binding acts of the European Union with constitutional relevance during the activity of Law no.85 / 2006 constitutes *eo ipso* a violation of the provisions of Article 148 par. (4) of the Constitution, since the legislator has allowed legal relations to be governed by these national provisions, and is disregarded by its constitutional obligation to guarantee, at legislative level, at least the same level of protection of the right to measures of social protection of the work with that stipulated in the binding acts of the European Union, as well as to permanently and continuously harmonize the national legislation with the binding acts of the European Union. In fact, the ordinary legislator identified those regulatory deficiencies and changed the legislative solution by Law no. 85/2014 on Insolvency and Insolvency Prevention Procedures"[43].

In Decision no. 602/2016[44], "the Court ruled on the legislator's obligation to adopt rules within the meaning of the judgments of the Court of Justice of the European Union (...)[45], with the effect of reimbursing the amounts collected as motor vehicle pollution tax and the pollutant emissions tax to motor vehicles plus the interest calculated until the date of full payment and court costs as well as other amounts set by the courts. The Court held that the legislator complied with the ruling of the Court of Justice of the European Union precisely through the provisions of the Constitution"[46].

## 6. Conclusions

The case law of the Constitutional Court of Romania regarding the interpretation and enforcement of the provisions of Art. 148 of the Constitution of Romania, republished, "has seen an evolution that led to the following conclusions in essence: the Constitution is the only direct reference in the framework of constitutional control; a rule of European law can be used in constitutional control as a rule interwoven with the direct reference, which can only be the Constitution, subject to certain conditions (an objective condition, regarding the clarity of the regulation, and a subjective one, which concerns the margin of appreciation of the constitutional relevance of the European Union legal regulation)"[47]. In that respect, the Constitutional Court held that "the use of a rule of law of the European Union in the framework of constitutional control as an interdependent rule (...) [of the Constitution] implied, under Art. 148 par. (2) and (4) of the Constitution of Romania, a cumulative conditionality: on the one hand, this rule must be sufficiently clear, precise and unambiguous by itself or its meaning has been clearly, precisely and unequivocally established by the Court of Justice of the European Union and, on the other hand, the rule must be circumscribed to a certain level of constitutional relevance, so that its normative content supports the possible violation by the national law of the Constitution - the only direct reference in constitutional control . In such a case, the action of the Constitutional Court is distinct from the simple enforcement and

[39] Decision CCR no. 802/2009, published in the Official Gazette of Romania, Part I, no. 428 of 23 June 2009.

[40] In case Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the granting of concession contracts or Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, both published in the Official Journal of the European Union, L series no. 94 of 28 March 2014.

[41] Decision no. 390 of 2 July 2014, published in the Official Gazette of Romania, Part I, no. 532 of July 17, 2014, paragraph 38.

[42] Published in the Official Gazette of Romania, Part I, no. 286 of April 28, 2015.

[43] Paragraph 33.

[44] Published in the Official Gazette of Romania, Part I, no. 859 of November 18, 2015.

[45] For example, the judgment of the Court of 7 April 2011, *Ioan Tatu v. / The Romanian State through the Ministry of Finance and Economics and Others*, Case C-402/09, EU:C:2011:219.

[46] Tudorel Toader, Marieta Safta, *Rolul normelor europene..., cited above*, pp. 8-9.

[47] Marieta Safta, https://europunkt.ro/2017/01/18/interviu-cu-marieta-safta-prim-magistrat-asistent-la-ccr-efectul-cooperarii-si-interactiunii-intre-curtile-constitutionale-si-cele-europene-este-pozitiv-intrucat-ele-conduc-la-consol/

interpretation of the law, jurisdiction of the courts and administrative authorities, or any issues related to the legislative policy promoted by the Parliament or the Government, as the case may be"[48]. "The appreciation of the constitutional relevance lies exclusively with the Constitutional Court of Romania"[49].

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[48] Decision CCR no. 903 of 30 June 2011, published in the Official Gazette of Romania, Part I, no. 673 of September 21, 2011.

[49] Marieta Safta, https://europunkt.ro/2017/01/18/interviu-cu-marieta-safta-prim-magistrat-asistent-la-ccr-efectul-cooperarii-si-interactiunii-intre-curtile-constitutionale-si-cele-europene-este-pozitiv-intrucat-ele-conduc-la-consol/

# INVOLVEMENT OF THE PEOPLE'S ADVOCATE IN THE CONSTITUTIONALITY REVIEW OF THE GOVERNMENT EMERGENCY ORDINANCES*

**Simina Popescu-MARIN***

**Abstract**

*The Constitution attributes to the People's Advocate the possibility to notify the Constitutional Court of the unconstitutionality of the Government's Emergency Ordinances on the way of the exception of unconstitutionality. The study proposes an analysis of the legislative evolution in this field, highlighting some solutions regarding the conditions to be fulfilled by the People's Advocate on the occasion of the notification of the Constitutional Court with exceptions of unconstitutionality of some provisions of Government Emergency Ordinances, as they were stated in the Constitutional Court's case law. The mechanism, characterized by a number of peculiarities, proves its practical utility, given that in many cases the exceptions of unconstitutionality raised directly by the People's Advocate were admitted by the Constitutional Court. The exception of unconstitutionality of certain provisions of the Government Emergency Ordinances allows for the quick removal of the vices of unconstitutionality, avoiding the perpetuation of the unconstitutional state contrary to the fundamental rights and freedoms and the functioning of the rule of law.*

**Keywords:** *exceptions of unconstitutionality, Government Emergency Ordinances, terms of referral, People's Advocate, Constitutional Court*

## 1. Introduction

The issue regarding the involvement of the People's Advocate in constitutional review of Government Emergency Ordinances, by the exception of unconstitutionality, presents a number of theoretical and practical peculiarities, having an impact on the current state life both for individuals and public authorities. The present study proposes an analysis of the constitutional and legal regulations relating to this matter from the historical perspective of the legislation evolution, while also explaining the legal nature of the Emergency Ordinances, as it was stated by the Constitutional Court in its jurisprudence. It also highlights the procedural rules for resolving the unconstitutionality exceptions raised directly by the People's Advocate before the Constitutional Court, by reporting certain aspects regarding the condition that the emergency ordinance, subject to the exception, to be in force, according with the Constitutional Court jurisprudence. Asked to decide in which cases People's Advocate may raise before the Constitutional Court the exception of unconstitutionality the Court has held that the People's Advocate, on the basis of independence and impartiality it is the only one able to decide on the appropriateness of the exercise of this task, irrespective of the regulatory field in which the emergency ordinances are adopted. Relevant aspects of the case-law of the Court are highlighted in this respect. The presentation of statistical data, the subject matters in which the People's Advocate initiated constitutional review and some examples from the case-law of the Court regarding the settlement of the exceptions of unconstitutionality raised directly by the People's Advocate, aim to highlight the usefulness of exercising this power, which is able to clarify the state of constitutionality in case of the provisions contained in Government Emergency Ordinances, thus ensuring the Constitution supremacy and the rule of law. The study therefore proposes a novelty topic in the specialized literature, from the perspective of its practical valences, by highlighting the recent jurisprudential clarifications, necessary to be known by all those who notice the People's Advocate (individuals, representatives of political parties or public authorities etc.), demanding that some exceptions of unconstitutionality be raised directly before the Constitutional Court.

## 2. Content

Institution of constitutional democracy and rule of law, the People's Advocate has its own means of action to ensure the observance of the Constitution and its supremacy.

Besides the legal procedures specific to the activities of ombudsman institutions that consist in receiving and solving petitions, conducting inquiries and issuing recommendations to the public administration authorities, if it finds a violation of the rights and freedoms of individuals, the People's Advocate may refer the Constitutional Court with exceptions and objections of unconstitutionality and communicates, at its request, points of view on exceptions of unconstitutionality. An analysis of legal and constitutional regulations in this field shows that relations between the Ombudsman and the Constitutional Court was established in 2002 by Law no. 181/2002 for the modification and supplementing the Law no. 35/1191 on the

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organization and functioning of the People's Advocate[1], which, through the Single Article point 4, introduced in the Law no. 35/1997, a new article, art. $18^1$ , as follows: "In the case of a complaint concerning the unconstitutionality of laws and ordinances concerning the rights and freedoms of citizens, the Constitutional Court will also request the point of view of the People's Advocate Institution ." The statement of reasons of Law no. 181/2002 stated that, considering the role of the Ombudsman, stipulated in Art. 55 of the Constitution of Romania[2] "it would be useful to have a point of view in the cases of exceptions of unconstitutionality of some normative acts".

The constitutional establishment of the relationship between the People's Advocate and the Constitutional Court was made in 2003, during the revision of the Constitution by Law no. 429/2003 on the revision of the Romanian Constitution[3], which, by Single Article, point $75^1$ amended Art. 144 (a) regarding the role of the Constitutional Court in deciding on the constitutionality of the laws, before their promulgation, and by the Single Article point $75^3$ , which amended Art. 144 (c) on the Court's power to rule on exceptions of unconstitutionality. Law on the revision of the Romanian Constitution no. 429/2003 was approved by the national referendum of 18-19 October 2003 and entered into force on 29 October 2003[4]. Following the renumbering of articles and the republishing of the Constitution[5], Art. 144(a) became Art. 146 (a), and Art. 144(c) became Art. 146 (d) of the Constitution, republished, having the following content: " *The Constitutional Court has the following attributions:*

*a) decides on the constitutionality of the laws, before the promulgation thereof, at the request of the President of Romania, of one of the presidents of the two Chambers, of the Government, of the High Court of Cassation and Justice, of the People's Advocate, of at least 50 deputies or at least 25 senators, as well as ex officio, on initiatives to revise the Constitution;*

*( ... )*

*d) decides on exceptions of unconstitutionality with respect to laws and Government ordinances brought before courts of law or commercial arbitration; the exception of unconstitutionality can also be raised directly by the People's Advocate;".*

Involving the People's Advocate in the constitutional review was therefore established at the constitutional level, although by the grounds set out in the Decision no. 148 of April 16, 2003 on the constitutionality of the legislative proposal to revise the Constitution of Romania[6], the Constitutional Court stated that : "With regard to the hypothesis contained in the same provision concerning the possibility of the People's Advocate to raise the exception of unconstitutionality, the Court finds that it does not contain a judicious solution (…), since the fact that the People's Advocate raises the exception of unconstitutionality for the benefit of a person cannot have the meaning of a genuine guarantee or a measure of protection of the citizen, as long as that person, having the capacity to act and being animated by a legitimate interest, has the possibility to exercise the procedural right to raise the exception before the court. In addition, the Constitutional Court notes that the People's Advocate can not invoke a procedural position that would legitimize his participation in a trial before the courts. As citizens are guaranteed with the right to free access to justice and the right to defense, they can defend themselves against the application of unconstitutional legal provisions in the judicial sphere. That is why the People's Advocate would have invested with an excessive, unconscionable role. In fact, the ombudsman institution at European level is conceived as a public authority whose attributions relate to the relationship of individuals with the public administration and not with the courts ".

Subsequent to the specified constitutional norms, rules regarding the involvement of the People's Advocate in a priori and a posteriori constitutional review were established by Art. I point 10 of Law no. 233/2004 for amending and completing the Law no. 35/1997 regarding the organization and functioning of the People's Rights Institution[7], and by Art. I, 12, 15, 16, 17, 24 and 28 of Law no. 232/2004 for amending and completing the Law no. 47/1992 on the organization and functioning of the Constitutional Court[8].

Following the republishing of the normative acts regarding the organization and functioning of the two fundamental state institutions, provisions regarding the possibility of the People's Advocate to refer the Constitutional Court directly, with the exception of unconstitutionality of the Government's emergency ordinances, can be found in Art. 15 par. (1)(i) of Law no. 35/1997 regarding the organization and functioning of the People's Advocate Institution[9], according to which the People's Advocate has the following

[1] published in the Official Gazette of Romania, Part I, no. 268 of April 22, 2002

[2] become Article 58 of the Constitution republished in 2003

[3] published in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003

[4] the date of publication in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003 of the Constitutional Court's Decision no. 3 of 22 October 2003 to confirm the outcome of the national referendum of 18-19 October 2003 on the Law on the revision of the Romanian Constitution

[5] in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003

[6] published in the Official Gazette, Part I, no. 317 of 12 May 2003

[7] published in the Official Gazette of Romania, Part I, no. 553 of 22 June 2004

[8] published in the Official Gazette of Romania, Part I, no. 502 of 3 June 2004

[9] republished in the Official Gazette of Romania, Part I, no. 181 of February 27, 2018

attributions: (i) may directly refer the Constitutional Court, with the exception of unconstitutionality of laws and ordinances; and in Art. 32 and Art. 33 of Law no. 47/1992 on the organization and functioning of the Constitutional Court[10]. Thus, Court Constitutional decide on the exceptions of unconstitutionality directly raised by the People's Advocate on the constitutionality of a law or ordinance or a provision of a law or ordinance in force.

In the Romanian legal system, the Government Emergency Ordinances are primary regulatory acts, equal in legal force with law, as it is highlighted by the jurisprudence of the Constitutional Court ( e.g. Decision no. 5 of 16 January 2001[11]). In terms of their legal nature, the two categories of normative acts- the law and the Government Emergency Ordinance- are not identical, having a different constitutional and legal regime. According to the jurisprudence of the Court, " the Government Ordinance approved by Parliament by law, in accordance with the provisions of Art. 115 par. (7) of the Constitution , ceases to be a stand-alone normative act and becomes, as a result of the approval by the legislative authority, a law, even if, for reasons of legal technique, together with the data of the approval law, preserves the identification elements assigned to their adoption by the Government In other words, the Government ordinance loses the character of a mixed act (administrative act through the prism of the issuer / legislative act through its content) and becomes law. " (see, to that effect, Decision no. 95 of 8 February 2006[12], Decision no**.** 1.039 of 9 July 2009[13], or Decision no. 761 of December 17, 2014[14] , paragraph 27].

Regarding the condition that the norms forming the object of the exception be "in force", the Constitutional Court, by Decision no. 766 of 15 June 2011[15], stated that "the phrase « in force » in the provisions of Art. 29 par. (1) and Art. 31 par. (1) of the Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished, is constitutional insofar as it is interpreted as subjecting to constitutional review, the laws or ordinances or the provisions of laws or ordinances whose legal effects continue to occur after the exit of their force".

In resolving the unconstitutionality exception raised directly by the People's Advocate, the provisions of L aw no. 47/1992 on the settlement of the unconstitutionality exception raised before the courts or commercial arbitration apply accordingly. However, the Constitutional Court held that the phrase "in force" cannot be interpreted in the same way as in the Decision no. 766 of June 15, 2011, as the settlement of the exception of unconstitutionality directly raised by the People's Advocate is done in the context of an abstract constitutional review, as long as the Constitutional Court cannot determine whether the legal provisions criticized still produce effects or their extent (this appreciation can be made only when it comes to an exception raised before a court of law or commercial arbitration). Therefore, the Court can only reject the exception of unconstitutionality directly raised by the People's Advocate on legal provisions that have been substantially amended or repealed after notification of the Constitutional Court (e.g. Decision no. 1167 of 15 September 2011[16], Decision no. 549 of July 15, 2015[17]).

Continuing its reasoning, by Decision no. 64 of February 9, 2017[18], the Court, by a majority of votes (with separate opinion signed by two judges of the Constitutional Court) held that "the People's Advocate raises an exception of unconstitutionality distinct from any judicial procedure, therefore, without any dispute, not having to defend a subjective right. Moreover, the Court held that, in the context of this abstract constitutional review, it cannot be determined whether the repealed normative act still produces legal effects on concrete legal relationships, which can be assessed only when the exception is raised before a court or commercial arbitration (see Decision no. 1.167 of 15 September 2011 or Decision no. 549 of July 15, 2015 , paragraph 16 ), which demonstrates the inapplicability of the Decision no. 766 of 15 June 2011 .

Therefore, in the latter hypothesis, the Court stated that the constitutionality review under Art. 146 (d) the second sentence of the Constitution can be performed , if the primary legal act criticized by the People's Advocate is part of the active fund of legislation, implicitly, of the legislative solution contained therein; only if the legislative solution was maintained, at the date of the Court's pronouncement, it can be analyzed on the merits under the conditions of the constitutional provision previously mentioned.

In the present case, at the time the unconstitutionality exception was raised, the emergency ordinance criticized by the People 's Advocate was partially in force [Art. II and Art. III par. (2) - (4)], in other words, it was part of the positive law, and partially was to enter into force on 11 February 2017 (art. I and Art. III par. (1)]. Even if the People's Advocate raised the exception of unconstitutionality of the entire emergency ordinance,

[10] republished in Official Gazette of Romania, Part I, no. 807 of 3 December 2010
[11] published in the Official Gazette of Romania, Part I, no. 94 of February 23, 2001
[12] published in the Official Gazette of Romania, Part I, no. 177 of 23 February 2006
[13]published in the Official Gazette of Romania, Part I, no. 582 of 21 August 2009
[14] published in the Official Gazette of Romania, Part I, no. 582 of 21 August 2009
[15] published in the Official Gazette of Romania, Part I, no. 549 of August 3, 2011
[16] published in the Official Gazette of Romania, Part I, no. 808 of 16 November 2011
[17] published in the Official Gazette of Romania, Part I, no. 718 of 24 September 15, 2015
[18] published in the Official Gazette, Part I, no. 145 of February 27, 2017

which, at the time of the referral [3 February 2017], was not yet in force as a whole, the Court noted that in its case-law it recognized the possibility of raising an exception of unconstitutionality on emergency ordinances which, although published in the Official Gazette of Romania, Part I, are not yet in force due to the fact that they themselves provide for a later date of entry into force (see, in this respect, Decision no. 447 of 29 October 2013[19]). However, at the time of judging the exception of unconstitutionality, the essential constitutional requirement is that the normative act, containing the criticized legislative solution, be in force, or be part of the active fund of legislation [see also Decision no. 447 of 29 October 2013, decision by which the Court accepted the exception of unconstitutionality at a date after the enactment of the contested normative act, even if it was not yet in force at the time of Constitutional Court notification]; so, naturally, the Court has jurisdiction to consider the constitutionality of the emergency ordinance, on the grounds of Art. 146 (d) the second sentence of the Constitution , only insofar as it is in force, thus maintaining the criticized legislative solution at the time of the decision. In the present case, the Court finds that the urgency ordinance criticized was no longer in force, being expressly repealed.

Accordingly, the Court held that the condition for the admissibility of the exception of unconstitutionality regarding character "into force" of the normative act subject to constitutional review was not accomplished. Accordingly, since the date of Court pronouncement was later than the date of repealing the criticized emergency ordinance, namely February 5, 2017, the Court rejected the exception of unconstitutionality as inadmissible.

The rules for solving the exception of unconstitutionality of an Emergency Government Ordinance are as follows: The Constitutional Court decides on the exceptions on the unconstitutionality of a Government ordinance or a provision of an ordinance in force. The provisions found to be unconstitutional by an earlier decision of the Constitutional Court cannot be subject of the exceptions on the unconstitutionality. Receiving the exception, the President of the Constitutional Court shall designate the Judge-Rapporteur and forward the judgment act by witch the Court has been notify to the Presidents of both Houses of Parliament and Government, indicating the date by which they can submit their opinions. Obviously, if the People's Advocate is the one who notify the Constitutional Court, by way of an exception of unconstitutionality, is not asked for its point of view on its own exception.

Judge - Rapporteur is required to take the necessary measures to administer the evidence at the time of the trial. Judgment takes place on the basis of the documents contained in the file, with the notification of the parties and of the Public Ministry. The prosecutor's participation in the trial is mandatory.

The decision to declare the unconstitutionality of an Emergency Government Ordinance or a provision of an ordinance in force is final and binding. If the exception is admitted, the Court will also rule on the constitutionality of other provisions of the contested act, of which the provisions referred to in the referral can not necessarily be dissociated.

As a result of the decision of the Constitutional Court, provisions of the ordinances in force found to be unconstitutional shall cease their legal effects 45 days after the publication of the Constitutional Court's decision if within this interval the Parliament or the Government, as the case may be, does not harmonize the provisions unconstitutional with the provisions of the Constitution, as established by Art. 147 par. (4) of the Constitution. Also, for a period of 45 days, the provisions found to be unconstitutional are de iure suspended.

Regarding the provisions of Art. 147 par. (1) of the Constitution , the Court , by Decision no. 415 of April 14, 2010[20], stated that they establish a difference in the obligation to harmonize the unconstitutional provisions with the provisions of the Constitution - between the competence of the Parliament for the provisions of the laws, on the one hand, and of the Government, for the provisions of ordinances, on the other hand.

Decisions by which the Court finds the unconstitutionality of an ordinance or a provision of an ordinance is communicated to the two Chambers of Parliament, the Government and the People's Advocate.

Regarding the legal provisions which may constitute the object of the unconstitutionality exceptions raised directly by People's Advocate it is important to stress upon an issue judicially established by the Constitutional Court on the occasion of solving the unconstitutionality exception of the provisions of Art. 13 par. (1) ( f) of Law no. 35/1997 regarding the organization and functioning of the People's Advocate Institution, which state that: " (1) *The People's Advocate has the following duties: [...]*

*f) may refer the Constitutional Court directly, unconstitutionality exception of laws and ordinances*."

Thus, in support of the criticism of unconstitutionality of the provisions of Art. 13 par. (1)( f) of Law no. 35/1997, the People's Advocate, as the author of the exception of unconstitutionality, showed that the legal provisions criticized violate Art. 58 of the Constitution "in so far as they are interpreted as meaning that the People's Advocate may refer to the Constitutional Court objections or exceptions of unconstitutionality also in other cases than those concerning the rights and freedoms of individuals ". The People's Advocate argued

[19] published in the Official Gazette of Romania, Part I, no. 674 of November 1, 2013
[20] published in the Official Gazette of Romania, Part I, no. 294 of May 5, 2010

that " Article 58 paragraph (1) of the Constitution enshrines the functional specialization of the People's Advocate, limiting its competence to the field of defense the individuals rights and freedoms. The notification of the Constitutional Court by an objection or exception to unconstitutionality is a way of fulfilling its constitutional role. The People's Advocate therefore considered that the objection or exception of unconstitutionality, in addition to the procedural conditions determining the lawfulness of the referral, must be circumscribed to the role and attributions and respect People's Advocate status ".

Consequently, " if the criticized legal text would be interpreted in the sense of recognizing its competence to raise objections and exceptions of unconstitutionality in all cases, this would be a violation of Art. 58 and 59 of the Constitution".

Finally, the People's Advocate argue that "the Constitutional Court jurisprudence is various in dealing with the role of the Ombudsman as a defender of the rights and freedoms of individuals, invoking in this respect the Decision No. 1.133 of 27 November 2007, on the one hand, for the recognition of its competence to raise exceptions of unconstitutionality in all cases, and of the Decisions no. 1.631 of 20 December 2011 and no. 45 of 20 January 2011, on the other hand, to the contrary ."

Consequently, the People's Advocate considered that "the criticized legal provisions are unconstitutional insofar as they are interpreted as meaning that the Ombudsman may raise the exception of unconstitutionality also in cases that do not concern the rights and freedoms of individuals. "

At the request of the Constitutional Court, the Government communicated its point of view on the exception of unconstitutionality of Art. 13 par. (1)( f) of Law no. 35/1997 , according to which the exception "could be admitted insofar as it is interpreted that the Ombudsman may raise exceptions of unconstitutionality in any case, even if the legal text whose constitutionality is being considered does not affect the rights or freedoms of some individuals " .In this sense, The Government mentioned that "systematic interpretation of the constitutional provisions of Art. 58 and Art. 146 (d) leads to the conclusion that the constitutional rank attribution that allows the People's Advocate to raise ex officio exceptions of unconstitutionality should be circumscribed to the role of the People's Advocate, otherwise it would lead to a distortion of its role in the Romanian constitutional and institutional system . "

The People's Advocate also informed the Constitutional Court, notified with the exception of the unconstitutionality of some legal provisions regarding the modification and completion of the Law no. 370/2004 for the election of the President of Romania , that, "in virtue of the institutional and functional independence it enjoys", "it does not express his opinion on the legal provisions criticized." He argued that "the People's Advocate exercises his powers within the constitutional and legal limits established for the fulfillment of his role as a defender of the rights and freedoms of individuals, without substituting other public authorities who, in their turn, have to fulfill their own attributions, as they are covered by the legislation in force. The issues raised concern mainly the relations between the public authorities, aspects of the functioning of constitutional democracy, which imply an analysis and a policy approach, which would oblige the People's Advocate to overcome his position of neutrality and objectivity and to engage in partisan controversy". Or, the People's Advocate must be impartial and objective, without engaging himself as an arbiter in politically nuanced disputes between state institutions, his fundamental role being [...] to defend the rights and freedoms of individuals in their relations with the authorities of the public administration." (see Decision No. 460 of 16 September 2014[21]).

The legal issue regarding the cases when the Ombudsman may refer the Constitutional Court the exception of unconstitutionality was examined by the Constitutional Court which by Decision. 336 of 24 September 2013[22], rejected as inadmissible the exception of unconstitutionality of Art. 13 par. (1)( f) of Law no. 35/1997 regarding the organization and functioning of the People's Advocate Institution, exception directly raised by the People's Advocate. Such a solution was based on the following reasoning: " The power of the People's Advocate to raise exceptions of unconstitutionality was established by the Law on the Revision of the Romanian Constitution no. 429/2003[23].

Article 13 (1)( f) of Law no. 35/1997 restates at infra-institutional level the provisions of Art. 146 (d) the second sentence of the Constitution , according to which "the exception of unconstitutionality can be raised directly by the People's Advocate".

By Decision no. 1.133 of November 27, 2007[24], the Constitutional Court established that Art. 146 of the Constitution does not set condition, in the manner shown by the Government, on the cases in which the Ombudsman is empowered to address to the Constitutional Court notices or exceptions of unconstitutionality.

The Government, in its opinion submitted and retained in the aforementioned decision, considered that from the systematic interpretation of the legal texts regulating the role and attributions of the People's Advocate, as well as of the constitutional provisions regulating the sphere of the legal subjects that may refer the Constitutional Court to an exception to unconstitutionality is that the People's Advocate has the

[21] published in the Official Gazette of Romania, Part I, no. 738 of October 9, 2014
[22] published in the Official Gazette of Romania, Part I, no. 738 of October 9, 2014
[23] published in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003
[24] published in the Official Gazette of Romania, Part I, no. 851 of December 12, 2007

power to initiate constitutional control by referring the Constitutional Court only in respect of the defense of the rights and freedoms of individuals.

According to the settled case law of the Constitutional Court, the People's Advocate may initiate the constitutional review on the basis of the exception of unconstitutionality irrespective of the issues covered by it, but the direct raising of the exception of unconstitutionality is and remains at the exclusive appreciation of the People's Advocate, that cannot be obliged or blocked by any public authority to raise such an exception.

As a consequence, the Court found that the Ombudsman had its marge in his decision to raise an exception of unconstitutionality, part of the institutional and functional independence he enjoys, so that there is no interest of the People's Advocate in promoting such an exception of unconstitutionality, since, by its very mode of action, it can conform to the constitutional meaning of the text.

In these circumstances, the Court held that, in fact, the Ombudsman wanted to be declared as unconstitutional the interpretation resulting indirectly from an earlier decision of the Constitutional Court (Decision no. 1133 of November 27, 2007, precited ); whereas the criticized legal norm is similar to the constitutional text of Art. 146 (d) the second sentence, the text of which the Constitutional Court has already established its meaning, it is inadmissible to find the unconstitutionality of an interpretation given to the constitutional norm by the Constitutional Court.

In fact, accepting the point of view of the People's Advocate would mean that the exceptions of unconstitutionality raised after year 2003, which did not concern the individuals fundamental rights and freedoms, had been formulated in violation of the Constitution , and the Constitutional Court, given that it analyzed them in substance, had violated the Constitution itself.

The Court also held that Article 146 (d) the second sentence of the Constitution was interpreted in the case law of the Constitutional Court in the sense that the People's Advocate is not limited to referring the Constitutional Court exceptionally only to matters concerning fundamental rights and freedoms; consequently, since the constitutional text has not been revised, such an interpretation of the Constitutional Court can no longer be called into question ."

Summarizing, we observe that the constitutional and legal provisions in the field and the jurisprudence of the Constitutional Court recognize the People's Advocate the right to notify the Constitutional Court with exceptions of unconstitutionality of some provisions of Government Emergency Ordinances, regardless of their subject matter, and that the appreciation to exercise of such a power rests solely with the Ombudsman, by virtue of his independence.

By exercising the constitutional review on the Parliament's Decision of dismissal the People's Advocate, by Decision No. 732 of July 10, 2012[25], the Constitutional Court held that "the People's Advocate is only responding to Parliament and its activity is subject to parliamentary control. As a result, the Parliament is the only authority able to assess whether the work of the People's Advocate as a leader of the institution has been achieved within the limits of the Constitution and law".

The emergency ordinances which were subjects of the unconstitutionality exceptions raised directly Ombudsman focused on issues concerning the organization and functioning of institutions or state authorities, rights and freedoms or problems inherent in the functioning rule of law, such as : organizing and the functioning of the Court of Audit, ministerial responsibility, public road traffic, the establishment of measures for the remuneration of education staff in the year 2008, the National Anticorruption Directorate , the public pensions system, state and service pensions, some measures in the field of public finances , ensuring the continuity of the activity of some structures within the Government's working apparatus, amending the Civil Procedure Code, paying certain amounts provided in executive titles for granting salary rights to the budgetary sector personnel, organizing the work of practitioners in insolvency, local public finances, as well as the establishment of financial measures, political convictions and administrative measures assimilated to them, pronounced between 6 March 1945-22 December 1989, strengthening the administrative capacity of the Romanian Office for Copyright Application, fees for crossing the national road network in Romania, establishing financial measures health insurance and public finance , measures in the cultural field , measures to reorganize the Official Gazette of Romania , Romania participation to the proceedings before the European Court of Human Rights and the Committee of Ministers of the Council of Europe and the exercise of the right of the state to resolve amicable settlements and decisions, insolvency and insolvency prevention procedures, the obligation of economic operators to use electronic fiscal cash registers, disposition of immovable seized property, annuity agricultural payment and holding of the referendum, amendment of Criminal Code, amending some legislative acts regarding education, research, training and health, holidays and benefits of health insurance .

By analyzing the jurisprudence of the Constitutional Court in the field, it follows that, since 2006, when the People's Advocate raised the first exception to the unconstitutionality of provisions contained in an emergency governmental ordinance (see, in this respect, Decision no. 544 of June 28, 2006[26], regarding the unconstitutionality of the

[25] published in the Official Gazette of Romania, Part I, no. 480 of July 12, 2012
[26] published in the Official Gazette of Romania, Part I, No. 568 of 30 June 2006

Government Emergency Ordinance No. 43/2006 on the organization and functioning of the Court of Audit) until March 15th, 2019, the People's Advocate notified the Constitutional Court with 27 exceptions of unconstitutionality of some provisions of Government Emergency Ordinances. Of these, 24 were settled by the Constitutional Court and three of them are pending. Following the settlement of exceptions, it appears that, in 14 cases, the Constitutional Court upheld the constitutional criticisms made, while in 10 cases dismissed as unfounded or inadmissible the exceptions of unconstitutionality.

These statistics data prove the usefulness of the role of the Ombudsman in the constitutional review, especially since in the case of Government Emergency Ordinances the exception of unconstitutionality raised by the Ombudsman directly to the Constitutional Court, in the absence of a case before a court of law is the only constitutional and legal way to verify their constitutionality in order to remove the vices of unconstitutionality and restore the Constitution supremacy.

Although there are certain examples in this respect, we can summarize here the Decision no. 1354 of 21 October 2010[27], by which the Constitutional Court upheld the exception of unconstitutionality directly raised by the People's Advocate. The Court held the the reasoning of the People's Advocate, according to which the establishment of a distinct legal treatment between the persons entitled to compensation for political convictions, depending on the moment when the court pronounced the final judgment did not have an objective and reasonable justification and therefore the legal provisions criticized were contrary to Art. 16 of the Constitution regarding the equality of rights.

Also, during nowadays reallity, may occur situations requiring prompt reaction for the verification of the constitutionality of Government Emergency Ordinances in order to eliminate or to reduce the negative consequences arising from a possible state of unconstitutionality. In such cases, the possibility of the People's Advocate to refer the Constitutional Court directly, by the exception of unconstitutionality, is a quick and adequate remedy capable of ensuring respect for the supremacy of the Constitution and the rule of law, enshrined in Art. 1 par. (5) of the Constitution.

## 3. Conclusions

The constitutional and legal regulations on the involvement of the People's Advocate in the constitutional review of Government Emergency Ordinance's Constitution support the aim of extending constitutional and institutional guarantees of fundamental rights and freedoms in line with those conferring similar attributions to Ombudsman institutions in the Member States of the European Union. Moreover, a comparative analysis of the power and duties of Ombudsman institutions is a subject to a separate future study with the purpose to analyze the possibility of involving the Ombudsman in other areas of constitutional review. Being at the sole appreciation of the People's Advocate, but subject to the requirements established by law, whose knowledge is extremely important for people who require the Ombudsman to raise directly the exception of unconstitutionality before the Constitutional Court, exercising this power proves practical its utility by clarifying the uncertainty on the constitutionality of some primary regulatory provisions.

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# LOCAL TAXES IN BULGARIA- A SOURCE OF REVENUES IN THE MUNICIPALITY BUDGETS

**Vanya PANTELEEVA***

**Abstract**

*Amendments to the Constitution of the Republic of Bulgaria were adopted in 2007 and Article 141 empowered the municipal councils to determine the amount of local taxes under the conditions and within the limits established by law. In practice, with this change, municipalities were given real tax powers for the first time. At the end of 2007, the relevant changes were made to the Local Taxes and Fees Act, which laid down these powers of the municipalities. The following years were extremely turbulent for municipal budgets and for fiscal policy in the country at large. Serious revenue growth in 2007 and 2008 was followed by a decline since the 2009 crisis. It was the crisis that challenged the new powers of the municipalities and revealed the lack of sufficient tools for conducting an adequate fiscal policy at the local level. Municipal budgets inevitably shrank during the difficult years and remain heavily dependent on state transfers. Meanwhile, within their limited powers, municipalities have started to pursue their own tax policy and compete on the level of local taxes.*

*The present article examines the different local taxes according to the tax system in Bulgaria, their rates and their influence in formation of municipality budgets revenues in the Republic of Bulgaria. In the conclusion, the idea of fiscal decentralization is considered and are made recommendations for effective allocation of local tax revenues.*

**Keywords:** *local taxes, fiscal decentralization, budget.*

## 1. Introduction

### 1.1. Introduction

In the Act amending and supplementing the Constitution of the Republic of Bulgaria, published in issue 12/2007 of the State Gazette, was made an important change concerning the powers of the legislative body - the National Assembly. This change concerned the organization of taxes. In the amended Article 84, point 3 of the Constitution has been provided that the National Assembly shall establish the taxes and determine the amount of the state taxes. In Art. 141 was created a new paragraph 3, which stipulates that the municipal council shall fix the amount of local taxes under the terms, procedure and within the limits established by law. The amendment of the Constitution is a subsequent step in the implementation of the idea of decentralization of the financial resources to municipalities.[1]

## 2. Content

According to Local Taxes and Fees Act, the following local taxes enter into the municipal budgets:

1. real estate tax;
2. succession tax;
3. donation tax;
4. tax on acquisition of property for consideration;
5. transport vehicle tax;
6. license tax (in force as of 01.01.2008);
7. tourist tax (in force as of 01.01.2011);
8. tax on the carriage of passengers by taxi (in force as of 01.01.2017);
9. any other local taxes as determined by legislative statute.

**Real estate tax** is levied on the buildings and land located within the territory of Bulgaria, located within the spatial planning areas of settlements, as well as the lands outside such areas, which, according to a detailed plan, have the purpose under Article 8, pt. 1 of the Spatial Planning Act; and after change of land's purpose where that is required by special legislative statute.

From the scope of taxation are excluded sites occupied by streets, roads of the national and municipal road networks, and the railway network, up to the limiting construction lines, any lands occupied by water basins which are state and municipal property, agricultural land and forests, with the exception of land with buildings and only for the built area and the adjoining it land.

According to Art. 11 from Local Taxes and Fees Act, the taxable persons are the owners of taxable real estates. Tax is due regardless of the fact if the real property has been used or not and the tax is determined on the basis of the value of the real property.

In Art. 22 from the same Act, the Municipal Councils have been ordered by an ordinance to determine the amount of the tax within the limits specified by the law. These limits are from 0.1 to 4,5 per mille of the tax value of the real estate. Therefore, every Municipality has different amount of real estate tax.

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[1] See S. Penov, Constitutional changes in the organization of local taxes and the amendment in Local Taxes and Fees Act, Administrative justice issue 2/2008

**Succession tax** is levied on the estate of any Bulgarian citizen succeeding located within Bulgaria or abroad property, as well as on the estate located within Bulgaria succeeded by foreign citizens. The estate of any succeeding stateless person is taxed as estate of Bulgarian citizens, if the person has been permanently resident within the territory of Bulgaria.

According to Art. 31 from Local Taxes and Fees Act, succession tax is paid by heirs, beneficiaries and legatees. The Municipal Council determines the amount of the tax separately for each heir or legatee, as follows:

1. brothers, sisters and their children: from 0.4 to 0.8 % for a succession over BGN 250,000.
2. for persons other than those under point 1: from 3.3 to 6.6 % for a succession over BGN 250,000.

Art. 44 from Local Taxes and Fees Act says that with Donation Tax and Tax on Acquisition of Property are taxed properties acquired through donation, as well as acquired real estates, limited rights thereto, and motor vehicles. Subject to taxation are also properties acquired without consideration in any manner other than by donation, as well as any obligations remitted. Tax charge on acquisition of property and is due to the acquisition of real estate and limited real rights over them on prescription

According to Art. 45 from Local Taxes and Fees Act, the tax is paid by the person acquiring the property under Article 44, and in the case of exchange, by the person acquiring the property of higher value, unless otherwise agreed. In case that it has been agreed that the tax is due by both parties, they are solidary obliged. If the parties have agreed that the tax is due by the transferor, the other party is a guarantor. If the person acquiring the property is abroad, the person delivering the property is obliged for payment of the tax.

The base for calculation of the tax is the value of the property in BGN at the time of the transfer, a limitation on the acquisition - at the time of issuance of the order certifying the right of property subject to registration.

The value of the property is calculated as follows:

1. real estates and limited rights thereto: at the price negotiated or at a price as set by a state or municipal authority or, if the said price be lower than the tax value, at the tax value under Annex 2;
2. any other properties: under the terms of Article 33 (1) pts. 2, 3, 4 and 5.

From tax are exempted the following:

1. property acquired by:

a) the State and the municipalities;
b) any budget-financed educational, cultural and scientific organizations, as well as specialized social services institutions and institutions providing medical – social care for children;
c) the Bulgarian Red Cross;
d) the nationally representative organizations of people with disabilities and for people with disabilities;
e) any funds providing relief to victims of natural disasters and financing the conservation and restoration of historical and cultural monuments;
f) healthcare institutions under Article 5(1) of the Healthcare Institutions Act.

2. any donations for medical treatment of citizens of member – states of the European Union, or other state party to the European Economic Area Agreement, as well as of technical assistance for people with disabilities;
3. humanitarian donations to persons who have lost between 50 and 100 % of their working capacity and to socially disadvantaged individuals;
4. donations for non -profit legal entities which receive subsidies from the central budget, and any non-profit legal entities, registered in the Central Register for Not-Profit Legal Entities designated for pursuit of public-benefit activities, in respect of the donations received and provided;
5. customary gifts;
6. any property transferred for free under statutory obligation;
7. donations in favour of cultural centers (chitalishte);
8. properties acquired under the Privatization and Post-privatization Control Act;
9. contributions in kind to the capital of a company, cooperative or a non-profit organization;
10. foreign States in respect of acquisition of real property: on a basis of reciprocity.
11. assistance provided under the terms and conditions the Financial Support for Culture Act.

According to Art. 47 from Local Taxes and Fees Act, upon donation of property, tax shall be calculated on the value of the transferred property in rates determined by the Municipal Council ordinance as follows:

1. from 0.4 to 0.8%: in case of donations between brothers and sister and their children;
2. from 3.3 to 6.6%: in case of donations between any persons other than the persons referred to in point 1,

If property is transferred for consideration, the tax is determined by the Municipal Council at a rate of 0.1 to 3 % of the value of the transferred property, and in the case of exchange, of the value of the more valuable property.

Upon partition of property resulting in an increase of the part owned before the partition, tax is calculated on the increase.

With the amendment of Art. 50 from the Local Taxes and Fees Act from 2018, in force from 2019, judges, notaries, regional governors, municipality mayors and other public officials execute the transaction or the act whereby rights are acquired, created, modified or terminated after ascertaining that the donation Tax and Tax on Acquisition of Property has been paid. From 2019, the notary's assessment of the tax paid on the vehicle subject to the transaction is made with:

1. verification by automated exchange of data with the information exchange system, maintained by the Ministry of Finance pursuant to Art. 5a mediated by the information system of the Ministry of Interior, or with
2. provision of a document issued or certified by the municipality, provided that the respective municipality has not provided the continuous automated exchange under point 1.

**Transport vehicle tax** is settled in Art. 52 from Local Taxes and Fees Act and shall be levied on:

1. motor vehicles registered for operation on the road network in the Republic of Bulgaria;
2. ships registered in the Bulgarian ports;
3. aircrafts recorded in the state register of civil aircraft of the Republic of Bulgaria.

The tax is paid by the owners of the transport vehicles.

The owners of transport vehicles shall declare the transport vehicles owned by them before the municipality where their permanent address or registered office is located, within two months after acquisition of the vehicles. With regard to transport vehicles, which have not been registered for operation within Bulgaria, the two-month time limit begins from the date of registration operation. Upon acquisition of a transport vehicle by succession, the declaration shall be submitted within 6 months after the opening of a succession.

For passenger cars and commercial vehicles with a technically permissible maximum mass not exceeding 3.5 tonnes, the annual tax consists of two components - property and environmental, and is determined by formula.

For other kinds of vehicles, such as passenger car trailers, commercial vehicles trailers, motorcycles, buses etc., the Municipal Council determines the amount of the tax by ordinance.

Local taxes and Fees Act provides tax exemption for transport vehicles owned by state and municipal bodies and by budget-financed organizations which enjoy special traffic privileges, as well as ambulances and fire trucks belonging to other persons; vehicles owned by diplomatic missions and consulates, on a basis of reciprocity; vehicles owned by the Bulgarian Red Cross, where used for the purposes of the organization; passenger cars owned by disabled persons who have lost between 50 and 100% of their working capacity, of an engine capacity not exceeding 2 000 cubic centimeters and engine power not exceeding 117, 64 kW; electrical automobiles.

**License tax** is an annual tax which is due by any natural person, including a sole proprietor, conducting an activity specified in Annex 4 (License Activities), with regard to the income from any such activity, provided that:

1. the turnover of the person for the preceding year does not exceed BGN 50,000, and
2. the person is not registered under the Value Added Tax Act, with the exception of registration for intra-Community acquisition under Article 99 and Article 100 (2) of that Act.

According to Annex 4, license activities are: collective tourist accommodation establishments or supplementary tourist accommodations of not more than 20 rooms; Mass-catering and entertainment establishments; Paid parking facilities; Carpenter services; Tailor, currier, furrier and knitting services; Trade in, manufacture of, and services involving Articles of precious metals; Cobbler, hatter and milliner services; Metalworker services; Hairdresser and barber services, pet beauty parlour services; Typing and/or photocopying services; Cosmetic and tattooing services; Manicure and chiropody; Watchmaker services, etc. In respect of the license activity carried out, the persons mentioned in point 1 and 2 shall not be taxed under the Natural Persons Incomes Taxes Act. These persons apply the provisions on taxes withheld at source and on taxation of expenses under Article 204 pt. 2 of the Corporate Income Tax Act.

A **tourist tax** is applied on accommodation. Taxable persons are those persons offering accommodation. These persons pay the tax in revenue to the budget of the municipality according to the location of the places of accommodation within the meaning of the Tourism Act. The tax must be disclosed separately in the document issued by the taxpayer to the person using an accommodation.

The Municipal council determines with an ordinance the amount of the tax in the range from BGN 0.20 to BGN 3.00 per night according to the settlements in the municipality and the category of accommodation.

**Tax on the carriage of passengers by taxi.** This tax is a new one, it is adopted and is in force from 01.01.2017. The taxable persons subject to a tax on the carriage of passengers by taxi for the activity of taxi-transport for passengers carried out by them or on their behalf. For all other activities taxable persons are taxed by the procedure of the Corporate Income Tax Act, respectively the Income Taxes of Natural Persons Act. Taxable persons are carriers with a certificate of registration issued by the Executive Director of the Automobile Administration Executive Agency and a taxi transportation permit issued by the mayor of the respective municipality under the Road Transport Act. The municipal council determines with an ordinance a year tax rate for taxi transportation of passengers for the respective year in the range from BGN 300 to BGN 1,000 until October 31 of the previous year. The tax due for the taxi transportation of passengers shall be paid to the revenue of the respective municipality, for whose territory a taxi transport authorization has been issued.

As it was mentioned, local finances have been a subject of many changes over the past 10 years. In 2007, amendments were adopted to the Constitution of the Republic of Bulgaria, which gave more powers to municipalities to determine the amount of local taxes within certain limits, which subsequently expanded. This step towards more tax powers was followed by allocating of some taxes to municipalities - a license

(patent) tax (2008), tourist tax (2011) and last tax on taxi transport (2017). However, these steps had a limited effect on the revenue structure of the municipal budget.

After the country's entry into the EU, European funds have also begun to play a leading role in local finances. Their burden has increased greatly after 2011/2012, as European taxpayers practically financing the capital expenditures of municipalities in Bulgaria almost entirely. Although the flow of this resource from outside is felt by local communities - whether through a new treatment plant or renovated urban spaces, the increasing dependence of municipal authorities on European aid also brings negatives to the financial autonomy and sustainability of municipal finances.

In the last 5 years, we have also seen attempts to direct additional resources to the municipalities, but in a form that puts local authorities in dependence with the state. The most striking example was the public investment program "Growth and Sustainable Development of Regions" in 2014, which revealed extremely heavy political dependencies in the allocation of funds and was not repeated[2]. On the other hand, in recent years, we have witnessed the largest regional program in the country's new history - the "National Energy Efficiency Program for Multifamily Residential Buildings", which in 2016 and 2017 directed a huge resource to the municipalities behind which is the state.[3]

All these developments in recent years - steps towards more tax powers for municipalities, an enhanced role for EU funds, state regional development programs, and the municipal financial recovery procedure are key for understanding the attitude towards financial decentralization over the past 10 years. The last decade has been a period in which extremely limited results have been achieved in terms of both the financial autonomy and sustainability of the municipal budget, as well as the possibilities for influence of the municipal budget on regional development outside the state transfers and the European funds.

The constitutional amendments in 2007 allowed municipalities to set local tax levels within certain limits, which gradually expanded. It should be noted that new local taxes have emerged - the transfer of the license (patent) tax to municipalities in 2008, the introduction of the tourist tax in 2011 and the establishment of the tax on taxi transport in 2017. Over the years, we see a relatively active tax policy of the municipalities, but without extremes - municipalities avoid shock increases in tax rates and stay away from the maximum levels. However, especially in 2016 and 2017, there is a clear upward trend in local taxes.[4]

Nevertheless, municipalities continue to rely mainly on transfers from the state budget. In 2017, for example, transfers from the state to the municipalities (we only comment the municipal budgets, excluding EU funds) are in the range of BGN 3.5 billion, and the municipal own revenues are amount to only BGN 2.2 billion. The breakdown of these BGN 2.2 billion shows that most of them are non-tax revenues - nearly BGN 1.3 billion, compared to only BGN 925 million tax revenues. This structure of municipal revenues and transfers has been relatively constant over the years, which means that all steps for more tax powers and small new municipal taxes have had a limited effect.[5]

The breakdown of own revenues clearly shows that they are focused on several specific items. The leading position in municipal tax revenues (BGN 876 million for 2016) are the real estate tax (BGN 306 million), the vehicle tax (BGN 281 million) and the property tax (253 million levs) million). These property taxes carry over 95% of all tax revenues, while other local taxes remain far behind - patent (BGN 17 million) and tourist (BGN 19 million). Non-tax revenues (BGN 1.2 billion in 2016) are dominated by the household waste tax (BGN 553 million), followed by revenues and income from municipal property (BGN 260 million). In practice, the municipalities' own revenues are heavily dependent on property taxes and fees - property taxes and property transactions, as well as the household waste tax, which is again tied to the property.

The structure of revenues in municipal budgets also reveals certain dependencies, mostly from the real estate market. While at macroeconomic level municipal tax revenues are within 16-17% of their budgets, the breakdown by municipalities shows large differences. While in the largest municipalities - for example, the municipality of Sofia, the tax revenues can reach 20-25% of the total budget of the municipality, then in the others, incl. smaller district centers, the share of tax revenues is often within 10-15% of the municipal budget. In smaller municipalities, incl. cities that are not regional centers, the share of tax revenues can be within 5% of the municipal budget. Exceptions are resort municipalities where tax revenues reach 30-40% of the municipal budget.

It is obvious that we can talk about some tax autonomy only in very large cities and resorts - where the value of properties is high and the property market is strong. Even with these municipalities, however, it is impossible to meet all the costs associated with infrastructure provision in the new neighborhoods - such as the case with the capital where the municipality fails to fully fund its investment program specifically in the new neighborhoods. Even assuming that certain changes in property taxes can be made - in terms of the tax base and valuation of property, this instrument is

[2] See P. Ganev, Institute for Market Economics, https://ime.bg/bg/articles/pari-za-regionite-prozrano-i-na-nashi-hora/
[3] See P. Ganev, Institute for Market Economics, https://ime.bg/bg/articles/saniraneto-vee-struva-2-mlrd-lv-na-danykoplatcite/
[4] See Y. Aleksiev, Institute for Market Ecomonics, https://www.regionalprofiles.bg/bg/news/even-higher-local-taxes-in-2017/
[5] Ministry of Finance of Republic of Bulgaria

unlikely to play a decisive role in enhancing the financial autonomy of municipalities.[6]

The review of municipal finances confirms that despite the steps taken in recent years for more municipal tax powers, the main problems remain. These include: 1) dominance of state transfers in municipal budgets, 2) dependence on European funds for investment costs, 3) very limited tax revenues and lack of flexibility in terms of own funds, and 4) lack of connection between the economic development of the municipality (excluding the property market) and the municipal budget. These problems are not just a prerequisite for falling into financial difficulties but, more importantly, an obstacle to the potential growth of the regions.

Independence based on a well-functioning financial environment can not be achieved if local authorities continue to be dependent of central government. Whatever mechanism for rescuing and controlling the revenue and expenditure of local authorities is applied, it will not address the causes of problems with the structure of municipal budgets and the incentives it creates. If local authorities are deprived of the ability to raise funds themselves and, accordingly, be responsible for their spending, it is questionable whether they can successfully pursue a policy at municipal level in the interest of their citizens.

The concept of fiscal decentralization contains the way of distribution of financial responsibilities at central and local level in the field of public revenue and expenditure. Analyzing the content of the concept of fiscal decentralization, the following elements can be reached:

- Responsibilities and roles between different levels of government in the vertical structure of the public sector;
- state subsidies and their influence;
- transfers between already established management levels;
- the stabilization of the revenue system at the local level;
- determining the system of delivery of local goods;
- Privatization of local public activities.[7]

Fiscal decentralization is based on two principles - "local self-government" and "subsidiarity". The first concept relates to the right and the real opportunity for local authorities to manage a substantial part of public affairs under their own responsibility and the second with the view that problems are resolved as quickly, easily and efficiently as possible at the lowest possible level at which they can be resolved.

A recent study made by the International Monetary Fund (IMF) states that fiscal decentralization may lead to an improvement in fiscal discipline. One of the reasons for this is the stronger pressure on local authorities to provide public goods and services through more limited resources.[8]

The practice of local taxation in the EU is similar to that in Bulgaria, with much of the tax revenue being generated by real estate taxation. There are only 7 countries in the EU where more than half of real estate tax revenues go to central government (Czech Republic, Denmark, Croatia, the Netherlands, Finland, Sweden and the UK). Bulgaria ranks among the countries where all real estate taxes are targeted at local authorities, along with Estonia, Latvia, Lithuania, Poland and Slovenia. Over 80% of these funds are directed to local authorities in Portugal, Slovakia, Romania, Italy, France and Ireland. The situation is similar in countries with a two-tier structure of a regional organization such as Germany and Spain, where funds are distributed almost equally between different levels of local self-government.

The transfer of taxation powers to municipalities in relation with income taxation is well known within the EU. Local authorities in Italy, Denmark, Sweden, Finland have such powers, and in all cases this is done within a set boundary. At the same time, in nearly one third of European countries, local authorities are entitled to part of the income from personal income taxes, although they can not affect the amount of the tax rate or tax base. At the same time, in nearly one third of European countries, local authorities have the right to collect a part of the income from personal income taxes, although they can not affect the amount of the tax rate or tax base. Sharing of a part of the incomes from the personal income taxes is the most commonly used method of decentralizing the fisc, followed by sharing a part of the corporation tax and VAT revenues. On average, for the EU in 2016, only 36% of local government revenues are formed by transfers from the central government, while the share for Bulgaria is about 60%.

In 2016, the local government revenues as a ratio to GDP in our country reached only 7%, with an average of 15.6% for the EU. Such levels are still observed in Slovakia, and lower - in only 7 countries, including Cyprus and Malta and the highly fiscal centralized - Greece and Cyprus. In Romania and the Baltic countries, the rates range from 8 to 10%, and in almost all Central and Western European countries they are over 10%.

How can fiscal decentralization happen in Bulgaria?

The transfer of part of the revenues from the personal income tax to the municipalities can not and must not be isolated change in the structure of the tax system. In order to guarantee the success of such a

[6] See Radeva M., Legal framwork of the public financing of the health system in the Republic of Bulgaria. IN: Proceedings in Global Virtual Conference Workshop, Žilina, Slovak Republic, 2013, pp. 96-98, ISBN 978-80-554-0649-7.

[7] See Panteleeva V., Фискален федерализъм, фискална децентрализация и има ли Европейският съюз своя система на фискален федерализъм, Conference proceedings of University of Ruse 2010, p. 156

[8] See Sow, M., Razafimahefa, I. *Fiscal Decentralization and Fiscal Policy Performance*. IMF Working Paper WP/17/64, 2017

change, a number of additional steps need to be taken, including:

- Moving to effective program budgeting at a local level, leading to greater efficiency and transparency;
- Improving the efficiency and transparency of finances and the management of municipal enterprises and municipal property;
- Territorial-administrative reform to ensure the long-term sustainability of spatial planning.

A real change in the financial autonomy of the Bulgarian municipalities is possible only through the restructuring of the existing tax system. The imposition of new taxes (eg on turnover) hides the risk of duplication of taxation. The increase in existing local levies will not solve the problem of incentives for local authorities and implies an overall increase in the tax burden in the economy.

Sharing revenue from indirect taxes such as VAT seems difficult to apply, and empowering municipalities to determine its level, or even the tax base of that tax, would lead to absolute administrative chaos and create the prerequisites for the establishment of tax arbitrage in which consumption is artificially targeting to municipalities with a lower tax burden.

This brings us to the most probable and widely applied model of fiscal decentralization in the EU in the form of direct revenue sharing or empowerment in relation to existing direct taxes - incomes of individuals (income tax) or profit (corporate tax).

The big part of the political challenges and administrative obstacles seem easily overwhelming in sharing revenue or empowering local authorities with regard to personal income taxes:

- The link between tax and democratic representation at local level will create incentives for local authorities to work for creating jobs (mainly by attracting investment) and will tie the financial situation of municipalities with the social and economic processes taking place in their territory.
- Incentives for tax arbitrage can be abolished by applying the principle “money follows the identity card” in which revenue from personal income taxes is distributed among individual municipalities based on the permanent address of the persons.
- The link between taxation and democratic representation in personal income taxes is much more pronounced than that of corporate taxation and creates incentives for real tax competition between municipalities.
- The vast majority of personal income tax are monthly transfers from employers to tax administration. Redirection on time of these funds to municipal authorities will provide an additional source of liquidity and can help to meet extraordinary costs.
- Legislative effort and the follow-up to the implementation of such a system are considerably lighter than existing alternatives. Taxes on personal income can be collected in the same order (by the National Revenue Agency), after which the respective part of them is redirected to the municipalities' accounts.

## 3. Conclusions

Fiscal decentralization in Bulgaria, although officially set as a strategic goal for the country, still remains more wishful than reality. Municipal budgets are heavily dependent on both state transfers and European funds, which limits the opportunities for a successful local policy. The lack of adequate self-sufficiency in municipalities not only leads to frequent financial difficulties and accumulation of current liabilities or arrears but, more importantly, limits the development potential of municipalities.

The solution of this problem passes through the idea of restructuring the tax system and redirecting tax revenues from central government to municipalities. The analysis made in the present paper shows that the best way to do this is income taxation, and in particular by assigning 1/5 of revenue from income tax to municipalities. That would amount to BGN 675 million for 2018 or a growth of nearly 1/3 of its own revenues in municipal budgets. Such a step is fiscally achievable against the background of the state budget situation in recent years.

The transfer of part of the income tax would tie the municipal finances with the development of the local economy, i.e. part of the taxed income of the local population will remain in the municipality, which is logical, both economically and democratically. By applying the rule that money should follow the identity card - the tax passed to the municipality of residence rather than the place of employment (if different). This would stimulate the development of smaller municipalities, and especially of peripheral ones, located near the strongest economic municipalities.

It is important to note that all municipalities will benefit from fiscal decentralization, i.e. each will report an increase in its own revenues. The greater effect will be concentrated where there are more jobs and higher wages, but that is exactly what it should be - the mechanism will simply follow the natural processes. The decentralization process itself implies parallel administrative-territorial reform, including the consolidation of municipalities.

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# PARENTING AND LABOR ACTIVITY

**Maria RADEVA***

**Abstract**

*In recent years there has been a public debate in Bulgaria about the reconciliation of childcare and the preservation of labor activity. The government policy regarding maternity support is broadly discussed - length of absence, job retention, salary level, career opportunities, etc.*

*The state has proposed measures to ensure that parents return to the labor market. One option is to return to work before the end of maternity leave. The resources for implementing this policy are provided to the social security system.*

*The Employment Agency is carrying out a project aimed at ensuring a better reconciliation of the professional and private life of parents with children from 0 to 12 years of age. The desired result is to have a positive effect by preserving the quality of workforce and labor productivity of parents by enabling them to start or continue their careers. The project is implemented with funds from the European Social Fund and national co-financing.*

**Keywords:** *maternity leave, labor activity*

## 1. Introduction

Family is a key element of the public system and it should be supported. Within the Bulgarian traditions, way of life and culture, family keeps and protects the fundamental values of the society. The parents in the family carry the responsibility of giving birth to, raising and educating the children.

Children are a priority of the government and the families. Each child has the right to a high standard of living, guaranteeing its well-being as well as the right to the best standards of healthcare and education. Spouses and parents have equal rights and responsibilities for raising and educating children. Ensuring efficient equality of men and women in the family is a basic condition for increasing the birth rate and ensuring the possibility for wholesome personal development and high quality of life for children. The equal opportunities for all for a wholesome social, labour, productive and reproductive life and non-discrimination are prerequisites for balanced demographic development of the population and for sustainable economic development and growth of the country.

Economic stabilization and improvement of the standard of living are the key factors for improvement of the demographic situation in Bulgaria and for the transition to a modern type of reproduction of the population.

## 2. Posing the problem

Economic and demographic changes in Bulgaria in the recent 30 years have material influence on the volume of the work force, the structure of employment and the standard of living of the population[1] . During that period the work force is decreasing at fast rate due to the ageing of the population. This is one of the reasons for the decline in the economic activity. In the beginning of XX century it reached 85% and in the beginning of the 1950s - about 80%. This high labour activity was due to the employment in agriculture. In the last 45 years and especially after 1989, the economic activity in Bulgaria quickly fell to 50% due to the decrease of the work force on the account of the migration processes and the fast ageing of the population. The decrease of the work force is connected with decrease of employment.

Negative trends in employment, economic activity and unemployment in Bulgaria after 1989 give rise to a number of social problems - decline in the standard of living, increase of the crime rate, increase of the morbidity of the population, decrease of the living potential of the nation, etc.

As a result of the economic instability and the lack of clear perspective about the development in 1997, Bulgaria reached one of the most unfavourable demographic indicators in Europe and registered the lowest birth rate in its history. As a result of the short-term and long-term emigration, the number of women in fertile age (15 - 49 years) has decreased, which limits the opportunities for more children being born in future.

In addition to the permanent trend of decrease of the number of women in childbearing age, there is also a wide complex of social reasons and factors for decrease of the birth rate. Such may be sought in the quick urbanised population and the intensive emancipation of women. The isolation and the subordinate role of women in the traditional families and households in the past has been gradually overcome. Own private space has been established,

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[1] Statistical data in this publication are quoted in accordance with the Updated national strategy for demographic development of the population in the Republic of Bulgaria (2012 - 2030)

spouses have started living independent life, the business relations between them have expanded and deepened. Today women often face the dilemma: Profession, career or family and children and increasingly often this dilemma is resolved in favour of the career. The extended period of education and the changes in the cultural stereotypes, especially among women, have contributed about that and as a result the spouses have formed specific attitudes and views about the number of their children and the sequence of births, which today is known as family planning. The achievement of compulsory high education has actually resulted in two-three times lower fertility. In a more remote period of the Bulgarian history, women used to give birth to their first child at quite low age. In the last years there has been a steady shift to births at a later age, which creates preconditions for limiting births to a single child.

A family with two children is the perfect reproductive option for the Bulgarians. However data from a sample survey conducted during the census in 2001 about birth rates show significant mismatch between the perfect size of the family and the realization of the reproductive wills of women at the age of 15 - 49 years. According to the survey, most Bulgarian families (70%) wish to have two children but due to economic difficulties 60% of them could not achieve that.

That is why the efforts of the government should be directed to creating proper conditions for giving birth to, raising, educating, material assurance and social realization of as many children as the couple would like to have.

## 3. Creating conditions for giving birth to and raising children

In Bulgaria there are many years of experience in conducting demographic policies that focus on encouraging birth rates and creating optimal conditions for giving birth to and raising kids by combining the personal and professional life.

Active government policy started at the end of 1967. Direct measures for stimulating demographic development are being used, such as a system of cash compensation (paid maternity leave, one-off compensation for giving birth to a child and child allowances), whose size is directed to stimulating the birth of a third child in the family. A well-organized network of facilities for raising and educating children at a pre-school age is being developed. Important steps have been made towards bettering the healthcare of children and mothers. A positive indirect effect on birth rates comes from the introduction of legal norms, aimed at preserving the reproductive health of women - labour protection directives, bans on performing heavy and harmful labour, transferring to a more appropriate job for reasons of health and other forms of protection of pregnant women and suckling mothers.

A large part of the measures for stimulating birth rates continue to be in force even after the social-political reforms in 1989. The following years of high inflation, fall of production and growing unemployment have led to devaluation of the family allowances for children and a strong reduction to their stimulating effect. During 2001, there were changes in regards to the maternity leave. Significant changes in the demographic policy after 1990 were brought in by the Family Allowance Act, effective since 2002. Some of the allowances have a universal character and are available to all without accounting for the income of a family member, others have a specific character with a pre-determined income criterion for access.

In accordance with the principle for equality of men and women in regards to labour and social insurance rights, related to the care and raising of children, as well as support for families with children, several legal options have been regulated in the Labour Code and the Social Security Code.

The Ministry of Labour and Social Policy conducts specific programmes to support families and children. Measures for boosted participation of women on the labour market are in progress. They are based on an integrated method, aimed at limiting the barriers to labour, encouraging participation in different forms of life-long learning, better balance between the professional and personal life. Unemployed mothers with small children are one of the vulnerable groups on the labour market with the risk of falling into poverty, which becomes even greater if active government policies are not applied.

Despite the condition of the economic development - growth, decline, recession, depression, recovery and etc. the perspectives for labour of mothers with small children must be supported with purposeful actions on the part of the government.

## 4. Labour realization and motherhood. Combining the family and professional life

Sociological studies categorically show that the labour status and economic standing are among the most important factors when making a decision about giving birth to children among young people. The transition to market economy led to radical changes in the conditions for professional realization of women and the possibilities for its combination with maternal and familial duties.

The level of economic activity of Bulgarian women is traditionally high.

The difference in the level of economic activity and employment between women and men in Bulgaria in comparison to many countries, specifically in the EU is not as prominent. During 2010 the level of economic activity of population aged between 15-64 is 62,3% for women and 70,8% for men, the level of employment is respectively 56,4% and 63,0% and for the age group 20-64 - 69,1% for men and 61,7% for women. These differences have different dimensions for women and

men, relating to education, age, family status, number of children, health status, place of residence, ethnic group. To a certain degree, these differences are owed to the still existing difference between the two genders as to the age for acquiring the right to retirement.

Key factors for achieving equality between genders are: Participation of women in the decision-making process; removing the so called "Glass ceiling for career development"; distribution of chores, prevention of traffic, prostitution, domestic abuse; creating better conditions for combining the family and professional life; guaranteeing leaves adequate for needs of the working parents, diversification and improvement of the quality of the services for raising children or dependent members of the families/households and etc.

Bulgaria has experience in building a normative base and government policies, aimed at combining the family and professional life. Despite that, women continue to delay the birth and raising of children due to the hardships and economic uncertainty that exist on the labour market. The combination of maternity with the professional development of women, set in the regulatory base is not realized in full due to the the lack of proper beliefs in men and women on the one hand and in employers on the other, for it to be applied. The control over the implementation of the labour law is ineffective. There are many cases of employers refusing to hire pregnant women and women with small children or dismissal upon occurrence of any of these circumstances. Under the pressure of job insecurity, many women take a position of self-limitations and compromises, affecting their personal and family life as far back as the initial discussions of employment contracts. Especially worrying is the tendency of violating the rights foreseen in the law that ban overtime, hard or night-time labour, as well as the ban of labour under harmful conditions of pregnant women and women with children up to 3 years old. Allowing unfavourable work conditions affects the reproductive health of Bulgarian women.

Combining the work and family responsibilities is made more difficult by the tendencies of increasing the working hours and wider spread of labour during the weekends, especially in the private sector, the family business and the service sector. All this impacts unfavourably the health of working women and their reproductive attitude, limits the time they have for raising children and wholesome parenting. During the last decade, the social empathy towards unequal extension of the working hours has increased due to the fact that in certain cases, the extra work is not paid and the extended time is not compensated, which contradicts the labour law.

Another factor for the existence of imbalance between professional development and maternity is the young families' access to child care and kindergarten services. In the last years, many municipalities in larger cities, where there is a larger concentration of citizens, opened up kindergartens and helped keep the price and quality of the services as adequate as possible for families. The full use of the existing social infrastructure and building a new one that follows the new forms of raising and educating children outside the state kindergartens and schools, will help overcoming the role conflict between work realization and maternity.

The possibilities for realizing flexible forms of employment, part-time work, work at home, regulated with new amendments of the labour law are underutilized. Applying such practices would change positively the structure of women's employment, carried out in favourable work conditions and work regimes. This would also conserve the reproductive abilities and common health of young women as a pre-condition for giving birth to and raising children.

The flexibility of the work hours is important for combining the professional and family life. Survey results show that out of all the employed people aged 15-64 that take care of children up to 14 years old or of adults, 91.1% work at a fixed start and end of work hours (determined by the employer) and only 8.9% have a more flexible form of work.

The flexibility is expressed not only in the different forms of work hours but in the ability of people, who work on a fixed time basis, to shift the beginning or end of their work day by at least one hour, if necessary, regardless of whether the absence is compensated or not. Of employees who take care of children or elderly and work on a fixed-time basis, 13.8% state that usually they have the option to change their working hours, if necessary, for family reasons (including taking care of children or elderly, disabled people, sick), 36.2% may do that by exception and 50,0% consider it impossible.

The imbalance between the labour realization and maternity is also maintained by the centuries-long division of labour in the family. According to this tradition even nowadays women with two children spend more than 4 hours a day for household work and consider themselves more engaged with household work compared to men. This introduces uncertainty and cause families and women to hesitate whether to have children. On the other hand, engaging with a greater part of the household work, reduces the opportunities of women for education and qualification improvement and therefore their competitiveness on the labour market; limits their social contacts; narrows their opportunities for wholesome recreation and rest. The working lone and divorced mothers as well as mothers of disabled children are in especially difficult situation due to their very limited mobility and limited opportunities for flexible employment.

Therefore an important element of overcoming the imbalance between the labour realization and the maternity is ensuring gender equality with a view to raising and taking care of children. An issue that requires not only regulatory changes but most of all change of the public attitude through civil education and appropriate media policy.

## 5. Policies supporting maternity

In the context of reduction of the share of employable population and longer life expectancy, ensuring opportunity for women to return to work after maternity leave is of major significance. The employment policy and law provide opportunities to maintain the participation of women on the labour market even without making them leave work during the years of raising their children.

For mothers with young children however, the participation on the labour market is closely connected with the availability of child care services and for women in general - the availability of services for the elderly because if such services are not available, women generally carry the main burden of care, which increasingly often hinders their access to employment.

Within the dynamically changing economy and most of all the private sector development, keeping the job position and guaranteeing the return on the same position after maternity leave are options that are difficult to be realized outside the government sector. Even in such cases women who have benefited of the full leave they are entitled to, experience difficulties upon reintegration due to their loss of qualification and lagging behind.

Government authorities that implement the social policy take into account the problems of women and the need for active intervention for their solution. The Ministry of Labour and Social Policy implements programmes especially designated for women taking into account their specific situation when they return to work after maternity leave.

In a survey within the project "Back to work" it is stated that among the totality of unemployed women, the share of women up to 29-years old is 28.9% and one of the reasons for the high unemployment rate among women up to 29-years old is the unwillingness of employers to employ young women due to the possibility that they may be absent longer due to maternity leave and sick leave.

Among registered unemployed women prevail those with primary and lower education - 54,6% and without occupation - 62,1%. The low level of education and most of all the lack of occupation and qualification affect the duration of registration where more than half of unemployed women - 51.1% are continuously unemployed.

The main purpose of the project is to create conditions for equal access for women to employment and keeping employment by improvement of the quality of work force as well as ensuring conditions for work realization and supporting the professional development of women who have returned to work after maternity leave.

The project "Parents in employment" is realized until 2020. The purpose of the project is to ensure better combination between the professional and personal life of parents of children from 0 to 12 years old and providing employment to unemployed by ensuring opportunities for taking care and raising children.

Through the planned project activities, parents of children from 0 to 12 years old will have the opportunity not only to continue their career development but also to provide secure and high quality care for their children. These activities will contribute to the better combination between professional and family duties of parents and practically will make the labour market more accessible for them. The project will contribute for the return to work of parents who are not able to do that because they raise their children. This will ensure their equal access to employment and jobs.

## 6. Vision for the future

The reproduction of the employable population is best described by the demographic replacement rate, which shows the ratio between the number of people entering employable age (15 - 19 years old) and the number of people leaving employable age (60 - 64 years old). As a comparison in 2001 every 100 persons leaving employable age were replaced by 124 young people. After 2008 this ratio is opposite - 100 persons leaving employable age are replaced by 91 persons, in 2009 by 82 persons and in 2010 by 74 persons. According to census data, in 2011 that rate is 70, which shows that the country already experiences stagnation with regard to the rejuvenation and development of employable population.

Deterioration of the age structure of the population affects the size and quality of labour resources. The ageing of the work force in the conditions of a dynamic labour market with constantly changing requirements to the qualification and the professional skills of the employed, gives rise to the need of continuous improvement of the general potential and lifelong learning of the work force.

One of the tasks defined in the Updated National Strategy for Demographic Development of the Population of the Republic of Bulgaria (2012 - 2030) is the combination of parenting and professional development. For the fulfilment of that task the following measures are planned:

- Wider use of flexible employment forms (part-time work, reduced working hours, modern information technologies for remote work, etc.);
- Introduction of relieves upon return to work after maternity/ paternity leave (reduced working hours, homework, etc.), for participation in qualification and retraining courses;
- Encouraging employers for active participation in the policy for creating security and protection for pregnant women and mothers at their workplace;
- Expansion of the system of control of employers for observance of the labour law in the part ensuring protection for pregnant women and young mothers and preventing misuse of children's labour;
- Stimulating the equality between women and men with regard to their professional development and their family responsibilities related to raising and educating children.

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# PROPERTY RESTITUTION – A TYPE OF REPARATIONS MEASURE IN ROMANIA

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**Abstract**

*The paper intends to highlight the manner in which property restitutions starting with 2001, in Romania, have accomplished the functions of a reparations measure. The analysis will follow on the one hand whether the process of property restitutions have been a part of a wider socio-political mechanism, that of transitional justice, and on the other hand it will analyse whether the legislation in the field has or has not facilitated the property recovery and, as a result, the rehabilitation of victims. From a methodological point of view, the study will use the analysis of official documents and of legislation in the field.*

**Keywords:** *reparations, property restitution, transitional justice, Romania, High Court of Cassation and Justice, ECHR*

## 1. Introduction

Research in the field of reparations concentrates on conceptual, operational aspects, on the manner in which reparations programs are implemented, on the social and political mechanisms that determine the application of reparations programs at the national level. The literature in the field[1] also presents the difficulties related to the implementation of reparations programs: the high and very high number of victims; reduced logistical and economic resources; the difficulty to categorize or to quantify the suffering to which victims were subjected; the lack of experience in managing cases of generalized abuses and violence. Studies show that the countries that conceived the reparations programs outside the context of transitional justice did not enjoy receptiveness from the victims.[2] The lack of receptiveness is directly related to the fact that the victims wish for a form of official recognition of the sufferings and abuses, of presenting the truth, which entails in turn a national mobilization and for the new governments to take upon themselves to implement the reparations programs. In the report of the UN secretary general, *transitional justice* (TJ) is defined as *encompassing the various processes and mechanisms implemented by a society in order to handle the abuses committed in the past with the purpose of establishing those responsible, of administering justice and of allowing reconciliation*.[3] TJ is not a special form of justice, but a justice adapted to the unique conditions of societies that are in the process of transformation and that have experienced generalized human rights abuses. Most of the problems that result from past abuses are often too complex to be resolved through measures such as ordinary judicial processes. Truth commissions represent the central mechanism of the TJ. The members of the commissions have the responsibility to gather evidence, to analyze the files of the victims of the former regime, to ensure the physical, psychological and moral protection of witnesses, to implement decisions, to establish reparations, and to elaborate the final report. The reparations programs are initiatives sponsored by the state that have the purpose of contributing to the material, moral and symbolic reparation of abuses suffered by victims in the past.

In Romania, after 1989, have been adopted laws with a reparatory character in the matter of buildings abusively seize by the state during the communist regime. The present paper will concentrate on the impact generated mainly by two of the laws with a reparatory character: Law no. 10/2001 *regarding the judicial character of certain buildings abusively seized during 6 March 1945-22 December 1989* and Law no. 165/2013 *regarding the measures for the finalization of the restitution process, in kind or in equivalent, of buildings abusively seized during the communist*

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[1] Koen De Fayter, Stephan Parmentier, Marc Bossuyt & Paul Lemmens (eds) *Out of the Ashes: Reparations for Victims of Gross and Sistematic Human Rights Violations* (Cambridge: Intersentia, 2005); Max du Plessis & Stephen Peté *Repairing the past? International Perspective on Reparations for Gross Human Rights Abses* (Cambridge: Intersentia, 2007); Jon Ester *Retribution and Reparation in the transition to Democracy* (Cambridge: Cambridge University Press, 2006); Katya Salazar, *Current Challenges in Seeking Justice for Serious crimes of the Past* (Aportes DPLF, 18:2013); Wemmers, Jo Anne M. Wemmers (ed) *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (London: Routledge, 2014); *Reports* of the Special Rapporteur to the Human Rights Council and the General Assembly available at https://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/AnnualReports.aspx.

[2] Priscilla Hayner B., "Truth and Reparations" in Priscilla Hayner B. (ed) *Unspeakable Truths: Transitional Justice and the challenge of Truth Commissions*, (New York: Routledge, 2snd ed 2011), p. 166.

[3] UN Report of the Secretary General, *The rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (S/2004/616) p. 4, available at https://www.un.org/ruleoflaw/files/2004%20report.pdf, accessed April 2019.

*regime in Romania.* Thus, it will analyse whether the two laws have configured a coherent, efficient and stable framework for the victims who were abusively dispossessed of properties to be rehabilitated.

## 2. Remediation, reparation, return to the "status quo ante".

Colonialism, civil wars, the two World Wars, the Holocaust, totalitarian regimes, military dictatorships, and military conflicts are periods in history where massive, collective and systematic violations of human rights took place. Even the Peace Treaty of Westphalia[4] makes a reference to restitutions. In the periods that followed, the nations that lost wars had to pay the winners certain sums or to offer them certain goods. During the Paris Conference of 1919, for instance, it was stipulated that the central powers (Germany, Austro-Hungary, Bulgaria, the Ottoman Empire) will pay, as a result of their defeat, compensations to the allied and associated forces (France, Great Britain, USA, Italy).

A first category of reparations could come under what Barkan Elazor[5] calls attempts at remediating "history's injustices". Here we could mention the compensations given to Holocaust survivors, the compensatory programs for Japanese-Americans from US concentration camps from World War II, the African-Americans rehabilitated after the slavery period during the American Civil War, and the reparations given to the aborigines in Australia.

The international community has tried to respond to the injustices of history with the purpose of preventing the repetition of similar events, thus creating specialized courts, adapting their norms in international law in order to punish the guilty parties, proposing distribution programs for the physical, moral and economic rehabilitation of victims. If at the beginning reparations were negotiated and given between states, their application sphere has been transferred in time, at the inter-state level, the beneficiaries being the victims of internal violence. All human rights violations involve taking responsibility, in other words, a secondary obligation to repair the violation of a main obligation such as banning genocide, crimes agains humanity, war crimes, torture, and extrajudiciary executions.[6] In time, the introduction of moral and justice indicators in the political sphere has represented a new wave in the manner in which nations have recognized their past abuses and have managed them.[7] The tendency created concentrates on post-conflict or post-authoritarian societies taking responsibility for past crimes.

The 80s represent the years for state reconstructions, for newly installed governments taking responsability for the actions committed by dictatorial and totalitarian regimes characteristic of Latin America and South-Eastern Europe. Victim reparations become a part of the Human Rights and International Law agenda. The efforts have started as early as 1988, when the *Sub-commission on the promotion and protection of human rights*[8] recognized and drew the attention on the fact that all victims who had their fundamental rights and liberties violated are entitled to benefit from restitutions, equitable compensations, and means to rehabilitate (as much as it is possible) the sufferings they were submitted to.

The study of *Theo von Boven* (1993)[9] has argued in turn for the necessity to conceptualize and operationalize reparations and mentioned that the right to reparation, to rehabilitation entails two sides: the procedural right to justice and the material right to compensarion as a result of violations of fundamental rights and liberties to which the victims were submitted and which are stipulated in national and international law. The year 2005 marks the adaptation of *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.[10] The fundamental principles marked a new beginning in regard to the institutionalization of reparatory programs but they stressed as well the necessity to take on at an international level the manner in which reparations are implemented.

In international law[11] reparations are defined as measures through which restitution, compensations,

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[4] *Treaty of Westphalia. Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies*, available at http://www.history.ubc.ca/sites/default/files/courses/documents/%5Brealname%5D/treaty_of_westphalia_excerpt.pdf, accessed April 2019.

[5] Elazar Barkan, *The Guilt of Nations, Restitution and Negotiating Historical Injustice* (New York: Norton Publishing House, 2000).

[6] UN General Assembly Resolution, *International Convenant on Civil and Political Rights* (A/RES/2200, 1966), available at https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf, accessed March 2019.

[7] Michael Waltzer *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977/2006)

[8] Dinah Shelton, "The United Nations Draft Principles on Reparations for Human Rights Violation: Context and Content" in Koen De Fayter, Stephan Parmentier, Marc Bossuyt & Paul Lemmens (eds) *Out of the Ashes: Reparations for Victims of Gross and Sistematic Human Rights Violations* (Cambridge: Intersentia, 2005).

[9] Theo von Boven *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, available at https://www.ilsa.org/Jessup/Jessup17/Batch%202/Study%20Concerning%20the%20Right%20to%20Restitution%20Compensation.pdf, accessed April 2019.

[10] UN General Assembly Resolution, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International HumanitarianLaw (A/RES/60/167 din 2005) available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement, accessed April 2019.

[11] *Rome Statute of the International Criminal Court* (Art. 75), available at https://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf; ONU, *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or*

rehabilitation, satisfaction, the guarantee of non-repetition, and measures implemented as a response to abuses suffered by victims-subjects of human rights are targeted. The restitution has as a purpose the "return" of the victim to the state before the abuse, whether it is a matter of recovering social or political rights, or material goods. Satisfaction and the guarantee of non-repetition are connected to other mechanisms of Transitional justice such as truth finding, official recognition of the abuses, and institutional reforms. The types of compensations will be mentioned in the next paragraph, with the presentation of the reparatory typologes in the perspective of Pablo de Grieff.

From a judicial point of view, the definitions for reparations take into consideration all possible situations. However, for the practiciens to be able to conceive a design for a reparations program, it is necessary for them to use a clear definition, focused on a target-group, and to take into account two elements: the type of reparation (material or symbolic) and the form of distribution (individual or collective).

Pablo de Grieff[12] creates a synthesis of the advantages and disadvantages of the main types of reparations: individual, collective, symbolic and material. The author highlights that *individual reparations* respect personal autonomy; they satisfy the needs and preferences of the targeted subjects; they promote the recognition of the individuals; they contribute to a better quality of life for the beneficiaries; they can be easy to administer. Concerning the limitations of individual reparations, the following can be highlighted: if they are conceived simply as a way of quantifying the losses suffered, there is the risk of being seen as being inadequate; if the payments are blocked under a certain level, they will not be able to contribute to a better quality of life for the victims; if there are no functional institutions from which the beneficiaries could buy services, the money received will not change their quality of life for the better; if they are not articulated to a complete design for reparations, with the possibility for the beneficiary to be able to understand the significance of the received sums, they could be seen as a way of "buying" the victims' silence. On the other hand, *reparations addressed collectively* with the purpose of developing social investments as well give the impression of being attractive from a political point of view; they give citizens the impression that results can be obtain both in relation to justice and development of the economy; they are *seemingly* directed toward the real causes of the violence. From the series of the limits one can mention the extremely limited reparatory capacities for the victims and the lack of respect for individual sufferings, and for citizens' rights in general.

Pablo de Grieff differentiates as well between *symbolic* and *material reparations*. For instance, letters where regret is presented and forgiveness is asked, photocopies of the reports edited by Truth Commissions that can be consulted by the public are, among others, a part of the category of *individual symbolic reparations*. These reparations represent a way to manifest respect for individual sufferings, a manner of recognizing sufferings, all without substantial financial costs. In the category of *collective symbolic reparations* the author mentions public acts of forgiveness, commemorative days, building museums, etc. with the purpose of consolidating collective memory and social solidarity. *Material reparations* are represented by fix sums, property restitutions, goods, vouchers that replace the value of the goods, service packages such as medical, educational, psychological or domestic assistance ones. They have the advantage of satisfying real needs, they can have positive effects in terms of equal treatment, they can be financially efficient if there already exist institutions that offer the necessary services, and they can stimulate the development of social institutions. On the other hand, the quality of the services depends on existing institutions, most of the programs concentrating on basic services, without being adapted to the needs of the victims.

## 3. Property restitutions as a reparatory measure in Central and Eastern Europe

*A first characteristic* of property restitutions in Central and Eastern Europe is an overlap of this procedure with programs of economic development and structural reform at the collective level. In the majority of cases, *restitutions were not oriented* toward the recovery of individual losses, but *toward social desiderata*. Either out of a lack of resources or a lack of openness toward reparatory measures, the governments preferred to associate restitutions with collective social investments such as bridges, roads, hospitals, schools etc. Initially, what was desired was the creation of equality among victims, despite the fact that the losses suffered in the past were different both from a value and quantitative point of view. From a desire to move away from the oppressions and injustices suffered during totalitarian regimes, the new political projects proposed, at a declarative level, a society based on human rights and equality before the law. In reality however the reparatory schemes either omitted or took too little in consideration the individual character. *Another characteristic* of property restitutions in the region was that they were not a part of the transitional justice process, meaning of the process of truth finding, of its official recognition at the national level. The logic according to which these reparations processes have worked and are working is the one according to which

*Punishment , General Comment No. 3 of the Committee against Torture Implementation of article 14 by States parties* (CAT/C/GC/3 din 2012) available at http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf.

[12] Pablo De Grieff "Justice and Reparations", in Pablo de Grieff (ed) *The handbook of Reparations* (Oxford: Oxford University Press, 2006), pp. 451- 477.

the sums of money/restitutions themselves satisfy the needs of those who were abused under the former regime. In Romania, although two Truth Commissions functioned here, restitutions are not seen as reparatory programs stipulated in their reports, from various reasons, one of which being the period in which the two commissioned functioned. *The third characteristic* of property restitutions is related to certain aspects of interpreting the European/national legislation, but especially to the manner in which they were speculated by former communist states. Significant documents such as the Universal Declaration of Human Rights or the EU Charter of Fundamental Rights mention the right to property but they do not make edifying specifications regarding the right to restitution, thus creating a slippery and interpretable space. Moreoever, many of the present Constitutions consider that property represents a protected right, despite the fact that restitution is not constitutionally regulated. Property is always uncertain in internal law, due to the governments' freedom to regulate it at any moment.[13] *The fourth characteristic* is connected to a series of limitations in the restitution process, limitations imposed by States themselves and that have fragmented the reparatory programs and steered them away from the concrete form of the compensation's size, from their initial mission. Among these limitations we can mention: exacting threshold; the lack of accord regarding types of compensations – the actual restitution and/or vouchers for new acquisition; the manner in which the competent authorities defined the past, meaning the period covered by the reparations program; the lack of accord regarding the types of goods – mobile/immobile-; the unrealistic deadlines for turning in the files.

For example, experts in the field from Lithuania have agreed upon the fact that these limitations and steerings away from the initial form of what a reparatory program should be are unconstitutional.[14] Also, as outlined in the no. 39794/98 to the ECHR, *Peter Gratzinger and Eva Gratzingerova v. the Czech Republic*, limited prescription deadline acts as a barrier in the practicing of the plaintiffs' rights[15]. As a result of legislative incoherence, of deadline postponements by courts, of the aforementioned limitations, former owners went to CEDO, this being another *common characteristic* regardting property restitutions in former communist countries.

It can be ascertained that property restitutions in the region only partially fulfilled the characteristics of a reparatory measure, due to the unilateral treatment implemented both by the governments of post-communist countries to this policy, and by the limits imposed by authorized agencies and institutions in the processes of reconvering goods and properties.

## 4. Reparations restitutions as a reparatory measure in Romania

The European Convention on Human Rights was adopted by member states of the European Council in Rome, on 04.11.1950 and came into effect on 03 September 1953. It was supplemented by 15 additional Protocols that were subsequently adopted by contractant states of which Protocols 15 and 16 have not come into effect yet. Romania ratified the Convention for the protection of human rights and fundamental freedoms through *Law no. 30 from 18 May 1994*[16] regarding the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and of the additional protocols to this convention, published in the Official Monitor no. 135 from 31 May 1994, in effect since 20 June 1994. Furthermore, Law no. 30 from 18 May 1994 ratified as well the additional Protocol no. 1 to the Convention for the protection of human rights and fundamental freedoms that was signed in Paris, on 20 March 1952 and that came into effect on 18 May 1954.

By adhering to CEDO, Romania took on the obligation to guarantee the protection of rights and freedoms regulated by the Convention of all individuals found under its jurisdiction. The connection between internal law and international protection of human rights is regulated by art. 11 from Title I entitled "General Principles" and in art. 20 from Title II entitled "Fundamental rights, freedoms and obligations" in Chapter I entitled "Common dispositions" from the revised Romanian Constitution.

To this end, art 11[17] (International and internal law) from the Romanian Constitution states that:

*"The Romanian state pledges itself to fulfill literally and in good faith the obligations it has from the treaties of which it is part. The treaties ratified by Parliament, according to law, are part of internal law. In the case where a treaty Romania will become a part of comprises dispositions contrary to the Constitution, its ratification can take place only after the revision of the Constitution."*

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[13] Eric A. Posner & Adrian Vermeule "Transitional Justice as Ordinary Justice", *Harvard Law Rewiev*, 2003, 117(3): 761-825.

[14] Kuti Ksongor, "Post-Communist Property Reparations: Fulfilling the Promises of the Rule of Law", *Acta Juridica Hungarica*, 2007, 48(2): 169-188.

[15] Grand Chamber Decision as to the Admissibility of Application no. 39794/98 by Peter Gratzinger and Eva Gratzingerova against the Czech Republic, available at http://echr.ketse.com/doc/39794.98-en-20020710/view/, accessed March 2019.

[16] *Legea nr. 30/1994 privind ratificarea Convenției pentru apărarea drepturilor omului și a libertăților fundamentale și a protocoalelor adiționale la această convenției*, published in Monitorul Oficial al României, in force since 31.05.1994, available at https://lege5.ro/Gratuit/he2tgmi/legea-nr-30-1994-privind-ratificarea-conventiei-pentru-apararea-drepturilor-omului-si-a-libertatilor-fundamentale-si-a-protocoalelor-aditionale-la-aceasta-conventie, accessed April 2019.

[17] Articolul 11, *Constituția României*, republished, *Monitorul oficial al României*, part I, no. 767/31.10.2003, available at https://www.presidency.ro/ro/presedinte/constitutia-romaniei, accessed April 2019.

Art. 20[18] (International treaties on human rights) from the Romanian Constitution states that:

*"1) The constitutional dispositions regarding citizens' rights snd freedoms will be interpreted and implemented in accordance to the Universal Declaration of Human Rights, to the pacts and other treaties of which Romania is a part. 2) If there is disagreement between pacts and treaties regarding fundamental human rights, of which Romania is a part, and internal laws, international regulations have priority, with the exception of the case where the Constitution or internal laws contain more favorable dispositions. "*

From the interpretation of these constitutional provisions and taking into acount as well the *decision no. 146 from 14 July 2000*[19] of the Constitutional Court, it emerges that CEDO is part of internal law and it is directly implemented, similar to any other law in Romania, with the distinction that the former has priority before internal laws that are in disagreement with the provisions of the Constitution.

The right to property represents a fundamental right for any individual, being enlisted together with the other rights and freedoms in the Constitution, in laws and international acts. The protection and guarantee of the right to private property is consacrated in art. 44 from the Romanian Constitution entitled *The right to private property*. According to the text, this right is not an absolute right but it can involve certain limitations, while the content and limits of the right to private property are established through law.[20] References regarding the right to private property are found as well in art. 136[21] from Title VI entitled *The economy and public finances*, namely:

*"1) Property is public or private. ... 6) Private property is inviolable, under the conditions of the organic law."*

The Universal declaration of human rights, adopted in 1948 by the General Assembly of the United Nations states in art. 17 that:

*"Everyone has the right to own property alone as well as in association with others ... No one shall be arbitrarily deprived of his property"* [22]

Art. 1 from the first additional Protocol to CEDO[23] entitled "Protection of property" stipulates that:

*"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".*

Art.17[24] from the EU Charter of fundamental rights (UECFR) states that:

*"Right to property. (1) Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. (2) Intellectual property shall be protected."*

A turning point in regard to both private property and the right to have it was represented by the instatement of the communist regime in Romania, when normative acts were adopted, by means of which the process of taking possession of buildings from private property and transfering them to state property was regulated. This process subtends a series of abusive measures first of all because they violated provisions from the Constitution that was in effect at that time, those from the *Universal Declaration of Human Rights from December 1948*, from *the International Covenant on Economic, Social and Cultural Rights*, and in the *International Covenant on Civil and Political Rights.* Second of all, abusive was also the manner in which these dispossession provisions were implemented and namely: not giving compensations to the owner, not publishing the acts regarding the taking over of properties by the state.

The post-1989 reparatory policies targeted both the rectification and attenuation of the abuses of previous regimes, one of the measures being the adoption of laws with a reparatory character in matters of buildings taken over abusively by the state during the communist regime in Romania. Out of these, we mention the Law on land resources no 18/1991, Law no. 169/1997 for changing and supplementing the Law on land resources no 18/1991, Law no. 1/2000 for the restoration of the right to property on agricultural and forests lands, required according to Law on land resources no 18/1991 and to Law no. 169/1997, Law no. 10/2001 on the judicial state of certain buildings

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[18] Articolul 20, Constituția României … op.cit.

[19] *Decizia nr. 146 din 14 iulie 2000 referitoare la excepția de neconstituționalitate a dispozițiilor art. 291 alin. 3 din Codul de procedură penală, published in Monitorul Oficial al României*, Part I, no. 566/15.11. 2000, available at http://legislatie.just.ro/Public/DetaliiDocumentAfis/25044, accessed April 2019.

[20] Articolul 44, Constituția României … op.cit.

[21] Articolul 136, Constituția României ... op.cit.

[22] *Declaratia universala a drepturilor omului din 10 decembrie 1948*, Articolul 17, published în Broșura din 10 decembrie 1948, available http://www.anr.gov.ro/docs/legislatie/internationala/Declaratia_Universala_a_Drepturilor_Omului.pdf, accessed March 2019.

[23] Articolul 1, Convenția CEDO - Protocolul 1, available at https://jurisprudentacedo.com/Conventia-CEDO/Protocolul-1.html, accessed April 2019.

[24] *Carta Drepturilor fundamentale a Uniunii Europene* (2012/C 326/02), available at https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12012P/TXT&from=RO, accessed April 2019.

taken over abusively during 6 March 1945-22 December 1989, Law no. 165/2013 on measures for finalising the restitution process, in kind or in equivalent, of buildings taken over abusively during the communist regime in Romania. To these, we can add the normative acts that exclusively regulate certain categories of buildings, namely GEO no. 83/1999 on the restitution of goods that belonged to communities of citizens part of national minorities in Romania and GEO no. 94/2000 on the restitution of real estates that belonged to religious cults in Romania.

The present paper will concentrate on the impact generated especially by two of the reparatory laws: **Law no. 10/2001** on the judicial state of certain buildings taken over abusively during 6 March 1945-22 December 1989, published in the Official Monitor no. 75 from 14 February 2001; **Law no. 165/2013** on measures for finalising the restitution process, in kind or in equivalent, of buildings taken over abusively during the communist regime in Romania, published in the Official Monitor no. 278 from 17 May 2013.These laws represent framework laws in matters of buildings taken over abusively by the state and special laws in connection to Law 287/2009 on the Civil Code[25] and Law no. 213 from 17 November 1998[26] on public property and its judicial state.

**Law no. 10/2001** on the judicial state of certain buildings taken over abusively during 6 March 1945-22 December[27] 1989, was republished in the Official Monitor, Part I no. 798 from 02 September 2005 and modified through the following acts: Rectification 2005; GEO no. 209/2005; Law no. 74/2007; Law no. 1/2009; Law no. 302/2009; Law no. 202/2010; Law no. 165/2013; Law no. 187/2012; Law no. 135/2014; GEO no. 98/2016. Art. 1 par. 1 from this normative act indicates the goods that fall under the incidence of this special law and the manner of their restitution, namely in kind or in equivalent. From the content of par. 1 and 2 from art. 1 it results that the principle of the restitution in kind is explicitly established, the restitution in equivalent intervening only when the restitution in kind is no longer possible. The principle of the prevalence of the restitution in kind is stipulated as well in pt. 1, letr. a from the the Methodological norm for the application of Law no. 10/2001, approved through GD no. 250/2007.[28] The provisions of art. 21-23 from Law no. 10/2001 establish the administrative procedure precursory of the notification to obtain restitution in kind or through equivalent by the rightful person, as well as the judiciary control on the decisions or dispositions issued within this procedure.

Thus, law no. 10/2001 offers to interested parties both access to an administrative procedure, and to a legal procedure when required.

In its interpretation and application, Law no. 10/2001 has generated numerous litigations, both in ***national courts*** and at **CEDO**. Although Law no. 10/2001 came into effect on 14 February 2001, even at present, after 18 years, there are still restitution requests formulated by individuals who allege they are entitled in the administrative procedure, with some of the requests recorded at national courts, while others at **CEDO**. In the administrative procedure, the notifications formulated by individuals who allege to be entitled to restitution were either not resolved by authorities or were resolved with significant delay. National courts have interpreted and applied the provisions of the law in different ways, so that there were many situations where there was no unitary point of view of identical situations.

As a result, in order to ensure a singular interpretation and application of the law by all courts, **The High Court of Cassation and Justice** gave its verdict on the matter of those legal issues that were resolved differently, through definitive judicial decisions, by the courts. Thus the **HCCJ** has intervened with the purpose of unifying the judicial principles through decisions given in the interest of the law, decisions that are mandatory from the moment they are published in the Romanian Official Monitor, Part I.[29] Thus, *according to Decision no. 20/2007* [30] the recourse was admitted in the interest of the law and it's been established in applying the dispositions of art. 26 par. (3) from Law no. 10/2001, republished, the court has the competence to resolve in essence not only the appeal filed against the decision/disposition to reject

[25] *Legea nr. 287/2009 privind Codul Civil*, republished in Monitorul Oficial al României nr. 505/15.07.2011, available at http://legislatie.just.ro/Public/DetaliiDocument/109884, accessed April 2019.

[26] *Legea nr. 213/1998 din 17 noiembrie 1998 privind bunurile proprietate publică*, published in Monitorul Oficial al României nr. 448/24.11.1998, available at http://legislatie.just.ro/Public/DetaliiDocument/16209, accessed April 2019.

[27] *Legea nr. 10/2001 privind regimul juridic al unor imobile preluate în mod abuziv în perioada 6 martie 1945 - 22 decembrie 1989*, published in Monitorul Oficial al României, in force since 14 februarie 2001, applicable form since 02. 09. 2005, available at https://lege5.ro/Gratuit/hezdmmbv/legea-nr-10-2001-privind-regimul-juridic-al-unor-imobile-preluate-in-mod-abuziv-in-perioada-6-martie-1945-22-decembrie-1989, accessed April 2019.

[28] Published in Monitorul Oficial al României nr. 227/3.04.2007, which has abrogated GEO. no. 498/2003, published in Monitorul Oficial nr. 324/14.03. 2003, act which has abrogated GEO. no. 614/2001, published in Monitorul Oficial no. 379/11.01.2001.

[29] Articolul 329 alin. 3 din Codul de procedură civilă 1865; Articolul 517 alin. 4 din Cod procedură civilă 2010, available at http://legislatie.just.ro/Public/DetaliiDocument/39374, accessed March 2019.

[30] Decizia nr. 20/2007 privind examinarea recursului în interesul legii, declarat de procurorul general al Parchetului de pe lângă Înalta Curte de Casație și Justiție, cu privire la aplicarea dispozițiilor art. 26 alin. (3) din Legea nr. 10/2001, republicată, cu modificările și completările ulterioare, în legătură cu stabilirea competenței instanței de a judeca pe fond contestația formulată împotriva deciziei/dispoziției de respingere a cererilor prin care se solicită restituirea în natură a imobilelor preluate abuziv sau în cazul refuzului nejustificat al entității deținătoare de a răspunde la notificare, în vigoare de la 12 noiembrie 2007, published in Monitorul Oficial, Part I no. 764/12.11. 2007, available at https://lege5.ro/Gratuit/geydeobwgq/decizia-nr-20-2007-privind-examinarea-recursului-in-interesul-legii-declarat-de-procurorul-general-al-parchetului-de-pe-langa-inalta-curte-de-casatie-si-justitie-cu-privire-la-aplicarea-dispozitiilor-, accessed April 2019.

the requests through which the solicitor requests compensation in the form of real estate that had been abusively seized, but also the action of the entitled person in the case of the unjustified refusal by the owning entity to respond to the notification of the interested party. Another example is *Decision no. 52/2007*[31] through which recourse was admitted in the interest of the law and it's been established that the stipulations found in art. 16 and the next ones from Law no. 247/2005, regarding the administrative procedure for granting indemnities, does not apply for decisions/dispositions given prior to the law coming into effect, appealed within the terms stipulated by Law no. 10/2001, as it has been modified by Law no. 247/2005.

Under the same category also falls Decision no. *33/2008*[32] through which recourse in the interest of the law has been admitted and has been established with respect to the actions based on the dispositions of the common law, having as an objective the reclaiming of property that was seized in an abusive manner from March 6 1945 to December 22 1989, formulated after Law no. 10/2001 came into effect and were unevenly resolved by the courts. The decision mentions that the competition between the special and the general law is resolved in favor of the special law, according to the principle *specialia generalibus derogant*, even if it isn't expressly stated in the special law. In the case where inconsistencies are noticed between the special law, respectively Law no. 10/2001 and the European convention for human rights, the latter has priority. This priority can be accorded in the case of an act of reclamation, based on common rights, to the extent to which another property law or the security of the judicial report are not thus affected. *Decision no. 1/2015*[33] through which recourse was admitted in the interest of the law establishes, with respect to the interpretation and application of art. 50 par. (2) and 50 ind. Par. (1) of Law no 10/2001, republished, together with subsequent additions. It's been decided that the court that has the power to resolve a monetary request based on market value, established according to art. 50 ind. 1 par. 1 of Law 10/2001, republished, together with subsequent modifications and additions, can grant the plaintiff the up-to-date price paid at the moment when the sale-purchase contract was signed in accordance with Law no. 112/1995, together with subsequent modification, in the case where it has been established that the conditions stipulated in art. 50 par. 2 of Law no. 10/2001, republished, together with subsequent modifications and additions, are fulfilled only if a head of claim has been formulated in this respect.

In addiction, the *HCCJ* has contributed to assuring the unitary applicability and interpretation of the law by courts by issuing rulings beforehand in order to resolve certain matters of law [34]. In this sense *decision no. 5/2015*[35] is mentioned through which the complaints formulated with respect to the pronouncing of a decision were filed and it has been established that: in interpreting and applying the dispositions of art. 26 par. 3 of Law no. 10/2001, republished, together with subsequent modifications and additions, in correlation with art. 4, art. 33-35 of Law 165/2013 it *is* premature to request an arraignment with respect to the solution

[31] Decizia nr. 52/2007 privind examinarea recursului în interesul legii, formulat de procurorul general al Parchetului de pe lângă Înalta Curte de Casație și Justiție, referitor la problema aplicabilității dispozițiilor cuprinse în titlul VII din Legea nr. 247/2005 privind reforma în domeniile proprietății și justiției, precum și unele măsuri adiacente, privind procedura administrativă pentru acordarea despăgubirilor în cazul deciziilor/dispozițiilor emise anterior intrării în vigoare a acelei legi, contestate în termenul prevăzut de Legea nr. 10/2001 privind regimul juridic al unor imobile prelate în mod abuziv în perioada 6 martie 1945-22 decembrie 1989, astfel cum aceasta a fost modificată ulterior, in force since 22.02. 2008 published in Monitorul Oficial, Part I no. 140/22.02.2008, available at https://lege5.ro/Gratuit/geytinzqgm/decizia-nr-52-2007-privind-examinarea-recursului-in-interesul-legii-formulat-de-procurorul-general-al-parchetului-de-pe-langa-inalta-curte-de-casatie-si-justitie-referitor-la-problema-aplicabilitatii-, accessed April 2019.

[32] Decizia nr. 33/2008 privind examinarea recursului în interesul legii, declarat de procurorul general al Parchetului de pe lângă Înalta Curte de Casație și Justiție, cu privire la admisibilitatea acțiunii în revendicare, întemeiată pe dispozițiile dreptului comun, având ca obiect revendicarea imobilelor preluate în mod abuziv în perioada 6 martie 1945 - 22 decembrie 1989, formulată după intrarea în vigoare a Legii nr. 10/2001- Secțiile Unite, published in Monitorul Oficial al României, in force since 23.02. 2009, available at https://lege5.ro/Gratuit/gezdanbvg4/decizia-nr-33-2008-privind-examinarea-recursului-in-interesul-legii-declarat-de-procurorul-general-al-parchetului-de-pe-langa-inalta-curte-de-casatie-si-justitie-cu-privire-la-admisibilitatea-actiunii, accessed April 2019.

[33] Decizia nr. 1/2015 privind examinarea recursului în interesul legii formulat de Colegiul de conducere al Înaltei Curţi de Casaţie şi Justiţie cu privire la posibilitatea instanţei de judecată învestite cu soluţionarea unei acţiuni în plata preţului de piaţă, întemeiată pe prevederile art. 50[1] din Legea nr. 10/2001 privind regimul juridic al unor imobile preluate în mod abuziv în perioada 6 martie 1945-22 decembrie 1989, republicată, cu modificările şi completările ulterioare, de a acorda reclamantului, în lipsa unui capăt de cerere distinct, preţul actualizat plătit la momentul încheierii contractului de vânzare-cumpărare în temeiul Legii nr. 112/1995 pentru reglementarea situaţiei juridice a unor imobile cu destinaţia de locuinţe, trecute în proprietatea statului, cu modificările ulterioare, în cazul în care constată ca fiind îndeplinite condiţiile prevăzute de dispoziţiile art. 50 alin. (2) din Legea nr. 10/2001, republicată, cu modificările şi completările ulterioare, in force since 25.03.2015, published in Monitorul Oficial al României I, 197/25.03.2015, available at https://www.legalis.ro/2015/03/27/ril-admis-interpretarea-si-aplicarea-dispozitiilor-art-50-alin-2-si-501-alin-1-din-legea-nr-102001/, accessed May 2019.

[34] *Articolul 521, Cod procedură civilă 2010*, available at https://lege5.ro/Gratuit/gyztaojtgy/art-521-continutul-si-efectele-hotararii-codul-de-procedura-civila?dp=g43temjvgyytg, accessed April 2019.

[35] Decizia nr. 5/2015 privind examinarea sesizărilor formulate de Curtea de Apel Bucureşti - Secţia a IV-a civilă, în Dosarul nr. 37.758/3/2013, şi Curtea de Apel Bucureşti - Secţia a III-a civilă şi pentru cauze cu minori şi de familie, în Dosarul nr. 30.602/3/2013, privind pronunţarea unei hotărâri prealabile pentru dezlegarea modului de interpretare şi aplicare a dispoziţiilor art. 26 alin. (3) din Legea nr. 10/2001 privind regimul juridic al unor imobile preluate în mod abuziv în perioada 6 martie 1945-22 decembrie 1989, republicată, cu modificările şi completările ulterioare, art. 1.528 din Codul civil, în corelare cu dispoziţiile art. 4, art. 33 alin. (1), art. 34 şi art. 35 din Legea nr. 165/2013 privind măsurile pentru finalizarea procesului de restituire, în natură sau prin echivalent, a imobilelor preluate în mod abuziv în perioada regimului comunist în România, cu modificările şi completările ulterioare, in force since 23.04.2015, published in Monitorul Oficial al României I no. 272/23.04. 2015, available at http://legislatie.just.ro/Public/DetaliiDocumentAfis/167356, accessed May 2019.

on the main issue of the notification that has been unresolved by the holding entity, a request that has been introduced after Law no. 165/2013 came into effect but prior to the fulfillment of terms of the previous procedure that have been regulated by this normative act, *coming into effect on 23 April 2015, published in the Official Monitor, part I no. 272 from 23 April 2015*. In addition *Decision no. 81/2017*[36] through which the complaint was filed has established that: in the interpretation and application of the dispositions of art. 42 par. (3) of Law no. 10/2001 republished, together with subsequent modification and additions, apart from the right to preemption, tenants also have the right to opt for purchasing living spaces, a right that is stipulated in art. 9 par. (1) of Law no. 112/1995[37] for the settlement of judicial situations of living spaces, taken by the state, together with subsequent modifications.

***The Constitutional Court*** in turn, has decided in regards to the unconstitutionality of certain provisions from Law no. 10/2001, by conducting an ulterior control of constitutionality by means of the unconstitutionality exception, invoked before the courts, its decisions being definitive and generally obligatory[38]. Thus, through *Decision no. 830/2008*[39] the unconstitutionality exception was admitted for the dispositions from art. 1 pt. 60 from title I from Law no. 247/2005 on the reform in the field of properties and justice, such as some adjacent measures. The exception was raised *ex officio* by the High Court of Cassation and Justice – Civil Chamber and intellectual property and it was ascertained that by repealing the syntagm *buildings taken over with valid title* from the content of art. 29 par. (1) from Law no. 10/2001, the dispositions from art. 15 par. (2) and art. 16 par. (1) from the Constitution are violated. Another decision is *841/2015*[40], through which the unconstitutionality exception was admitted and it was ascertained that the provisions of art. 5 par. (1) from Law no. 10/2001 are constitutional as long as they do not allow restitution in kind or awarding reparatory measures by equivalent to individuals who come under the incidence of accords signed by Romania with other states regarding regulating the financial problems in suspension enumerated in Appendix 1 to Law no. 10/2001.

Considering the successive legislative modifications, non-unitary practice, numerous requests were registered at ***CEDO*** against Romania through which what was invoked was the violation of the right to property guaranteed by art. 1 of the additional Protocol no. 1 of the European Convention for human rights.

The plaintiffs have claimed *the violation of the right to property,* either on the basis of fact that the property that they owned was sold by the state to third parties of good faith, either on the basis of the fact that they found themselves in the impossibility of fully recovering their good even when they had at their disposal a definitive motion to force the state to apply the court's decision. In the cases where it has been brought to notice, the Court has analyzed whether the plaintiffs own/don't own a "good" in the sense of art. 1 of Protocol no. 1, whether any violation of property rights are noticed/not noticed to exist, whether the violations of the right to property are justified/not justified. The court has been confronted with such phrases as "state title", "the sale of another's property", "the good-faith of the buyer", "reclaim", "the theory of the appearance in the law". In this sense the *Decision from 1 December 2015 in the case of Păduraru versus Romania*[41], as well as *the Decision in the case of Străin et al. versus Romania* [42] In observing these realities, the Court has restated that the only obligation, according to art. 19 of the Convention, is to ensure the respecting of the commitments that result from the Convention for the contracted parties. The Court has shown that it *is*

[36] Decizia nr. 81/2017 privind examinarea sesizării formulate de Tribunalul Cluj - Secția civilă în Dosarul nr. 3.633/211/2016 în vederea pronunțării unei hotărâri prealabile, in force since 18.01.2018, published in Monitorul Oficial, Part I no. 49/ 18.01. 2018, available at https://lege5.ro/Gratuit/gi3dmnrrgmya/decizia-nr-81-2017-privind-examinarea-sesizarii-formulate-de-tribunalul-cluj-sectia-civila-in-dosarul-nr-3633-211-2016-in-vederea-pronuntarii-unei-hotarari-prealabile, accessed May 2019.

[37] Legea nr. 112/1995 pentru reglementarea situației juridice a unor imobile cu destinația de locuințe, trecute în proprietatea statului, published in Monitorul Oficial al României, in force since 28.01.1996, available at https://lege5.ro/Gratuit/haydinq/legea-nr-112-1995-pentru-reglementarea-situatiei-juridice-a-unor-imobile-cu-destinatia-de-locuinte-trecute-in-proprietatea-statului, accessed April 2019.

[38] Articol 31, Legea nr. 47/1992 privind organizarea și funcționarea Curții Constituționale, published in Monitorul Oficial no. 807/3.12.2010, republished, available at https://www.ccr.ro/Legea-nr-471992, accessed April 2019.

[39] Decizia nr. 830/2008 referitoare la admiterea excepției de neconstituționalitate a dispozițiilor art. I pct. 60 din titlul I al Legii nr. 247/2005 privind reforma în domeniile proprietății și justiției, precum și unele măsuri adiacente, in force since 24.07.2008, published in Monitorul Oficial, Part I no. 559/24.07. 2008, available at https://lege5.ro/Gratuit/geytaojvga/decizia-nr-830-2008-referitoare-la-admiterea-exceptiei-de-neconstitutionalitate-a-dispozitiilor-art-i-pct-60-din-titlul-i-al-legii-nr-247-2005-privind-reforma-in-domeniile-proprietatii-si-justitiei-pr, accessed April 2019.

[40] Decizia nr. 841/2015 referitoare la admiterea excepției de neconstituționalitate a prevederilor art. 5 alin. (1) din Legea nr. 10/2001 privind regimul juridic al unor imobile preluate în mod abuziv în perioada 6 martie 1945 - 22 decembrie 1989, in force since 12.02. 2016, published in Monitorul Oficial, Part I no. 110/12.02. 2016.

**[41]** *Hotărârea în Cauza Păduraru împotriva României*, Cerere no. 63252/2000, ECHR final Judgment/01.03.2006, published in Monitorul Oficial al României, Part I no. 514/14.06.2006, available at https://hudoc.echr.coe.int/eng#{"fulltext":["\"CASE%20OF%20PĂDURARU%20v.%20ROMANIA\""],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-71444"]}, accessed May 2019.

[42] *Hotărârea în cauza Străin și alții împotriva României*, Cerere no. 57001/2000, final Judgment ECHR/30.11.2005, published in Monitorul Oficial al României/02.02. 2006, available at https://hudoc.echr.coe.int/eng#{"fulltext":["cauza%20Străin%20și%20alții%20împotriva%20României"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-122574"]}, accessed April 2019.

*not obliged to substitute the internal courts*, underlining the fact that interpreting internal law encumbers first of all national authorities and in particular courts. In this sense, one can consult the decisions in the cases *Garcia Ruiz versus Spain*[43] and *Păduraru versus Romania* [44].

In its jurisprudence, *repeatedly*, the Court has decided that art. 1 of the First Protocol addendum to the Convention for the protection of human rights and of fundamental liberties contains three distinct norms[45]:

*"the first, established in the first thesis of the first paragraph, is of a general nature and lays out the principle for respecting property; the second, found in the second thesis of the same paragraph, refers to the privation of property and subject it to certain conditions; the third norm, registered with general intent. The second and third rules refer to specific examples, where the rights to property were touched upon, rights which therefore have to be interpreted based on the principle that has been consecrated by the first".*

With respect to the *existence of a "good"*, the Court has constantly states that the notion of "goods" may include both "actual goods", as well as patrimonial valuables, including debt on the basis of which the plaintiff can claim to have had at least a "legitimate hope" of obtaining effective benefit of the right to property. On the other hand, the hope of recognizing the continuation of an old right to property that has long been impossible to effectively exercise cannot be considered a "good" in the sense of art. 1 of Protocol no. 1. In this sense, one may consult the cases *Prince Hans-Adam II of Lichtenstein versus Germany*[46], *Draon versus France*[47], *Bock and Palade versus Romania* [48], *Gratzinger and Gratzingerova versus the Czech Republic* [49].

With respect to the *justified intrusion*, the Court analyzed whether the intrusion is "provided by law", the purpose of the intrusion and scope of the intrusion. In its jurisprudence, the Court has shown that art. 1 of Protocol no. 1 imposes, before anything else, that an intrusion by public authorities in the property rights should be legal. The principle of law implies also the existence of norms pertaining to internal law, sufficiently accessible, precise and predictable. Relevant in this situation are the cases *Hentrich versus France*[50], and *Lithgow et. al. versus the UK*[51]. Nevertheless, the Court has limited competence when verifying whether internal law is respected, as has been mentioned in the cases *Hokansson and Sturesson versus Sweden*[52], *Străin et. al. versus Romania*[53], *Păduraru versus Romania* [54].

In a series of law suits against Romania, the Court has noticed that the sale by the state to third parties in good faith of property that had belonged to someone else, represents a privation of goods, even in those cases when such a sale occurs prior to the definitive recognition by the justice system of the right to property of the respective person. Such a privation, combined with a total lack of compensation, is contrary to art. 1 of Protocol no. 1. This situation is also encountered in the following cases: *Străin et. al. versus Romania*[55], *Katz versus Romania*[56]; *Porțeanu versus Romania*[57]; *Buttu and Bobulescu versus Romania*[58]. Furthermore, in the case *Păduraru versus Romania*[59], the Court ruled

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[43] *Case of Garcia Ruiz v. Spain*, Application no. 30544/96, ECHR Judgement/ 21.01. 1999, available athttps://hudoc.echr.coe.int/eng#{"display":[2],"languageisocode":["ENG"],"appno":["30544/96"],"itemid":["001-58907 accessed April 2019.

[44] *Hotărârea în Cauza Păduraru împotriva României* … op.cit.

[45] *Articolul 1, Convenția CEDO - Protocolul 1* … op.cit.

[46] *Case of Prince Hans-Adam II of Liechtenstein v. Germany*, Application no. 42527/1998, ECHR Judgment/21.07.2001, available at https://www.legal-tools.org/doc/4c1354/pdf/, accessed April 2019.

[47] *Case of Draon v. France*, Application no. 1513/2003, ECHR Judgement/21.06.2006, available at https://hudoc.echr.coe.int/eng#{"itemid":["001-75905"]}, accessed April 2019.

[48] *Cauza Bock și Palade împotriva României*, Cererea nr. 21740/02, 15.02. 2007, definitivă 15/05/2007, Strasbourg, available http://ier.gov.ro/wp-content/uploads/cedo/Cauza-Bock-și-Palade-împotriva-României.pdf, accessed April 2019.

[49] Case of *Peter Gratzinger and Eva Gratzingerova v the Czech Republic*, Application no. 39794/1998, Admissibility ECHR/ 10.07. 2002, available at http://echr.ketse.com/doc/39794.98-en-20020710/view/, accessed April 2019.

[50] *Case of Hentrich v. France*, Application no. 13616/88, ECHR Judgment/ 22.09.1994, available at https://www.legal-tools.org/doc/5513d6/pdf/, accessed April 2019.

[51] *Case of Lithgow and Others v. The United Kingdom*, Applications no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, ECHR Judgment/8.07.1986, available at https://www.legal-tools.org/doc/21e1dd/pdf/, accessed April 2019.

[52] *Case of Håkansson and Sturesson v. Sweden,* Application no. 11855/85, ECHR Judgment/21.02.1990, available at http://cambodia.ohchr.org/sites/default/files/echrsource/Håkansson%20&%20Sturesson%20v.%20Sweden%20[21%20Feb%201990]%20[EN].pdf, accessed April 2019.

[53] *Hotărârea în cauza Străin și alții împotriva României … op.cit.*

[54] *Hotărârea în Cauza Păduraru împotriva României … op.cit.*

[55] Hotărârea în cauza Străin și alții împotriva României … op.cit.

[56] Hotărârea din Cauza Katz împotriva României, Cerere nr. 29739/2003, Hotărâre ECHR/20.01.2009, available at https://jurisprudentacedo.com/Cauza-Katz-c.-Romaniei-Case-nationalizate.-Hotarare-pilot.-Obligatiile-statului.html, accessed March 2019.

[57] Hotărârea în Cauza Porțeanu împotriva României, Cererea nr. 4596/2003, Hotărârea definitivă ECHR/16.05. 2005, published in Monitorul Oficial, Part I, no. 783/15.09. 2006, available at https://hudoc.echr.coe.int/eng#{"itemid":["001-122755"]}, accessed May 2019.

[58] Hotărârea în Cauza Buttu și Bobulescu împotriva României (no. 2), Cererea no. 20.532/2002, Hotărârea ECHR/7.02.2008, published in Monitorul Oficial al României, Part I no. 613/20.08.2008, available a https://hudoc.echr.coe.int/eng#{"fulltext":["Buttu%20and%20Bobulescu%20v."],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-122814"]}, accessed May 2019.

[59] Hotărârea în Cauza Păduraru împotriva României … op.cit.

that the state did not fulfill its positive obligation to react in a coherent and timely manner in regards to the general real interest of the return or sale of property that had come under its possession, by virtue of the decrees of nationalization. At the same time, the Court appreciated that the general uncertainty thus created reverberated back to the plaintiff, who found themselves in the impossibility of recovering their property in its entirety, even though they were in possession of a court order that obligated the state to return it to them. Similar situations may be found in the cases *Togănel and Grădinaru versus Romania* [60], *Ruxandra Ionescu versus Romania* [61]; *Johanna Huber versus Romania* [62], *Fara versus Romania* [63].

In 2010. The Court observed that it had registered requests against Romania similar to those requests that it had settled beforehand and through which it had noticed the violation of art. 6 and 1 of the Convention and art. 1 of Protocol no. 1, although through the rulings *Viașu*[64], *Faimblat*[65] *and Katz*[66] it had indicated that the Romanian state should adopt general measures in order to ensure the effective and rapid realization of the right to restitution.

In relation to what has been noticed and in order to prevent new rulings that would note breaches of the Convention to be passed on similar requests, the Court appealed to the application of a ruling pilot-procedure. As a result, on October 22 2010, the Court issued against Romania its first *pilot-ruling*, in the case of Maria Atanasiu et. al. *versus Romania*[67] , Monitor no. 778 on November At the heart of the case are two requests against Romania through which the plaintiffs Maria Atanasiu and Ileana Iuliana Poenaru (request no. 30.767/05) and the plaintiff Ileana Florica Solon (request no. 33.800/06) have called upon the Court, in keeping with art. 34 of the Convention to defend their human rights and fundamental liberties. Through the requests addressed to the administrative authorities and national courts, the author of the complaint and subsequently the plaintiffs themselves requested the return of property that had been unjustly seized by the state during the Communist regime. The plaintiffs utilized administrative and legal procedures, invoking the restitution laws adopted after 1989 or the common law provisos concerning the respect for the right to property.

The Court acknowledged that a lack of response on behalf of the administrative authorities to the restitution requests submitted under Law no. 112/1995 and no. 10/2001, to which are added a lack, throughout the period mentioned, of a plan of attack, had compelled the plaintiffs Atanasiu and Poenaru to suffer through a disproportionate burden, thus touching upon the very substance of their rights of access to a court of law.[68] As a result, they noticed a breach of art. 6 and 1 of the Convention with respect to the plaintiffs Atanasiu and Poenaru. The Court appreciated that, in essence, the fact that the plaintiffs did not receive any compensation yet and have been given no assurances in regards to a date when they will receive any, has laid a disproportionate and excessive burden upon them, which is incompatible with the right to respect for their property, guaranteed under art. 1 of Protocol no. 1.[69] Therefore, they decided that a breach of art. 1 of Protocol no. 1 of the Convention had occurred concerning all plaintiffs. Through the *pilot-ruling*, the courts in Strasbourg had decided that Romania must take measures to ensure effective protection of rights as stipulated in art. 1 and 6 of the Convention and art. 1 of Protocol no. 1, when dealing with all cases that are

[60] Hotărârea în Cauza Togănel și Grădinaru împotriva României, Cererea no. 5.691/2003, Hotărârea ECHR/29.06.2006, published in Monitorul Oficial al României/19.05.2008, availabe at https://lege5.ro/Gratuit/gezdenzrhe/hotararea-in-cauza-toganel-si-gradinaru-impotriva-romaniei-din-29062006, accessed May 2019.

[61] Hotărârea din cauza Ruxanda Ionescu contra României, Cererea nr 2608/2002, Hotărâre ECHR/12.10.2006, published in Monitorul Oficial al României, Part I no. 570/20.08.2007, available https://jurisprudentacedo.com/Ruxandra-Ionescu-c.-Romaniei-Imobil-vandut-de-locatari-Actiune-in-revendicare-Decretul-92/1950.html, accessed May 2019.

[62] Hotărârea în Cauza Johanna Huber împotriva României, Cererea nr. 37296/2004, Hotărârea ECHR/21.02.2008, published in Monitorul Oficial al României no. 677/2.10.2008, available at https://hudoc.echr.coe.int/eng#{"fulltext":["Johanna%20Huber%20împotriva%20României"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-122791"]}, accessed May 2019.

[63] *Hotărârea în Cauza Fara împotriva României*, Cererea nr. 30142/2003, Hotărâre definitive ECHR/14.05. 2008, available at https://hudoc.echr.coe.int/eng#{"fulltext":["Fara%20împotriva%20României"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-123943"]}, accessed May 2019.

[64] Hotărârea în Cauza Viașu împotriva României**,** Cererea nr. 75.951/2001, Hotărâre ECHR/9.12.2008, published in Monitorul Oficial al României nr. 361/29.05.2009, available at https://hudoc.echr.coe.int/eng#{"fulltext":["Cauza%20Viașu%20împotriva%20României"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-122644"]}, accessed May 2019.

[65] Hotărârea în Cauza Faimblat împotriva României, Cererea nr. 23.066/2002, Hotărârea ECHR/13.01.2009, published in Monitorul Oficial al României no. 141/6.03.2009, available at https://hudoc.echr.coe.int/eng#{"fulltext":["Faimblat%20împotriva%20României"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-122603"]}, accessed May 2019.

[66] Hotărârea din Cauza Katz împotriva României … op.cit.

[67] Hotărârea în Cauza Maria Atanasiu și alții împotriva României, Cererile nr. 30.767/2005; 33.800/2006, Hotărâre ECHR/12.10.2010, published in Monitorul Oficial no. 778/22.11.2010, available at https://hudoc.echr.coe.int/eng#{"fulltext":["Maria%20Atanasiu%20și%20alții%20împotriva%20României"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-122762"]}, accessed May 2019.

[68] Hotărârea în Cauza Maria Atanasiu și alții împotriva României …op.cit. paragraph 123.

[69] Hotărârea în Cauza Maria Atanasiu și alții împotriva României … op.cit. paragraph 193.

similar to that of Maria Atanasiu et. al. *versus Romania* in accordance with the principles that have been consecrated by the Convention, within 18 months from the date when the ruling in question remains final. At the same time, the Court decided to suspend for a period of 18 months from the date when the ruling in question remains final an analysis of all requests that are the result of the same overall issue. In addition, the Romanian state was obligated to pay the plaintiffs Maria Atanasiu and Ileana Iuliana Poenaru the sum of 65000 Euro, for all damages, in addition to any sums that may be due to taxes, to be converted into the local currency of the state against which the complaint had been filed, at the exchange rate for the date when the payment is made. In addition, Romania was obligated to pay the plaintiff Ileana Florica Solon the following sums, to be converted into the local currency of the state against which the complaint had been filed, at the exchange rate for the date when the payment is made: (1) 115000 Euro for all damages, in addition to any sums that may be due to taxes; (ii) 3151.84 Euro, plus any sums that the plaintiff may owe in tax, to cover the cost of litigation.

Romania requested and obtained a continuance until May 12 2013 for the initial deadline, in order to determine an appropriate mechanism that might protect the right to property in accordance with the Convention. In this context, in order for Romania to fulfill its obligation established in the pilot-ruling *Maria Atanasiu et. al. versus Romania*, ***Law no. 165*** was published on May 17 2013 in the Official Monitor no. 278, which was later modified and added to through Law no. 368/2013, GEO no. 115/2013, GEO no. 8/2014, GEO no. 21/2015, GEO no. 65/2015, Law no. 168/2015, GEO no. 66/2015, Law no. 103/2016, GEO no. 98/2016, Law no. 251/2016, Law no. 111/2017, Law no. 149/2017, GEO no. 63/2018 and through Law no. 212/2018. This normative act was adopted in order to finalize the restitution process, in kind or its equivalent, for property that was unjustly seized during the Communist regime in Romania, however *it did not replace the previous restitution laws*, rather it proposed to make them more efficient, to offer an added degree of coherence to the legislative framework with respect to the restitution of property. Art. 2[70] of the law mentions the principles that stand as the basis for granting measures as stipulated in the law:

*"a) the principle of prevalence of restitution in kind; b) the principle of equity; c) the principle of transparency of the process through which reparatory measures are established; d) the principles of maintaining just equilibrium between the particular interests of the former owners and the general interest of society."*

One can observe that these principles can also be found in part in the *Methodological norms* for unitary application of Law no. 10/2001. The provisos of art.4 of the law that establishes the requests to which this law applies are also relevant. Within the category of requests one can find: requests formulated and submitted within legal timelines, to the legally invested institutions, unresolved when the present law came into effect; the open cases pertaining to the restitution of property taken unjustly; the open cases at CEDO that had been suspended due to the pilot-ruling of October 12 2010, issued in the case *Maria Atanasiu et. al. versus Romania*, when the present law came into effect.

From art. 1 par. 1 and 2 and art. 2 it results that *Law no. 165*[71] has explicitly regulated the principle of prevalence for restitutions in kind, while equivalent restitutions remain incidental in the following two cases: when restitution in kind of the property that was unjustly seized is no longer possible; when the owner has relinquished his rights in accordance with the restitution laws. In this latter case, the only reparatory measure is compensation on the basis of points. However, in the process of applying *Law 165* there were difficulties. Arguments in this sense are the numerous modifications and addendums to the law, as well as court rulings that are constitutionally contentious, when resolving exceptions of unconstitutionality that had been invoked.

***The Constitutional Court,*** in analyzing the accordance to the Constitution of certain provisos of the law, by way of exceptions of unconstitutionality, has ruled the following: Decision no. 88/2014, Decision no. 210/2014, Decision no. 269/2014, Decision no. 686/2014, Decision no. 395/2017, Decision no. 44/2017, Decision no. 671/2017. For example, through *Decision no. 88/2014*[72], the exception of unconstitutionality was deemed admissible and it was noted that the dispositions in art. 4, second thesis, of Law no. 165/2013 are constitutional provided that the terms stipulated by art. 33 of the same law do not also

[70] Articolul 2, Legea nr. 165/2013 privind măsurile pentru finalizarea procesului de restituire, în natură sau prin echivalent, a imobilelor preluate în mod abuziv în perioada regimului comunist în România, published in Monitorul Oficial al României, in force since 16.04.2014, available at https://lege5.ro/Gratuit/gm3dcojzge/legea-nr-165-2013-privind-masurile-pentru-finalizarea-procesului-de-restituire-in-natura-sau-prin-echivalent-a-imobilelor-preluate-in-mod-abuziv-in-perioada-regimului-comunist-in-romania, accessed May 2019.

[71] Decizia nr. 88/2014 referitoare la admiterea excepției de neconstituționalitate a prevederilor art. 4 teza a doua raportate la cele ale art. 33 din Legea nr. 165/2013 privind măsurile pentru finalizarea procesului de restituire, în natură sau prin echivalent, a imobilelor preluate în mod abuziv în perioada regimului comunist în România, published in Monitorul Oficial al României/16.04.2014, available at https://lege5.ro/Gratuit/gm4tkojzgu/decizia-nr-88-2014-referitoare-la-admiterea-exceptiei-de-neconstitutionalitate-a-prevederilor-art-4-teza-a-doua-raportate-la-cele-ale-art-33-din-legea-nr-165-2013-privind-masurile-pentru-finalizarea-p, accessed May 2019.

[72] Decizia nr. 210/2014 referitoare la admiterea excepției de neconstituționalitate a dispozițiilor art. 4 teza a doua raportate la cele ale art. 1 alin. (2) din Legea nr. 165/2013 privind măsurile pentru finalizarea procesului de restituire, în natură sau prin echivalent, a imobilelor preluate în mod abuziv în perioada regimului comunist în România, în redactarea anterioară modificării acestor prevederi prin Legea nr. 368/2013 pentru modificarea și completarea Legii nr. 165/2013, published in Monitorul Oficial al României/05.06.2014, available at https://lege5.ro/Gratuit/gm4tqojvgu/decizia-nr-210-2014-referitoare-la-admiterea-exceptiei-de-neconstitutionalitate-a-dispozitiilor-art-4-teza-a-doua-raportate-la-cele-ale-art-1-alin-2-din-legea-nr-165-2013-privind-masurile-pentru-final, accessed May 2019.

apply to the cases in the matter of the restitution of unjustly seized property, still being discussed in court at the time when the law came into effect. Through Decision no. *210/2014* [73] the exception of unconstitutionality was deemed admissible and it was noted that the dispositions in art. 4, second thesis, in relation to those of art. 1 par. (2) of Law no. 165/2013, in the outline found prior to them being modified by Law no. 368/2013 for the modification and addendum to Law no. 165/2013, are unconstitutional. Through *Decision no. 395/2017*[74] the exception of unconstitutionality was deemed admissible and it was noted that the dispositions of art. 13 par. (1) of Law 165/2013 are constitutional to the extent that the restitution of forest land belonging to the public domain of the state is done only after these lands are passed into the private domain of the state, in accordance with the law. One can also recall *Decision no. 671/2017*[75] through which the exception of unconstitutionality was deemed admissible and where it was observed that the phrase "only after the depletion of the agricultural land affected by the restitutions in kind identified at the local level" in art. 21 par. (4) of Law no. 165/2013 is constitutional to the extent that it does not apply in the hypothetical case where a judge ruling exists that is definite/irreversible through which the courts have granted the restitution of a financial equivalent.

In order to ensure a unitary judicial practice regarding Law no. 165/2013, the ***HCCJ***, in turn, has given its position by means of various decisions on matters of law that had been differently resolved by the courts, through final court decisions. In what follows the decision given in the recourse in the interest of the law will be mentioned. The *Decision no. 12/2018*[76] through which the recourse in the interest of the law was admitted and it was established that in the unitary interpretation and application of the dispositions from art. 1 par. (2) from Law no. 165/2013, with its subsequent changes and additions, corroborated with art. $22^1$-$22^3$ from its norms of application[77], goods different from those mentioned in the list compiled by the certified entity can be granted as compensation as well. This only with the resolution of the request formulated on the basis of Law no. 10/2001, republished, with subsequent changes and additions, if the entitled person proves its available character. Also in order to ensure a unitary judicial practice, the ***HCCJ*** gave its position by means of various decisions related to matters of law, invoked during the judging of a case, and on which the awarding of a solution on the main issue of the given matter on trial depends. In what follows a series of decisions precursory to the deciphering of certain matters of law will be mentioned. *Decision no. 42/2016*[78] through which the formulated complaint was admitted and established in regard to the interpretation and application of the provisions of art. 1 par. (3) and art. 4 thesis I from Law no. 165/2013, with the subsequent changes and additions, by relating to the provisions of art. 1 par. (1) and art. 3 pt. 6 from the same normative act, art. 27 par. (1) from the Law on land resources no. 18/1991, republished, with subsequent changes and additions, and the provisions of art. 1 from Protocol no. 1 additional to the Convention for the protection of human rights and fundamental freedoms.

[73] Decizia nr. 395/2017 referitoare la excepția de neconstituționalitate a prevederilor art. 13 alin. (1) și (3) din Legea nr. 165/2013 privind măsurile pentru finalizarea procesului de restituire, în natură sau prin echivalent, a imobilelor preluate în mod abuziv în perioada regimului comunist în România, published in Monitorul Oficial al României/18.07.2017, available at https://lege5.ro/Gratuit/ge3dombugiya/decizia-nr-395-2017-referitoare-la-exceptia-de-neconstitutionalitate-a-prevederilor-art-13-alin-1-si-3-din-legea-nr-165-2013-privind-masurile-pentru-finalizarea-procesului-de-restituire-in-natura-sau-, accessed May 2019.

[74] Decizia nr. 671/2017 referitoare la excepția de neconstituționalitate a prevederilor art. 21 alin. (4) și art. 41 alin. (5) din Legea nr. 165/2013 privind măsurile pentru finalizarea procesului de restituire, în natură sau prin echivalent, a imobilelor preluate în mod abuziv în perioada regimului comunist în România, published in Monitorul Oficial al României/21.12.2017, available at https://lege5.ro/Gratuit/gi3dimrygi4a/decizia-nr-671-2017-referitoare-la-exceptia-de-neconstitutionalitate-a-prevederilor-art-21-alin-4-si-art-41-alin-5-din-legea-nr-165-2013-privind-masurile-pentru-finalizarea-procesului-de-restituire-in, accessed May 2019.

[75] Decizia nr. 12/2018 privind examinarea recursului în interesul legii declarat de Colegiul de conducere al Curții de Apel Cluj referitor la interpretarea dispozițiilor Legii nr. 165/2013 privind măsurile pentru finalizarea procesului de restituire, în natură sau prin echivalent, a imobilelor preluate în mod abuziv în perioada regimului comunist în România, cu modificările și completările ulterioare (Legea nr. 165/2013), referitoare la posibilitatea acordării în compensare, pentru imobilele preluate abuziv, și a altor bunuri decât cele înscrise pe lista bunurilor întocmită în conformitate cu dispozițiile art. $22^1$ alin. (5) din Normele de aplicare a Legii nr. 165/2013, aprobate prin Hotărârea Guvernului nr. 401/2013 (Normele de aplicare a Legii nr. 165/2013), astfel cum au fost completate prin Hotărârea Guvernului nr. 89/2014, published in Monitorul Oficial al României/06.07.2018, available at https://lege5.ro/Gratuit/gi4doojwguyq/decizia-nr-12-2018-privind-examinarea-recursului-in-interesul-legii-declarat-de-colegiul-de-conducere-al-curtii-de-apel-cluj-referitor-la-interpretarea-dispozitiilor-legii-nr-165-2013-privind-masurile, accessed May 2019.

[76] Normele de aplicare a Legii nr. 165/2013 privind măsurile pentru finalizarea procesului de restituire, în natură sau prin echivalent, a imobilelor preluate în mod abuziv în perioada regimului comunist în România din 19.06.2013, published in Monitorul Oficial al României/29.06.2013, available at https://lege5.ro/Gratuit/gm3tcnzzg4/normele-de-aplicare-a-legii-nr-165-2013-privind-masurile-pentru-finalizarea-procesului-de-restituire-in-natura-sau-prin-echivalent-a-imobilelor-preluate-in-mod-abuziv-in-perioada-regimului-comunist-in, accessed May 2019.

[77] Decizia nr. 42/2016 referitoare la respingerea excepției de neconstituționalitate a dispozițiilor art. 35 alin. (2) din Legea nr. 165/2013 privind măsurile pentru finalizarea procesului de restituire, în natură sau prin echivalent, a imobilelor preluate în mod abuziv în perioada regimului comunist în România, published in Monitorul Oficial al României/26.04.2016, available at https://lege5.ro/Gratuit/geydmmrqha3q/decizia-nr-42-2016-referitoare-la-respingerea-exceptiei-de-neconstitutionalitate-a-dispozitiilor-art-35-alin-2-din-legea-nr-165-2013-privind-masurile-pentru-finalizarea-procesului-de-restituire-in-nat, accessed May 2019.

[78] Decizia nr. 40/2016 privind examinarea sesizării formulate de Curtea de Apel Constanța - Secția I civilă, în vederea pronunțării unei hotărâri prealabile cu privire la art. 41 alin. (1) din Legea nr. 165/2013, published in Monitorul Oficial al României/08.12.2016, available at https://lege5.ro/Gratuit/geztomjqg44a/decizia-nr-40-2016-privind-examinarea-sesizarii-formulate-de-curtea-de-apel-constanta-sectia-i-civila-in-vederea-pronuntarii-unei-hotarari-prealabile-cu-privire-la-art-41-alin-1-din-legea-nr-165-2013, accessed May 2019.

Thus it was decided that in the case where the owner has estranged the rights that he/she is entitled to according to the law on property restitution, and the request for restoration formulated under the law on land resources was not resolved through the issue of the property title or through compensation in the benefit of the original owner, their heirs or to a third party acquirer until Law no. 165/2013 came into effect, the assignee, as a person entitled to reparatory measures, has the exclusive tight to the reparatory measure provided by the new law on reparations consisting in compensations through points according to art. 24 par. (2) - (4) from Law no. 165/2013, with its subsequent changes and additions. The *Decision 40/2016* [79] through which the formulated complaint was admitted and established that the provisions of art. 41 par. (1) from the Law no. 165/2013, with its subsequent changes and additions, are not applicable to the entitled individuals or to their authors who have obtained compensation titles issues by the Central Commission for Establishing Compensations before Law 165/2013 came into effect and who have not followed the administrative procedure stipulated in chapter $V^1$ section 1 from title VII of Law no. 247/2005 regarding reform in the fields of property and justice, as well as certain adjacent measures, with subsequent changes and additions, not respecting the deadlines regarding capitalizing on these titles. The *Decision no. 25/2016* through which the formulated complaint was admitted and established in regard to the interpretation of the provisions of art. 1 par. (2) in relation to art. 12 from Law no. 165/2013, as they were modified through Law no. 368/2013 meant to modify and supplement Law no. 165/2013, and to art. $22^1$ - $22^3$ from the *Application norms of Law no. 165/2013*[80]. It was decided that the goods that can be given as compensation are parcels, with or without constructions on them, and constructions that are finalized or not, no matter the category of the buildings for which the notification was formulated under Law no. 10/2001 regarding the judicial state of certain buildings taken over abusively during 6 March 1945-22 December 1989, republished, with its subsequent changes and additions, while the provisions of art. 12 from Law no. 165/2013, with its subsequent changes and additions, are not applicable.

On 29 April 2014, in the case of *Preda et al. versus Romania*[81] (requests no. 9584/02, 33514/02, 38052/02, 2582/03, 29652/03,3736/03,17750/03 și 28688/04), CEDO showed that a judicial and administrative practice in the application of Law no. 165/2013 has not yet been developed, since the law had only been adopted recently. Moreover, it appreciated that the doubts expressed by the plaintiffs in regard to the chancess of success of the new internal legislative instrument cannot change this conclusion. The court thus concluded that, except in the situations where there are several property titles that coexist for the same building, *Law no. 165/2013 offers*, in principle, to Romanians answerable to the law *the possibility to obtain a resolution for the complaints at an internal level*, a possibilitity that the Romanian state should use. However, on 26 February 2019, in the case of *Ana Ionescu et al. versus Romania*[82], CEDO condemned the Romanian state to 2.731.632 Euro for not respecting the right to property. The court concluded that through the application of Law no. 165/2013 an efficient remedy for granting reparatory measures for buildings taken over abusively by the communist state is not ensured.

## 5. Conclusions

Rehabilitation presupposes the victim's "return" to the state before the abuse, whether it is about recovering social or political rights, or material goods. In Romania, after the 89 Revolution what was desired was the configuration of a democratic society, based on respect for the law and for human rights. The victims who were dispossessed of properties and of their right over them during the communist period, wanted a *restoration of rights* and a *recovery of properties*.

In order to respond to the first objective established in this paper, we will appeal to mentioning Pablo de Grieff, specialist in TJ. He[83] mentions two reasons for which outlining a reparations design cannot be conceived in a limited manner, but by taking into account the society's political and social projects. A first argument would be the fact that the attorneys' work is concentrated around the behaviors that are exceptions to the norms that ensure social order. The law treaties are conceived to individually respond to human rights violations. However, in the case of a totalitarian regime such as the one in Romania, grave human rights violations did not represent an exception, but a generalized and frequent act. This is why the conception of a unilateral, limited system of reparation was not welcome or recommended, its articulation in the social and political framework would be more appropriate. A second argument focuses on the

[79] Decizia nr. 25/2016 privind examinarea sesizării formulate de Curtea de Apel Craiova - Secția I civilă, în Dosarul nr. 2.078/104/2015, in force since 14.11.2016, published in Monitorul Oficial, Part I no. 912/14.11. 2016, available at https://lege5.ro/Gratuit/geztinrxgi3q/decizia-nr-25-2016-privind-examinarea-sesizarii-formulate-de-curtea-de-apel-craiova-sectia-i-civila-in-dosarul-nr-2078-104-2015, accessed May 2019.

[80] Normele de aplicare a Legii nr. 165/2013 … op.cit.

[81] Hotărârea în Cauza Preda și alții împotriva României, Cereri nr. 9584/2002; 33514/2002; 38052/2002; 2582/2003; 29652/2003; 3736/2003,17750/2003; 28688/2004, Hotărâre definitivă ECHR/ 29.07. 2014, published in www.scj.ro no. 223/29.04. 2014, available at https://hudoc.echr.coe.int/eng#{"itemid":["001-142671"]}, accessed May 2019.

[82] Hotărârea în Cauza Ana Ionescu și alții împotriva României, Cererea nr. 19788/03 și alte 18 cereri, Hotărâre ECHR/ 26.02. 2019, available at http://ier.gov.ro/wp-content/uploads/2019/03/Ana-Ionescu-si-altii-impotriva-Romaniei.pdf, accessed May 2019.

[83] Pablo De Grieff "Justice and Reparations"… op.cit.

implementation of the reparations program. In the case where it is supported by the project of societal change, being one of its components, the possibility for it being implemented is higher. The purposes of reparations contain in themselves more than the satisfaction of individual necessities, more than a package of administrative measures. The reparations programs presuppose precisely desiderata such as recognition, civic trust, and solidarity. In the cases of generalized abuses such as those that took place in Romania, the expectations regarding the reparations packages are not to rectify just the particular cases, but also the preconditions of a rule of law, an objective that brings with itself a public, collective dimension, an idea that is found as well in the holistic approach promoted within the General theory of law.

It is true that there were two Truth Commissions that operated in Romania: the Presidential Commission for the Analysis of the Communist Dictatorship in Romania in 2006 for a period of six months, and the International Commission for Studying the Holocaust in Romania in 2004 for a year. Just as it is mentioned in studies on Transitional Justice mention, the truth and reconciliation commissions can generate more positive effects if they are created immediately after the installment of the new regime. The truth and reconciliation commissions represent a central element of the TJ process, which has the role of facilitating according to case, during transitional periods, the crossing from totalitarian regimes to democratic ones, from a state of conflict to a peace one. In the case of Romania, the reports of the two truth commissions recommend individual and collective reparations programs for the victims who were dispossessed of properties in the old regime. Considering that the two commissions operated after 5, and 6 years respectively from the 89 Revolution, it cannot be stated that the recovery of properties was established as a program taken on during a TJ process.

Thus it remained more on the shoulders of those harmed, of the victims of the old regime to put in the efforts to recover their properties. In this endeavor, as it can be deduced from the present analysis, the victims were confronted with a legislation that is in a constant change, with a lack of unity in jurisprudence, with certain syncopes in the implementation of court decisions. In an attempt to become rehabilitated, the victims appealed to both national courts and to CEDO. The present research reveals how in the case of both law no. 10/2001 and law no. 165/2013 there were numerous changes and additions that took place and there were numerous decisions given regarding the unconstitutionality of certain provisions from the laws, in the recourse in the interest of the law and in order to decipher various law matters. Moreover, the abundance of appeals made by plaintiffs to CEDO and to courts of constitutional law presents in turn a hidden risk. Sadurski[84] considers that the strong system of judicial revision can have negative connotations, with the risk for the discourse on rights to be translated from the public setting to the small, specialized world of constitutional experts. It is concluded that the legislative, political, technical and administrative limitations in the field of property restitutions in Romania have lead in many of the cases to the fragmenting of the reparations and to moving away both from the concrete form of the size of the compensation and from its symbolic meaning.

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[84] Kuti Ksongor, "Post-Communist Property Reparations: Fulfilling the Promises of the Rule of Law" … op.cit.

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# EU TRADE POLICY AFTER BREXIT. PROVISION OF PROFESSIONAL SERVICES

**Oana-Mihaela SALOMIA**[*]

**Abstract**

*The accession to the European Union has been an irreversible and unique process until the Lisbon Treaty and the recent United Kingdom withdrawal.*

*The legal consequences of such withdrawal cannot be analysed in a separated way from the economic and social ones or from the future United Kingdom status - third country as the European Commission stated - which supposes the application of the same regime as for the actual third countries in the field of the common commercial policy.*

*The new generation of the trade agreements negotiated with developed third countries such as the USA, Canada (already concluded), New Zealand, Australia, Singapore, or countries as Chile and Indonesia, contains specific dispositions on the provision of professional services with an important economic input facilitating the free movement of persons. The European Union has an exclusive competence to conclude these international agreements in accordance with the art. 3 of the Treaty on functioning of the European Union, but it remains under discussion and analysis its competence to include the recognition of the professional qualifications within these agreements or to conclude a separate one on this matter.*

**Keywords:** *United Kingdom withdrawal, international trade agreements, provision of professional services, recognition of professional qualifications, exclusive competence.*

## 1. Introduction

### 1.1. Legal framework

The free movement of persons as fundamental human right is guaranteed and regulated at European Union level and the provision of professional services is one of the important elements of this freedom.

The provision of professional services is linked with the regulation of the professions by the Member States and the recognition of the professional qualifications under the Directive 2005/36/EC; the European Commission recommends to the Member States to undertake certain reforms in the field of profession regulation for facilitating the free movement of persons and economic development. So, in this context, the provision of professional services by third countries providers must be allowed respecting the equal treatment principle, the fundamental liberties of the European Union (EU), the high-level of the providers training (the training for seven professions is harmonised at the Member States level by the Directive 2005/36/EC), the quality of provided services and the protection of consumers.

According with the art.53 and art.26 of the Treaty on functioning of the European Union (TFEU), the recognition of the professional qualifications is covered by the shared competence between Union and Member States and thus a specific international agreement must be concluded by both actors being a mixed agreement. It seems that the European Commission considers exclusive the competence of the Union to conclude an international treaty on recognition of professional qualifications since such legal document will be necessary and efficient only in the field of the commercial relations with a third country.

Nowadays, European Commission confirms that "The withdrawal of the United Kingdom does not affect decisions on the recognition of professional qualifications obtained in the United Kingdom taken before the withdrawal date based on Directive 2005/36/EC by an EU-27 Member State. As of the withdrawal date, United Kingdom nationals will be third country nationals and hence Directive 2005/36/EC no longer apply to them". The United Kingdom (UK) Government states that "The UK will ensure that professionals arriving in the UK from the EEA after the exit date will have a means to seek recognition of their qualifications. However, this will differ from the current arrangements." (EEA - European Economic Area).

The conclusion of an international trade agreement by the European Union with the United Kingdom including provisions on the professional services must be realized under the existing good practices; at the same time, it is necessary to take into account the former status of the United Kingdom without creating a more favourable regime as it happened until now in relation with the application of EU treaties (see the opt out provisions allowed to UK in different fields[1]).

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[1] Oana-Mihaela Salomia, Augustin Mihalache, "Principiul egalității statelor membre în cadrul Uniunii Europene, in *Revista "Dreptul*", no 1 (2016): 172.

## 2. Content

### 2.1. Recognition of the professional qualifications

The draft of the withdrawal agreement contains dispositions regarding the recognition of the professional qualifications done before the end of the transition period, which "shall maintain its effects in the respective State, including the right to pursue their profession under the same conditions as its nationals[2], where such recognition was made in accordance" with the Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC and the Council Directive 74/556/EEC of 4 June 1974 laying down detailed provisions concerning transitional measures relating to activities, trade in and distribution of toxic products and activities entailing the professional use of such products including activities of intermediaries.

Ongoing procedures on the recognition of professional qualifications will be solved according to the European law mentioned above.

Nowadays, according with the withdrawal draft agreement, the rules regarding the recognition of the professional qualifications are the following:

"As of the withdrawal date, United Kingdom nationals will be third country nationals and hence Directive 2005/36/EC no longer applies to them. It follows that:

- The recognition of professional qualifications of United Kingdom nationals in an EU-27 Member State will be governed by the national policies and rules of that Member State, irrespective of whether the qualifications of the United Kingdom national were obtained in the United Kingdom, in another third country or in an EU-27 Member State.
- The temporary or occasional provision of services by United Kingdom nationals in an EU-27 Member State, even if they are already legally established in an EU-27 Member State will be governed by the national policies and rules of that Member State.

Concerning EU-27 nationals, qualifications obtained in the United Kingdom (hereafter "UK professional qualifications") as of the withdrawal date are third country qualifications for the purpose of EU law. Recognition of such a qualification is no longer covered by the recognition regime of Directive 2005/36/EC (both in respect of EU citizens and of United Kingdom nationals) but, in accordance with Article 2(2) of Directive 2005/36/EC, the recognition will be governed by the national policies and rules of each of the EU-27 Member States."[3]

For the UK's Government, "The proposed new system of recognition of professional qualifications will:

- Protect recognition decisions that have already made; allow applications for recognition which have been made before exit to be concluded under the same rules as far as possible; and allow individuals to complete temporary and occasional service provision which started before exit.
- Retain a general system for recognition where UK regulators will be required to recognise EEA and Swiss qualifications which are of an equivalent standard to UK qualifications in scope, content and level.
- No longer include certain obligations on regulators such as offering compensation measures, partial access and temporary and occasional provision of services. However, it will leave regulators with the discretion to decide how to treat non-equivalent EEA or Swiss qualifications.
- Correct deficiencies in the Regulation of Professional Qualifications Regulations so that the system that is being retained can still function effectively and professionals will retain a route for recognition of their professional qualification"[4].

In the same way, "EEA lawyers will be able to practise in England and Wales under the regulatory arrangements and rules that apply to lawyers from other third countries. However, this change will mean:

- EEA and Swiss lawyers will no longer be able to provide legal activities normally reserved to advocates, barristers or solicitor under their home state professional title in England/Wales and Northern Ireland. (Reserved activities are: the exercise of a right of audience, the conduct of litigation, reserved instrument activities (conveyancing), probate activities, notarial activities and the administration of oaths)
- EEA and Swiss lawyers will no longer be able to seek admittance to the English/Welsh or Northern Irish profession based on experience"[5].

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[2] Augustin Fuerea, "BREXIT – trecut, prezent, viitor – mai multe întrebări și tot atâtea răspunsuri posibile-", Curierul Judiciar, no. 12 (2016): 633.

[3] European Commission Directorate-General For Internal Market, Industry, Entrepreneurship And Smes, Brussels, 21 June 2018, Notice To Stakeholders: Withdrawal of the United Kingdom and EU Rules in the field of regulated professions and the recognition of professional qualifications

[4] https://www.gov.uk/government/publications/providing-services-including-those-of-a-qualified-professional-if-theres-no-brexit-deal/providing-services-including-those-of-a-qualified-professional-if-theres-no-brexit-deal#recognition-of-professional-qualifications accessed March 16, 2019. '' The UK has reached agreements with Iceland, Liechtenstein and Norway, and with Switzerland, to address separation issues which include specific arrangements for the recognition of professional qualifications for these countries' nationals.''

[5] https://www.gov.uk/government/publications/providing-services-including-those-of-a-qualified-professional-if-theres-no-brexit-deal/providing-services-including-those-of-a-qualified-professional-if-theres-no-brexit-deal#recognition-of-professional-qualifications,

In Romania if the *no deal* scenario applies, the recognition of professional qualifications will be done considering the status of British citizens – if they obtain or not a legal status like the EU27 citizens[6]. As already mentioned, the Romanian competent authorities will continue to recognize the decisions pronounced before 29 March 2019 and the ongoing procedures will be solved according to the EU law in this matter[7].

The Directive 2005/36/EC has introduced three systems of the recognition of the professional qualifications in order to exercise a regulated profession in a Member State[8] but only for seven professions there are specific provisions included for the harmonisation of the training at the level of all Member States; the qualifications for these professions are automatically recognised by the competent authorities of the Member States whereas the qualifications for the other regulated professions are recognized on the general system of recognition or on the automatic recognition of the experience mentioned by the Directive. Considering the exercise of the internal competence of the Union in this domain we appreciate that an external competence could be allowed at supranational level[9]; that can be a reason for accepting this kind of external competence. Apart from that, the shared competences between EU and Member States are defined as exclusive competencies based on their exercise while the exclusive competences mentioned by the art. 3 TEU – Treaty on the European Union are defined as exclusive competencies based on their nature[10].

In this context, if a withdrawal agreement will be concluded, "During any implementation period, arrangements would be put in place with partner countries so that the UK is treated as an EU member state for the purposes of international agreements, including trade agreements…In the event of a 'no deal', there will be no implementation period. In this scenario, the government (UK) will seek to bring into force bilateral UK-third country agreements from exit day, or as soon as possible thereafter…In the event of a 'no deal', EU trade agreements will cease to apply to the UK when we leave the EU. Our intention (UK's Government) is that the effects of new bilateral agreements will be identical to, or substantially the same as, the EU agreements they replace."[11].

The withdrawal agreement doesn't contain any disposition regarding the provision of the professional services, which will be regulated through a possible separate international agreement between European Union and United Kingdom.

This kind of agreement will be negotiated and concluded by the EU in the field of the common commercial policy which is included into the exclusive competence of the Union according with the art.3 para.1 letter (e) of the Treaty on the functioning of the European Union or with para. 2[12]: "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope".

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accessed accessed March 16, 2019: "There will be a transitional period until December 2020 for Registered European Lawyers to transfer to UK title. During the transitional period Registered European Lawyers will be able to continue to practice".

[6] The Romanian Government has adopted at 19 March 2019 a Memorandum on the rights of the Britain citizens allowe by the Romanian authorities – "MEMORANDUM cu tema: Plan de măsuri privind reglementarea statutului cetățenilor britanici rezidenți în România în contextul retragerii Marii Britanii din Uniunea Europeană fără un acord" - http://gov.ro/ro/guvernul/sedinte-guvern/informatie-de-presa-privind-proiectele-de-acte-normative-aprobate-sau-de-care-guvernul-a-luat-act-in-edinta-guvernului-romaniei-din-19-martie-2019 accessed March 25, 2019.

[7] See, for France – "CHAPITRE II EXERCICE D'UNE PROFESSION SOUMISE AU RESPECT DE CONDITIONS" from *Ordonnance no 2019-76 du 6 février 2019 portant diverses mesures relatives à l'entrée, au séjour, aux droits sociaux et à l'activité professionnelle, applicables en cas d'absence d'accord sur le retrait du Royaume-Uni de l'Union européenne,* published in Journal Officiel de la République Française, 7 février 2019.

[8] Adrian Iordache, Recunoașterea profesională pentru profesii reglementate, Conference proceedings: Conferința internațională „*Fair recognition: best practices and innovative approaches*" (Ed. Institutul de Stat „Glavexpertcenter", Moscova, 2015): 47 – see "the effects of the professional qualifications".

[9] ECLI:EU:C:1971:32, Commission of the European Communities v Council of the European Communities. - European Agreement on Road Transport, 31 March 1971, case 22-70: "15. to determine in a particular case the community' s authority to enter into international agreements, regard must be had to the whole scheme of the treaty no less than to its substantive provisions . 16 such authority arises not only from an express conferment by the treaty - as is the case with articles 113 and 114 for tariff and trade agreements and with article 238 for association agreements - but may equally flow from other provisions of the treaty and from measures adopted, within the framework of those provisions, by the community institutions . 17 in particular, each time the community, with a view to implementing a common policy envisaged by the treaty, adopts provisions laying down common rules, whatever form these may take, the member states no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules . 18 as and when such common rules come into being, the community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the community legal system".

See Olivier Costa et Nathalie Brack, *Le fonctionnement de l'Union européenne* (troisième édition revue et augmentée, Editions de l'Université de Bruxelles, Bruxelles, 2017), 304 – "la théorie des pouvoirs implicites".

See Mihaela-Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia* (C.H. Beck, București, 2015) ,147.

[10] Stéphane Leclerc, *Les institutions de l'Union européenne* (5e édition, Gualino Lextenso éditions, 2014), 85.

[11] https://www.gov.uk/government/publications/existing-free-trade-agreements-if-theres-no-brexit-deal/existing-free-trade-agreements-if-theres-no-brexit-deal accessed March 16, 2019

See *Brexit Brief: Options for the UK's future trade relationship with the EU*

https://www.instituteforgovernment.org.uk/sites/default/files/publications/Brexit%20Options%20A3%20November%20update.pdf

[12] See Mihaela-Augustina Dumitrașcu, Oana-Mihaela Salomia, "The European Union as international actor: the specificity of its external competencies" in *Analele Universității din București, Seria Drept 2017* (Ed. C.H. Beck): 107.

### 2.2. Provisions of services

The provision of services is regulated at the EU level through the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market[13] which "establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services" (art. 1.1)[14].

Regarding the application of this Directive, the UK Government informs the citizens that "UK businesses providing services in the EEA would no longer be covered by the EU Services Directive. As a result, countries in the EEA could treat them in the same way as they treat third country service providers. In many EEA countries, the regime for third countries has different requirements. This could result in additional legal and administrative barriers for UK firms, such as requirements based on nationality, re-submitting information to regulators and potential loss of access to any online portal to complete mandatory applications and licenses where this is only available to EEA nationals"[15]. Also, "when the UK leaves the EU, EEA businesses will be treated like other third country service providers as the Regulations will need to be amended to comply with the UK's commitments under World Trade Organisation rules"[16].

The document „*Internal EU27 preparatory discussions on the framework for the future relationship: "Mobility"* elaborated by the European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU and presented by the Council at Brussels, 21 February 2018 mentioned the implications for mobility regarding Schengen border crossing, Visa regime, Migration, Trade in services (mobility related aspects), Social security coordination. The main consequence of the UK withdrawal is the "GATS fall-back" which supposes:

"Professional mobility remains possible for service providers falling within the Mode 4[17] categories defined in GATS, for the sectors covered

- For those persons, labour market tests ("economic needs tests") and numerical restrictions could be partially avoided
- Service suppliers and their employers do not benefit from social security coordination or any right to equal treatment
- Labour market rules of individual Member States apply in full
- Lack of recognition (e.g. of qualifications) may imply supply of a service only possible based on host state qualifications
- Mobility of persons not fitting within GATS follows the regime applicable to third-country nationals — partly harmonised (for transferees) and partly set by individual Member States."

GATS does not covered: "Recently recognised categories of skilled service providers (trainees, independent professionals, various short-term business visitors); Service providers with low- and medium-level qualifications; Subcontracting or employment-agency type work; Anyone who is not a service provider or an investor (e.g. jobseekers, workers, students)".

## 3. International trade agreements

During the last years, the European Union started to negotiate international commercial agreements with third countries which have a developed economy such as the USA, Canada, New Zealand, Australia, Singapore etc. which include specific provisions on the professional services; these agreements strengthen the EU economic position worldwide and increase the growth and competitiveness at Internal Market level. "The EU wants to help the least-developed countries and others to boost their production, diversify their economy and infrastructure, and improve their governance. The EU's trade and development policy emphasises that these countries should have ownership of their own development strategies. They need to implement sound domestic policies and make necessary domestic reforms to stimulate trade and investment, ensure that the poor benefit from trade-led growth and make sure their development is for the long-term"[18].

In the field of the common commercial policy, "There are three main types of agreements:

1. Customs Unions
   - eliminate customs duties in bilateral trade

[13] The Directive has been transposed in Romania by the Government Emergency Ordinance no. 49/2009 approved by the Law no. 68/2010.

[14] See Augustin Fuerea, *Dreptul Uniunii Europene – principii, acțiuni, libertăți* (Universul Juridic, București, 2016), 243.

[15] https://www.gov.uk/government/publications/providing-services-including-those-of-a-qualified-professional-if-theres-no-brexit-deal/providing-services-including-those-of-a-qualified-professional-if-theres-no-brexit-deal#recognition-of-professional-qualifications, accessed March 17, 2019 : "A 'No Deal' scenario will also mean changes for UK nationals providing services in person into EEA countries, whether on a short term 'fly in, fly out' basis, longer term movement to provide services to clients, or placements within other parts of the business. Businesses should check whether a visa and/or work permit is required and otherwise comply with the immigration controls in place in each Member State where the service is being provided in person".

[16] https://www.gov.uk/government/publications/providing-services-including-those-of-a-qualified-professional-if-theres-no-brexit-deal/providing-services-including-those-of-a-qualified-professional-if-theres-no-brexit-deal#recognition-of-professional-qualifications accessed March 17, 2019.

[17] https://www.wto.org/english/tratop_e/serv_e/mouvement_persons_e/mouvement_persons_e.htm accessed March 20, 2019: "The movement of natural persons is one of the four ways through which services can be supplied internationally. Otherwise known as "Mode 4", it covers natural persons who are either service suppliers (such as independent professionals) or who work for a service supplier and who are present in another WTO member to supply a service".

[18] http://ec.europa.eu/trade/policy/countries-and-regions/development/ accessed March 13, 2019.

- establish a joint customs tariff for foreign importers.

2. Association Agreements, Stabilisation Agreements, (Deep and Comprehensive) Free Trade Agreements and Economic Partnership Agreements

- remove or reduce customs tariffs in bilateral trade.

3. Partnership and Cooperation Agreements

- provide a general framework for bilateral economic relations
- leave customs tariffs as they are."[19]

Regarding the professional services and recognition of the professional qualification these agreements have included specific dispositions which stated that these aspects will be regulated by a future separated international agreement concluded by the Union. For example, the Free Trade Agreement between the European Union and the Republic of Singapore[20] mentions, in the article 8.16 Mutual Recognition of Professional Qualifications of the SECTION E Regulatory Framework Sub-Section 1 Provisions of General Application that "the relevant professional bodies in their respective territories to develop and provide a joint recommendation on mutual recognition to the Committee on Trade in Services, Investment and Government Procurement established" by the Agreement. "Such a recommendation shall be supported by evidence on:

a) the economic value of an envisaged an agreement on mutual recognition of professional qualifications (hereinafter referred to as "Mutual Recognition Agreement"); and
b) the compatibility of the respective regimes, i.e., the extent to which the criteria applied by each Party for the authorisation, licensing, operation and certification of entrepreneurs and service suppliers are compatible". After a specific verification of the conformity with the Agreement's provisions, "the Parties shall take necessary steps to negotiate, through their competent authorities or designees authorised by a Party, a Mutual Recognition Agreement".[21]

It is obvious that the Parties are European Union and the Republic of Singapore not the Member States and consequently the Union will conclude the Mutual Recognition Agreement with the Republic of Singapore not the Member States having as legal basis this exclusive competence of the Union for common commercial policy.

We appreciate that such exclusive competence in the field of mutual professional recognition can not be founded on an international trade agreement considering that at internal level this competence is shared with the Member States. The paragraph 6 of the art.207 of TFEU which establishes the uniform principles of the common commercial policy mentions very clear that "6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation"; the fundamental principle of the EU – principle of conferral of the competences has priority against other specific policy rules of the Union.

On the Agreement mentioned above, the Court of Justice of the European Union stated in its Opinion no 2/15[22] which is the domain of the exclusive competence of the Union[23].

In the light of this Opinion, it seems that the Union could have the exclusive competence to conclude an international agreement on mutual recognition of professional qualifications. The Court did not pronounce on that specific topic which will be regulated in a future separate agreement but on a joint recommendation on the mutual recognition of professional qualifications which will be set up by the competent authorities in Singapore and European Union:

"277. Since it is apparent from this opinion that all the substantive provisions of Chapters 2 to 8 and 10 to 13 of the envisaged agreement **fall within the exclusive competence of the European Union, the**

[19] http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/ accessed March 13, 2019

[20] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1980

accessed March 13, 2019: Brussels, 13 February 2019, "Agreement with Singapore set to give a boost to EU-Asia trade. The trade and investment agreements between the EU and Singapore have today received the approval of the European Parliament. The Parliament has also given its green light to the Partnership and Cooperation Agreement ".

[21] http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151743.pdf accessed March 13, 2019

[22] ECLI:EU:C:2017:376, OPINION 2/15 OF THE COURT (Full Court), 16 May 2017, accessed March 16, 2019.

See Marianne Dony, *Droit de l'Union européenn*e (septième édition revue et augmentée, Editions de l'Université de Bruxelles, Bruxelles, 2018), 662, para. 1159.

[23] https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170052en.pdf, accessed March 16, 2019: "In particular, the Court declares that the EU has exclusive competence so far as concerns the parts of the agreement relating to the following matters: • access to the EU market and the Singapore market so far as concerns goods and services (including all transport services) and in the fields of public procurement and of energy generation from sustainable non-fossil sources; • the provisions concerning protection of direct foreign investments of Singapore nationals in the EU (and vice versa); • the provisions concerning intellectual property rights • the provisions designed to combat anti-competitive activity and to lay down a framework for concentrations, monopolies and subsidies; • the provisions concerning sustainable development (the Court finds that the objective of sustainable development now forms an integral part of the common commercial policy of the EU and that the envisaged agreement is intended to make liberalisation of trade between the EU and Singapore subject to the condition that the parties comply with their international obligations concerning social protection of workers and environmental protection); • the rules relating to exchange of information and to obligations governing notification, verification, cooperation, mediation, transparency and dispute settlement between the parties, unless those rules relate to the field of non-direct foreign investment".

**provisions referred to in paragraphs 258 to 267** and 269 to 273 of this opinion also fall within that competence, for the reason set out in the previous paragraph. The same is true of Chapter 17 of the envisaged agreement, in so far as it relates to the Committee on Trade in Goods, the Committee on Sanitary and Phytosanitary Measures and the Committee on Customs."

"267. Chapter 8 of the envisaged agreement, which deals with services, establishment and electronic commerce, envisages, in Article 8.16, **that the competent authorities in the European Union and in Singapore will develop a joint recommendation on the mutual recognition of professional qualifications** and provide it to the Committee on Trade in Services, Investment and Government Procurement. That chapter also provides for cooperation regarding telecommunications (Article 8.48) and electronic commerce (Article 8.61)".

The Court's reference to a joint recommendation not to an international agreement is clear and entitles the Union and the Member States to conclude this agreement based on the recommendation (at the level of the European Union law, the recommendations are not mandatory acts according with the art. 288 TFEU).

A similar provision is included in the draft of the new Agreement with Chile[24] (SECTION B PROVISIONS OF GENERAL APPLICATION Article 5.4 Mutual Recognition of Professional Qualifications – art. 5.4 "3. On receipt of a joint recommendation, the [Committee] shall, within a reasonable time, review the joint recommendation with a view to determining whether it is consistent with this Agreement. 4. When, on the basis of the information provided for in paragraph 2, the joint recommendation has been found to be consistent with this Agreement, the Parties shall take necessary steps to negotiate, through their competent authorities or designees authorised by a Party, a Mutual Recognition Agreement"); "the EU and Chile concluded an Association Agreement in 2002, which includes a comprehensive Free Trade Agreement (FTA) that entered into force in February 2003 covering EU-Chile trade relations"[25].

"As a member of the EU, the UK currently participates in around 40 free trade agreements with over 70 countries. These free trade agreements cover a wide variety of relationships, including:

- Economic Partnership Agreements with developing nations
- Association Agreements, which cover broader economic and political cooperation
- trade agreements with countries that are closely aligned with the EU, such as Turkey and Switzerland
- more conventional free trade agreements"[26].

## 4. Future relationships between EU and UK

The article 50 of TEU mentions that the withdrawal agreement[27] will be negotiated and concluded "taking account of the framework for its future relationship with the Union"; this provision could determine the elaboration, at the same time, of two international agreements – the withdrawal agreement and the international agreement on the future relationship between UK and EU. In fact, both Parties did not work on such an approach[28] and it would be very difficult for the EU institutions to act on two directions for the first exit from the Union (the Greenland exit in 1984 had not had such major implications). In its Guidelines from 23 March 2018 "the European Council restates the Union's determination to have as close as possible a partnership with the UK in the future. Such a partnership should cover trade and economic cooperation as well as other areas, in particular the fight against terrorism and international crime, as well as security, defence and foreign policy… As regards the core of the economic relationship, the European Council confirms its readiness to initiate work towards a balanced, ambitious and wide-ranging free trade agreement (FTA) insofar as there are sufficient guarantees for a level playing field."[29] This kind of agreement would address the principal domains such as trade in goods, appropriate customs cooperation, trade in services and "access to public procurement markets, investments and protection of intellectual property rights". Also, "the future partnership should include ambitious provisions on movement of natural persons, based on full reciprocity and non-discrimination among Member

[24] EU-Chile Free Trade Agreement EU TEXTUAL PROPOSAL INVESTMENT AND TRADE IN SERVICES TITLE- http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156589.pdf, accessed March 17, 2019.

[25] http://ec.europa.eu/trade/policy/countries-and-regions/countries/chile/ , accessed March 17, 2019.

[26] https://www.gov.uk/government/publications/existing-free-trade-agreements-if-theres-no-brexit-deal/existing-free-trade-agreements-if-theres-no-brexit-deal accessed March 17, 2019.

[27] Maria-Cristina Solacolu, "The Relationship between Euratom and the United Kingdom after Brexit in *The International Conference – CKS 2018 – Challenges of the Knowledge Society* (Bucharest, 11th - 12th May 2018, 12th Edition, "Nicolae Titulescu" University Publishing House, Bucarest): 648: "In the future, thoroughly regulating the process of withdrawal from Euratom – and from the EU – should be a priority, in order to avoid a repetition of the current state of uncertainty. Particular attention should be paid to safety guidelines, ensuring the existence of a supply of time-sensitive medical resources, protecting the rights of EU citizens involved in Euratom projects and clarifying the situation of property rights over facilities and resources housed by the withdrawing state".

[28] Dony, Droit de l'Union européenne, 66, para. 102.

[29] https://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf accessed la 22.03.2019 accessed March 22, 2019: "At the same time, the European Council has to take into account the repeatedly stated positions of the UK, which limit the depth of such a future partnership. Being outside the Customs Union and the Single Market will inevitably lead to frictions in trade. Divergence in external tariffs and internal rules as well as absence of common institutions and a shared legal system, necessitates checks and controls to uphold the integrity of the EU Single Market as well as of the UK market. This unfortunately will have negative economic consequences, in particular in the United Kingdom".

States, and related areas such as coordination of social security and recognition of professional qualifications"[30].

We appreciate that it is also possible that in the case of hard Brexit/no deal scenario, the future relationship between UK and EU should be formalised through an international trade agreement based on the existing models[31] because the Member States did not have competence to conclude international trade agreements with third countries considering the exclusive competence of EU in this matter. Moreover, "the EU has offered a Free Trade Agreement[32] with zero tariffs and no quantitative restrictions for goods. It proposed close customs and regulatory cooperation and access to public procurement markets, to name but a few examples"[33] and UK did not take a clear position on that suggestion of the EU. Concerning the application of the trade policy rules, "in the event that the UK leaves the EU without a deal, from 11pm GMT on 29 March 2019, many UK businesses will need to apply the same processes to EU trade that apply when trading with the rest of the world"[34].

## Conclusions

At 21 March 2019, as reponse of the letter of the UK Prime-minister from 20 March 2019, "The European Council agrees to an extension until 22 May 2019, provided the Withdrawal Agreement is approved by the House of Commons next week. If the Withdrawal Agreement is not approved by the House of Commons next week, the European Council agrees to an extension until 12 April 2019". At 29 March, Members of the Parliament did not vote the Agreement negociated by the Prime-Minister.

In conclusion, the UK withdrawal could determine the elaboration of a new type of an international agreement; EU is competent for concluding such agreements in the field of common commercial policy including provisions on free movement of persons and services.

At the same time it seems to be obvious that the Court of Justice of the European Union did not state very clear on the possibility of the Union to conclude a separate agreement in the field of tjhe recognition of the professional qualifications which facilitates the provision of professional servicies. At this moment, the legal better solution could be the conclusion of a mixed agreementon considering the shared competence in the matter of Internal Market where the recognition of perofessional qualifications is included.

Also, it is possible that UK will benefit from a special treatment in relationship with EU leading to the elaboration of a new type of international agreement; it depends from the reaction of the EU traditional partners like the Member States of EEA or the new ones like Canada, Singapore etc.

The UK Government expresses its intention to continue allowing the same regime for the EU27 citizens as that before the withdrawal based on the principle of reciprocity. The application of the Directive 2005/36/EC continues to be very important for the UK authorities and in fact it seems to be obvious that the minimum training requirements for the seven regulated professions can not be changed neither in EU27 nor in the UK and the automatic recognition of those professional qualifications must be applied by both Parties.

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[30] https://www.consilium.europa.eu/media/33458/23-euco-art50-guidelines.pdf accessed March 22, 2019.

[31] https://www.instituteforgovernment.org.uk/summary-trade-after-brexit accessed March 22, 2019: "The European Commission has suggested that the UK faces a choice for its trading relationship post-Brexit – to become a rule taker with full market access like Norway, or have a standard free trade agreement like Canada. The UK has rejected this "stark and binary choice" between two existing models, calling for a bespoke free trade agreement. The Prime Minister rejected the Norway model on the grounds that becoming a rule taker with no formal vote would be politically unsaleable".

[32] Iuliana–Mădălina Larion, "A brief analysis on Brexit's consequences on the CJEU's jurisdiction" in The International Conference – CKS 2017 – Challenges of the Knowledge Society (Bucharest, 12th - 13th May 2017, 11 th Edition, "Nicolae Titulescu" University Publishing House, Bucarest): 480:"In the future, the UK might come again under the CJEU's jurisdiction, at least for some types of actions, like a direct action based on contractual liability47, if it concludes a contract or an international agreement with the EU, as any other third country can. For example, if the UK becomes a member of the European Free Trade Association (EFTA), the Agreement on the European Economic Area already authorises courts and tribunals of the EFTA Member States to refer questions to the Court of Justice on the interpretation of an agreement rule" .

[33] https://ec.europa.eu/commission/news/ambitious-partnership-uk-after-brexit-2018-aug-02_en accessed March 17, 2019.

[34] https://www.gov.uk/guidance/customs-procedures-if-the-uk-leaves-the-eu-without-a-deal accessed March 17, 2019.

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# THE PRINCIPLE OF PROPORTIONALITY, THE IMPLEMENTATION OF EU LAW, THE PUBLIC ADMINISTRATION. GENERAL AND PRELIMINARY ASPECTS

**Oana ŞARAMET**[*]

**Abstract**

*Fundamental principle of EU law is governed, at present, by Article 5 (4) of the EU Treaty, as well as Article 5 from the Protocol no 2 of the Lisbon Treaty, the Protocol on the application of the principle of subsidiarity and proportionality. This principle implies that the content and form of Union action shall not go beyond what is necessary to achieve objectives of the Treaties. Established constitutionally by the provisions of Article 53 (2) of the Romanian Constitution, the principle of proportionality cannot and should not be ignored in public administration, obviously. In our opinion, taken into consideration our national constitutional regulation could come off an erroneous conclusion that the proportionality concerns only the restriction of certain rights, not being necessary to govern the activity of public administration. But such an assertion cannot be supported at EU level where its action, its institutions actions and the Member States action that falls within the sphere of EU law are conditioned on the compliance with this principle. Moreover, even at national level, by the Strategy for consolidation public administration for 2014-2020, adopted by Government Decision no. 909/2014, the principle of proportionality is recognized as one of the general principles underpinning this strategy and, especially, the public administration through its activity. Also, for example, the proportionality was settled as a principle in the draft Code of Administrative Procedure, a relevant issue even if this bill did not become a law until now. In same context, after the ECJ decision in the case C-8/55 Fédération Charbonnière de Belgique v. High Authority of European Coal and Steel Community, the Court of Justice consistently recognized, in its jurisprudence, the existence and the applicability of this principle, such as is revealed by the jurisprudence of the Constitutional Court of Romania.*

*Good governance, but also the control mechanisms developed to protect and guarantee such governance requires a Member State, such as ours, the implementation of EU law by national authorities by taken into consideration even of the principle of proportionality that will focus on the policies chosen to be applied, the administrative and judicial measures applicable, the recognized, protected and guaranteed rights..*

**Keywords:** *proportionality, principle, public administration, good administration, good governance*

## 1. Introduction

Nowadays the constitution of any state provides, expressly or not, that the power owned by the people is organized on the basis of the principle of the separation and balance of powers - legislative, executive, and judicial.

Especially the contemporary period has shown and still shows us that there are reciprocal tendencies of some authorities which are exercising one of the three constitutional powers to acquire and even to exercise specific attributions of the other two powers.

In our opinion, certainly, the independence of the judiciary power must not be affected in any way by the actions of the public authorities of the other two powers.

However the increased role of the executive branch compared to that of the legislative power is a reality.

Accelerating the rhythm of everyday life requires that sometimes some attributions of legislative power, such as law-making, even be taken over by the executive branch, unfortunately not just temporarily.

In this context, we are asking ourselves this question – exercising the constitutional powers this way does not affect the balance between the powers, and then even their independence?

Thus, one of the keys to the existence of a democratic state and a state of law is to ensure the balance between the three powers - legislative, executive and judiciary, but especially the balance between the legislative and executive powers.

At the same time, the relationship between governance and administration must be respected. The governing keys belong to the legislative power, which has to determine the limits in which the governance should be accomplish by the executive authorities, including through the administration of public affairs.

Whether we are talking about good governance or good administration, or both of them, those two - governance and administration must be realised only for the benefit of the public interest, but without neglecting the principle of proportionality.

Analysing the principle of proportionality in EU law, it was pointed out that „in any proportionality inquiry the relevant interests must be identified, and there will be some ascription of weight or value of those

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interests, since this is a necessary condition precedent to any balancing operation" [1].

Starting from this statement and extrapolating, we appreciate that this principle of proportionality could and should contribute to ensuring the balance between the three powers - legislative, executive and judicial. This way it would be created an optimal framework for achieving good governance and, implicitly, good administration.

## 2. Good administration or good governance?

As we mentioned above, these two concepts - good governance and good administration - do not have the same meaning.

In our opinion, the governance should involve taking the most important political decisions to ensure the leadership of a state, and the optimal development of a nation.

In contrast, administration should aim to solve the daily problems of a community or individual person, and the public authorities, through their actions, should ensure the concrete transposition of the decisions taken by governance.

Regarding a possible definition for „good governance", it is well known that „there is no single and exhaustive definition ...nor is there a delimitation of its scope, which commands universal acceptance"[2].

This term of good governance „[i]s used with great flexibility" and „depending on the context and the overriding objective sought, good governance has been said at various times to encompass: full respect of human rights, the rule of law, effective participation, multi-actor partnerships, political pluralism, transparent and accountable processes and institutions, an efficient and effective public sector, legitimacy, access to knowledge, information and education, political empowerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance"[3].

In a draft report on the notion of „good governance"[4], the Venice Commission has noted that the definitions of „good governance", but also of „good administration", vary considerably. However, the Venice Commission could identify a set of similar elements used by these definitions, for example: „ accountability, transparency, responsiveness to the people's needs, efficiency, effectiveness, openness, participation, predictability, rule of law, coherence, equity, ethical behaviour"[5].

The authors of this draft report have concluded that „the present preoccupation with the issue appears to have originated in the World Bank and the other financial institutions, whose primary concern was to ensure that government became a reliable institution for sustainable growth"[6].

At present, we also consider that „the term of governance came to be used to define the reinventing of public administration"[7] to make it more receptive to the needs of the people. Also we agree that "good governance" is referring to a „public service that is efficient, a judicial system that is reliable, and an administration that is accountable to its public"[8].

Thus, when we are talking about good governance, we are referring to the „favourable political framework conditions for social, ecological and market oriented development as well as responsible use of political power and public resources by the state"[9].

Taking into consideration what we have mentioned until now, we could notice that when we are talking about terms like *governance* or *good governance,* theirs definition „range between social and political concerns and those of more technical economic nature"[10]. But it is also possible to distinguish

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[1] P. Craig, G. de Búrca, *EU Law. Text, cases and materials*, fifth edition, Oxford University Press, New York, 2011, p.526.

[2] See United Nations. Human Rights. Office of the High Commissioner, available at https://www.ohchr.org/en/issues/development/goodgovernance/pages/goodgovernanceindex.aspx, accessed on: 04.04.2019

[3] Ibidem

[4] European Commission for Democracy Through Law (Venice Commission), Draft Report on the notion of „good governance", on the bassis of comments by Mr. O. Kask (Member, Estonia), and Mr. A. Eide (Expert, Norway), Study no. 470/2008, CDL(2008)091, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2008)091-e, accessed on: 04.04.2019

[5] Ibidem

[6] Ibidem. In a study, an author has mentioned that „during 1980s under economic reforms, especially under globalization the use of term governance became popular with its emphasis on the process and manner of governing to the notion of sustainable development". He also has mentioned that „meanwhile, organizations such as the IMF, NGOs, the UN and its agencies, the World Bank and international media were quick to pick up the term and use it in a variety of way", and that from then on the term of good governance has appeared especially „in the vocabulary of polity and administrative reform". See: R. Tripathi, *Good Governance: origin, importance and development in India* in *International Journal of Development Research*, Vol. 07, Issue, 11, pp.16968-16970, November, 2017, p. 16968, available at: https://www.journalijdr.com/sites/default/files/issue-pdf/11084.pdf, accessed on: 04.04.2019.

[7] R. Tripathi, *op. cit.*, p. 16968

[8] It is a definition given by former World Bank president Barber Conable in World Bank 1989, p. xii, quoted by N. Maldonado in *The World Bank's evolving concept of good governance and its impact on human rights*, article submitted at Doctoral workshop on development and international organizations, Stockholm, Sweden, May 29-30, 2010, available at: https://warwick.ac.uk/fac/soc/pais/research/.../maldonado_nicole_paper-final_ii.doc, accessed on:04.04.2019, accessed on: 04.04.2019.

[9] F. Bundschuh-Rieseneder, *Good governance: characteristics, methods and the Austrian example* in *Transylvania Reviews of Administrative Sciences*, 24E, p. 27, available at: http://rtsa.ro/train s/index.php/tras/article/view/91/87, accessed on: 04.04.2019. The author underlines that the meaning of good governance „includes the process in which public institutions conduct public affairs, manage public resources and guarantee the realization of human rights", and also „accomplishes this free of abuse and corruption and with due regard for the rule of law". Ibidem

[10] F. Bundschuh-Rieseneder, *op. cit.*, p. 28.

from so different definitions, more characteristics of good governance like: „openness, participation, legitimacy, transparency, effectiveness, efficiency, accountability, availability, predictability or coherence”[11].

In our opinion all different definitions and characteristics identified by doctrine or legislation, some of them mentioned above, „are similar to and overlap with the nine „core characteristics” of good governance articulated by the United Nations Development Programme (UNDP) in 1994”[12]. In the UNDP it was stipulated that „[g]ood governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law. Good governance ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources”[13].

The bodies of the Council of Europe have tried to find the most consistent definition of good governance. We consider that one of these definitions is more comprehensive and it states that „good governance has become a model for giving real effect to democracy, the protection of human rights and the rule of law”[14].

In European Union, the European Commission has identified five principles of good governance in a White Paper on European Governance[15]: openness, participation, accountability, effectiveness and coherence.

But, „the article 41 of the Charter of Fundamental Rights of European Union stipulates that every person has a right to good administration towards the institutions or bodies of the European Union”[16].

If good governance can be understood like „a process whereby societies or organization make their important decisions, determine whom they involve in the process and how they render account”[17], „good administration is an aspect of good governance”[18].

Governance means taking fundamental decisions for the future of a nation[19] while administration is just a dimension of governance.

Analysing good administration, like an aspect of good governance, we can identify some specific elements like: impartiality, fairness, termination of proceedings within a reasonable time, legal certainty, proportionality, non-discrimination, right to be heard, effectiveness, efficiency[20].

Even if we pointed out that good governance and good administration are not similar concepts, terms, and more than that we underlined that good administration is just an aspect of good governance, we also must emphasize that both of those concepts could be related to public administration.

It is also important to mention that the principle of proportionality is a benchmark for both concepts. Thus, as we have mentioned above, this principle is a key element in studying good administration. But also „[i]n regard to checks and balances there a number of key institutions namely, parliament, the courts and the high councils of state that play a control role in the

[11] See OECD, *Managing across levels of governement*, OECD Paris, 1997, p. 60 ff; Wimmer, *Dynamische Verwaltungslehre*, Springer Verlag Wien New York, 2004, qouted by F. Bundschuh-Rieseneder, *op. cit.*, p. 28. For more details about each characterstics we have mentioned above, also see F. Bundschuh-Rieseneder, *op. cit.*, pp. 28-31.

[12] E. B. Holiday, *Perspectives on good governance: nature, importance, practice and challenges*, lecture at the University of Utrecht, The Netherlands, February 18, 2013, p. 7, available at: http://www.kabgsxm.com/lecture%20good%20governance%20Utrecht%20february%2018%202013-final.pdf, accessed on: 04.04.2019.

[13] UNDP, *Good Governance – and sustainable human development*, quoted in European Commission for Democracy Through Law (Venice Commission), Draft Report on the notion of „good governance”, *op. cit.*, p. 6.

[14] European Commission for Democracy Through Law (Venice Commission), Draft Report on the notion of „good governance”, *op. cit.*, p. 3. For more details, see: *Council of Europe Strategy on Innovation and Good Governance al Local Level, MCL-15(2007)/8*, adopted at the Conference of European Ministers responsible for local and regional government, at their fifteenth session in October 2007, available at: http://www.namcb-org.bg/gga/images/2015/06.2015/MCL-15(2007)8_EN.pdf, accessed on: 04.04.2019. This strategy also lists twelve principles of good democratic governance, like: effectiveness, efficiency, openness, transparency, accountability or responsiveness.

[15] The White Paper on European Governance is available at: https://ec.europa.eu/europeaid/european-governance-white-paper_en, accessed on: 04.04.2019.

[16] European Commission for Democracy Through Law (Venice Commission), Draft Report on the notion of „good governance”, op. cit., p. 3. The article 41 of the Charter of Fundamental Rights of European Union stipulates: 1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. 2. This right includes: a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions. 3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

[17] J. Graham, B. Amos and T. Plumptre, *Principles for good governance in the 21st century*, Institute on Governance, Ottawa, Ontario, Canada, 2003, quoted by D. Hermana, *The Role of Public Administration Ethics in Achieving Good Governance in Indonesia* in *The Social Sciences* 12 (12): 2365-2368, 2017, p. 2366, available at: http://docsdrive.com/pdfs/medwelljournals/sscience/2017/2365-2369.pdf, accessed on: 04.04.2019.

[18] Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration, adopted by the Committee of Ministers on 20 June 2007 at the 999bis meeting of the Ministers' Deputies, p. 3, available at: https://rm.coe.int/16807096b9, accessed on: 04.04.2019.

[19] E. Slabu, Buna administrare în spațiul administrativ european. (Good administration in European administrative space), rezumat al tezei de doctorat (summary of PhD thesis), p. 4, available at: https://drept.unibuc.ro/dyn_doc/oferta-educationala/scoala-doctorala/rezumat-teza/rezumat2017SlabuElisabetaromana.pdf, accessed on: 04.04.2019.

[20] European Commission for Democracy Through Law (Venice Commission), Draft Report on the notion of „good governance”, *op. cit.*, p. 11.

realization of good governance. The parliament as the representative of the people and charged with the control of the government must play a determining role in the realization of good governance"[21]. But the authorities that are exercising their specific powers to control the realization of good administration, they also have to analyse even the proportionality of the measures or actions decided by the public authorities, especially by the authorities from the public administration.

## 3. Principle of proportionality – the benchmark of good administration

Identified and developed by the German administrative law, especially by doctrine and jurisprudence, from the beginning of the twentieth century, the principle of proportionality has not found its legal consecration in the constituent treaties of the three original European Communities.

But, in time, the Court of Justice of the European Coal and Steel Community has been obliged to examine various aspects of the principle of proportionality in various cases. Even though the Court has not mentioned expressly that it was about the principle of proportionality, we can identify different aspects of this principle as they were highlighted by German administrative courts.

In the German system, the courts have developed a uniform structure for controlling the principle of proportionality, the application of which is also a uniform one[22], to answer to the following requirements that attesting to or not respecting the principle:

- legitimate aim[23]- in administrative law, the identification of the aim is more than a didactic effort, because the administration – in applying a statute – has to pursue the aim that the legislator wanted to achieve by adopting the statute[24], and this is because the discretionary power of the public administration must not exceed the limits of legality;
- suitability (compatibility) of the measure[25]–the assessment of this requirement of the principle of proportionality should not reflect how optimal is the measure taken by the public administration, but rather whether it is probable that the aim of the measure will be achieved or at least that its achievement is encouraged, fostered[26];
- necessity[27]- means that, among several measures that are comparably effective, the administration has to choose the one measure that is the least burdensome for the addressee[28]. This requirement of the necessity of the measure to be answered clearly and correctly by the administration for application of the principle of proportionality has been „the historical nucleus"[29] of this principle and „it has remained the center of its gravity until today"[30];
- - adequacy (adequacy or proportionality *stricto sensu*)[31]– „means that in an over-all balance of all relevant factors, the infringement of the rights of the addressee of the administrative measure has to be proportionate in relation to the advantages for the general public"[32].

The principle of proportionality „was not imported" *mutatis mutandis* from German law into Community law, first of all, different component parts have been taken over by the Court of Justice as we can see in some of its judgments.

The European Court of Justice has justified its particular approach by asking itself: „Does that mean that the fundamental principles of national legal systems have no function in Community law? No. They contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case-law an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual. In that sense, the fundamental principles of the national legal systems contribute to enabling Community law to find in itself the resources necessary for ensuring, where needed, respect for the fundamental rights which form the common heritage of the Member States. "[33]

Thus, in the Case Fédération Charbonnière de Belgique v High Authority of the European Coal and

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[21] E. B. Holiday, *op. cit.*, p. 18.

[22] N. Marsch, V. Tünsmeyer, *op. cit., apud The judge and the proportionate use of discretion: A comparative law study*, Ronledge Research EU Law, edited by S. Ranchordás, B. de Waardeds, 2016, p. 32.

[23] Ibidem.

[24] Ibidem.

[25] Ibidem.

[26] See N. Marsch, V. Tünsmeyer, *op. cit., apud The judge and the proportionate use of discretion: A comparative law study*, Ronledge Research EU Law, edited by S. Ranchordás, B. de Waardeds, 2016, p. 32.

[27] N. Marsch, V. T., *op. cit., apud The judge and the proportionate use of discretion: A comparative law study*, Ronledge Research EU Law, edited by S. Ranchordás, B. de Waarded, 2016, p. 33

[28] See N. Marsch, V. Tünsmeyer, *op. cit., apud The judge and the proportionate use of discretion: A comparative law study*, Ronledge Research EU Law, edited by S. Ranchordás, B. de Waardeds, 2016, p. 33

[29] I. Kraft, *Der Grundsatzder Verhältnismäßigkeit im deutschen Rechtsverständnis*(2007), BDVR-Rundschreiben p. 14, in N. Marsch, V. Tünsmeyer, *op. cit., apud The judge and the proportionate use of discretion: A comparative law study*, Ronledge Research EU Law, edited by S. Ranchordás, B. de Waardeds, 2016, p. 33

[30] F. Ossenbühl, *op. cit.*, p. 618, în N. Marsch, V. Tünsmeyer, *op. cit., apud The judge and the proportionate use of discretion: A comparative law study*, Ronledge Research EU Law, edited by S. Ranchordás, B. de Waardeds, 2016, p. 33

[31] N. Marsch, V. Tünsmeyer, *op. cit., apud The judge and the proportionate use of discretion: A comparative law study*, Ronledge Research EU Law, edited by S. Ranchordás, B. de Waardeds, 2016, p. 33

[32] Idem, pp. 33-34

[33] Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community (C-8/55, ECLI:EU:C:1956:11), p. 299

Steel Community[34], analysing the reduction or withdrawal of equalization as regards certain undertakings by taking into consideration different arguments of the applicant, the Court of Justice has mentioned also that „equalization must, therefore, not exceed the limits of what is strictly necessary in order to neutralize to a certain extent the effects of the disadvantage resulting from those differences, which does not imply a guarantee that the original level of receipts will be maintained". Also, responding to another argument of the applicant, the Court has underlined that „[i]n accordance with a generally accepted rule of law such an indirect reaction by the High Authority to illegal action on the part of the undertakings must be in proportion to the scale of that action"[35].

In another relevant case, analysing even the possible violation of the principle of proportionality, in his Opinion, Mr. Dutheillet de Lamothe concerning the Case 11/70[36] of the European Court of Justice, has stated that this principle in the one „which citizens may only have imposed on them, for the purposes of the public interest, obligations which are strictly necessary for those purposes to be attained".

In time, by its judgments, European Court has acknowledged the principle of proportionality itself.

Therefore, in different judgments, it has been mentioned that „[t]he Court has consistently held that the principle of proportionality is one of the general principles of Community law"[37]. In this particular case, the Court has mentioned that „[B]y virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued"[38].

Meanwhile „the principle of proportionality acquired the status of a treaty when the Treaty of Maastricht entered into force"[39], and now this principle „is one of the few principles expressed explicitly in the European Union's acts"[40].

In another case[41], „[d]ealing with the question whether a Member State may make provision for a general, indefinite and automatic ban on exercising civil rights that also applies to the right of citizens of the Union to vote in elections to the European Parliament"[42], the Court has established that „Article 52(1)[43] of the Charter accepts that limitations may be imposed on the exercise of rights such as those set forth in Article 39 (2) of the Charter, as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others". So in the case in point, the deprivation of the right to vote was provided for by law[44], and also it did not call into question as such the right to vote referred to in Article 39(2) of the Charter of Fundamental Rights since it has the effect of excluding certain persons, under specific conditions and on account of their conduct, from those entitled to vote in elections to the

[34] Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community (C-8/55, ECLI:EU:C:1956:11), p. 306.

[35] Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community (C-8/55, ECLI:EU:C:1956:11), p. 299.

[36] Internationale Handelsgesellschaft mbH v Einfuhr – und Vorratsstelle für Getreid und Futtermittel (C-11/70, ECLI:EU:C:1970:100).

[37] The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others (C-331/88, ECLI:EU:C:1990:391), paragraph 13.. But before this judgment, in another one – Bela-Mühle Josef Bergmann KG v Grows-Farm GmbH & CO. KG - (C-114/76, ECLI:EU:C:1977:116), the principle of proportionality has been mentioned and analysed in the decision of Court, at paragraph 5. More than that, in this last judgment, other European institutions have referred to the principle of proportionality. Therefore, the Council and the Commission have pointed out that „ [t]he principle of proportionality is not a purely abstract one. It leaves the legislature with plenty of room for manoeuvre in deciding whether the legislative measure concerned, viewed in its context, is in the circumstances proportionate to the objective pursued. " (See paragraph 1 letter d) from Written observations submitted to the Court) In the same sense, these two institutions have shown that [t]he general principle of proportionality must be the only test in determining whether the infringement of this fundamental right serves a purpose which is in itself acceptable, whether it is such as to enable this objective to be attained and whether it does not constitute an arbitrary and intolerable burden". (See paragraph 2 letter d) from Written observations submitted to the Court)

[38] The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others (C-331/88, ECLI:EU:C:1990:391), paragraph 13.

[39] J. Długosz, *The principle of proportionality in European Union Law as a Prerequisite for Penalization* in Adam Mickiewicz University Law Review, DOI 10.14746/ppuam.2017.7.17, p. 283, available at: http://ppuam.amu.edu.pl/uploads/PPUAM%20vol.%207/Dlugosz.pdf, accessed on: 04.04.2019.

[40] Ibidem. See article 5 (4) of the Treaty of European Union Law: „Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality".

[41] Paragraph 46 from (Delvigne Case) – Thierry Delvigne v Commune de Lesparre-Médoc, Préfet de la Gironde (C-650/13, ECLI: EU:C:2015:648).

[42] Court of Justice of the European Union, Annual Report 2015. Judicial Activity, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/rapport_annuel_2015_activite_judiciaire_en_web.pdf, accessed on: 20.03.2019, p. 12.

[43] This article regulates about the scope of guaranteed rights, and in paragraph 1 stipulates that „ [A]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. "

[44] See Court of Justice of the European Union, *Annual Report 2015. Judicial Activity, op. cit.*, pp. 12-13

Parliament [45]. In this context, and more important for our research, the Court also underlined that „such a limitation is proportionate in so far as it takes into account the nature and gravity of the criminal offence committed and the duration of the penalty and in so far as national law provides for the possibility of a person who has been deprived of the right to vote applying for, and obtaining, the lifting of that measure"[46]

In a recent case[47] with further reference to the migration crisis, on 6 September 2017, the Grand Chamber of the Court delivered its judgment in which it dismissed in full the actions seeking annulment of Council Decision 2015/1601 establishing provisional measures for the mandatory relocation of asylum applicants[48]. „The Council had adopted that decision on the basis of Article 78(3) TFEU in order to help Italy and Greece deal with the massive inflow of migrants in the summer of 2015. It provided for the relocation from those two Member States to other Member States, over a period of two years, of almost 120 000 persons in clear need of international protection. Slovakia and Hungary, which had voted against the adoption of that decision in the Council, asked the Court to annul the decision. In support of their actions, they argued, first, that the adoption of the contested decision was vitiated by errors of a procedural nature or was founded on an inappropriate legal basis and, secondly, that the decision was neither a suitable response to the migration crisis nor necessary for that purpose"[49]. In this judgment, concerning the principle of proportionality, the Court has established that „according to settled case-law of the Court, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued"[50]. Thus, in this context, „[t]he objective of the relocation mechanism provided for in the contested decision, in the light of which the proportionality of that mechanism must be considered, is, according to Article 1(1) of the decision, read in conjunction with recital 26 thereof, to help the Hellenic Republic and the Italian Republic cope with an emergency situation characterised by a sudden inflow, in their respective territories, of third country nationals in clear need of international protection, by relieving the significant pressure on the Greek and Italian asylum systems"[51]. The Court has also ruled on that „it cannot be denied that the contested decision, in so far as it includes provision for a compulsory distribution between all the Member States of migrants to be relocated from Greece and Italy (i) has an impact on all the Member States of relocation and (ii) requires that a balance be struck between the different interests involved, account being taken of the objectives which that decision pursues. Therefore, the attempt to strike such a balance, taking into account not the particular situation of a single Member State, but that of all Member States, cannot be regarded as being contrary to the principle of proportionality"[52].

In another case[53] the Court has ruled on „the chargeability conditions for excise duty, within the meaning of the first paragraph of Article 9 of Directive 2008/118 concerning the general arrangements for excise duty, interpreted in the light of the principle of proportionality"[54]. Thus, the Court has reminded that „as the Advocate General pointed out in point 32 of her Opinion[55], in the exercise of the powers conferred on them by EU law, the Member States must comply with the general principles of law among which are, in particular, the principle of proportionality which the Commission considers has been breached in the present case"[56].

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[45] Ibidem

[46] Ibidem

[47] Slovakia and Hungary v Council (C-643/15 and C-647/15, EU:C:2017:631)

[48] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248, p. 80)

[49] See Court of Justice of the European Union, Annual Report 2017. Judicial activity. Synopsis of the judicial activity of the Court of Justice and the General Court, 2018, pp. 46-47, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/_ra_2017_en.pdf, accessed on: 04.04.2019.

[50] Slovakia and Hungary v Council (C-643/15 and C-647/15, EU:C:2017:631) paragraph 206.

[51] Slovakia and Hungary v Council (C-643/15 and C-647/15, EU:C:2017:631) paragraph 212.

[52] Slovakia and Hungary v Council (C-643/15 and C-647/15, EU:C:2017:631) paragraph 290.

[53] Commission v Portugal (C-126/15, EU:C:2017:504)

[54] See Court of Justice of the European Union, Annual Report 2017, op. cit., p. 66. „In this case, an action for failure to fulfil obligations had been brought before the Court seeking a declaration that, by subjecting packets of cigarettes to a prohibition on marketing and sale to the public at the end of the third month of the year following that which appears on the marking affixed, the Portuguese Republic had failed to comply with its obligations under that directive and with the principle of proportionality" (See Court of Justice of the European Union, Annual Report 2017, op. cit., p. 66).

[55] In this Opinion, the Advocate General has underlined that „[t]he Court usually begins its examination of the proportionality of a measure in the field of indirect taxation by stating that the Member States must employ means which, while enabling them effectively to attain the objectives pursued by their domestic laws, on the one hand, cause the least possible detriment to the objectives and principles laid down by the relevant EU legislation, on the other. In accordance with a more precise formulation of the requirements imposed by the principle of proportionality that has been established by case-law, a measure must be appropriate for attaining the legitimate objectives pursued by it and must not go beyond what is necessary to achieve those objectives. When there is a choice between several appropriate measures, recourse must be had to the least onerous; furthermore, the disadvantages caused must not be disproportionate to the aims pursued." Commission v Portugal. Opinion of Advocate General Kokott, delivered on 27 October 2016 (C-126/15, EU:C:2016:822), paragraph 33

[56] Commission v Portugal (C-126/15, EU:C:2017:504) paragraph 62.

From the above-mentioned cases and not only, we can see that the Court of Justice of the European Union has analysed the compliance and application of the principle of proportionality in multiple and varied areas like: the common agriculture policy, the competition law in European Union, the free movement of workers, tax provisions from the European Union law, common foreign and security policy, etc. In these cases, the Court of Justice has examined compliance with the principle of proportionality in governance or administration by the European Union's institutions, bodies, offices or agencies, inter alia, in order to make it possible to ensure good governance and good governance within European Union and, implicitly, within the Member States. Even by sanctioning of any breach of the principle of proportionality, the Court of Justice contributes, exercising of its specific competence, to respecting the institutional balance in the European Union.

## 4. Conclusions

The authorities from the executive branch participate in the governance of a state, mainly through the realization of its internal and external policy and less as the deciding factor of this policy.

However, to ensure the implementation of the domestic and foreign policy of the country, the same authorities, generically identified in this context as public administration, exercise the general management of public administration, but also achieve specific administrative activities, so their contribution to the right to good administration it will be essential in any state of law.

But a right of appreciation is recognized for the authorities and institutions from public administration. On the other hand, exercising this discretionary power, the public administration authorities may infringe the principle of proportionality. But, the acts they issue exercising of their competence, the public administration authorities must not only affect the legality, but also the opportunity. In our opinion this is the moment when, public administration authorities, first of all, have to ensure the compliance and the enforcement of the principle of proportionality.

So, if „the function of the principle of proportionality is to control the manner in which the European Union exercises its power, both in relation to Member States and individuals, and to assess the activities of those states”[57], we appreciate that this function should be adapted at national level and public administration authorities should exercise theirs power taking into consideration this principle in relation with individuals, legal persons or other public authorities. This way it will be easy for any state to ensure good governance and, also, good administration for everyone.

Through this study we initiated a research on the principle of proportionality and its importance in European Union law emphasized by legislation, the case-law of the Court of Justice, and doctrine.

This way, we wanted to highlight the relevance of this principle in achieving good governance, but above all good administration because it is important to develop new regulations regarding this principle in our national legislation.

First of all, we consider that it is appropriate to be mentioned, expressly, in our Constitution this principle of proportionality and also its meaning. Now we have just a reference of proportionality in the Article 53 paragraph 2 of Romanian Constitution[58].

In the Administrative Code that was adopted by our Parliament, but was declared unconstitutional by Romanian Constitutional Court[59], the legislative authority has provided a definition[60] for the principle of proportionality, and has mentioned about proportionality in other articles[61].

Even if by the Strategy for consolidation public administration for 2014-2020, adopted by Government Decision no. 909/2014[62], the principle of proportionality is recognized as a general principle of public administration in relation to its own activity[63]. We appreciate that the indirect references[64] to proportionality that we can find in Law no. 554/2004 of the contentious administrative, are not enough to ensure full implementation of this principle, and also of the right of good administration.

We have the same opinion regarding the right to good administration, appreciating that it is mandatory to establish it, expressly, even in our Constitution.

[57] J. Długosz, *op. cit.*, p. 285.

[58] According to this provision restriction on the exercise of certain rights or freedoms shall only be ordered if necessary in a democratic society and the measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom.

[59] See Decision no 681 from November 6, 2018, published in Official Gazette of Romania, Part I, no 190 from March 11, 2019.

[60] Article 9 from the Administrative Code has provided that the principle of proportionality represents: „The forms of activity of the public administration authorities must be appropriate to the satisfaction of a public interest and balanced in terms of effects on individuals. The provisions or measures of the public administration authorities and institutions are initiated, adopted, issued, as the case may be, only after assessing the needs of public interest or the problems, as the case may be, the risks and impact of the proposed solutions”. Proportionality has been mentioned even like principle of administrative liability in Article 574 paragraph 2.

[61] See, for example, Article 313 letter c) regarding the proportionality in concession contract for goods public property.

[62] Decision no. 909/2014 was published in Official Gazette of Romania, Part I, no 834 bis from November 17, 2014.

[63] In this Strategy, the principle of proportionality is defined as follows - any action taken must be appropriate, necessary and appropriate to the intended purpose. See Strategy for consolidation public administration for 2014-2020, p. 18, available at: http://www.dpfbl.mdrap.ro/documents/strategia_administratiei_publice/Strategia_pentru_consolidarea_administratiei_publice_2014-2020.pdf, accessed on: 04.04.2019

[64] See, for example, Article 2 paragraph 1 letter n) form this law where excess of power is defined by exercising the power of discretion of the public authorities by infringement of the limits of competence provided by law or by infringement of the rights and freedoms of citizens

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# COMPARISON BETWEEN THE LEGAL PARTICULARITIES OF ROMANIA'S AND THE UNITED KINGDOM'S MEMBERSHIP OF THE EUROPEAN UNION

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**Abstract**

*Since its early accession to the European Economic Community (the predecessor of the European Union), the United Kingdom has, at times, shown itself reluctant to fully integrate and adopt the acquis communautaire. The UK has chosen to negotiate several opt-outs – more than any other Member State – regarding certain EU policies, with notable examples being the Monetary Union and the Schengen Agreement. Despite being granted such exemptions, the UK has remained a more sceptical member of the EU and has become the first to ever invoke the applicability of Article 50 of the Treaty on European Union, starting the process of withdrawal from the organisation. According to the terms provided by Article 50, the completion of said process should take place in the first half of 2019, coinciding with the rotating Presidency of the Council being taken over by Romania, who only joined the EU in 2007. Its legal standing is noticeably different compared to that of the UK: Romania's participation in the aforementioned EU policies, which the UK has opted out of, is mandatory, but conditioned by the fulfilment of specific criteria. Romania is also, alongside Bulgaria, the object of certain safeguard measures designed to address the specific issues faced by the two states.*

*The purpose of this article is to compare certain legal particularities that characterise Romania's and the United Kingdom's membership of the EU, and to determine their consequences with regard to each of the two states' relationship with the organisation, as well as to the complex position the EU finds itself in during the first half of 2019.*

**Keywords:** *Opt-out – Integration – Area of Freedom, Security and Justice – Schengen Agreement – Economic and Monetary Union*

## 1. Introduction

The United Kingdom, while a strong proponent of the free market and of the liberalisation of trade, has often been considered one of the more reticent Member States with regard to the integration process and the transfer of powers toward the European Union, starting with its refusal to participate in the founding of the European Communities[1] - a decision which has since been called a mistake by some historians[2] – and continuing, after the UK's eventual accession, with its attempts to steer the organisations towards enlargement, as opposed to the deepening of the integration process[3]. Several times, when other Member States agreed upon a new or enhanced form of integration, the UK chose not to participate and was granted an opt-out. While not the only state to enjoy such benefits, it became the Member State with most opt-outs[4], regarding the Schengen Area, the Economic and Monetary Union, the Charter of Fundamental Rights of the European Union and the area of freedom, security and justice. This feeling of detachment from the European Union, reflected in the general population, became more and more accentuated over the years and culminated, in 2016, with the referendum regarding the UK's withdrawal from the EU[5], when a little under 52% of the voters decided that they wanted the state to leave the organisation. This decision came about despite the fact that, a few months prior to the referendum, the UK's government had negotiated with the EU and had managed to obtain several desired changes regarding EU legislation[6].

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[1] The United Kingdom decided not to take part in the Schuman Plan, that lead to the establishment of the European Coal and Steel Community (ECSC) in 1952, and later withdrew from the negotiations held at Messina regarding the creation of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). The UK finally joined the European Communities in 1973; its first application to join the European Communities had been made in 1961, and its second in 1967, but both had been vetoed by France.

[2] Helen Parr, *Britain's Policy Towards the European Community. Harold Wilson and Britain's world role, 1964–1967*, Routledge, 2006, p 1.

[3] The United Kingdom's preference for a less involved form of cooperation lead to its founding of the European Free Trade Association, in 1960, as an alternative to the EEC. It soon became clear, however, that the UK's economic interests would be better served as part of the integration-based EEC, especially due to the fact that trade with the Commonwealth countries – who had traditionally been the UK's preferred economic partners – had entered a decline. See Helen Parr, *op. cit.*, p. 122.

[4] Three other Member States currently have opt-outs: Denmark has three (regarding Defence, the Economic and Monetary Union and the Area of freedom, security and justice), the Republic of Ireland has two (regarding the Schengen Agreement and the Area of freedom, security and justice) and Poland has one (regarding the Charter of Fundamental Rights of the European Union). Noticeably, all opt-outs concern the same few areas of competence.

[5] It was not the first referendum the UK held regarding this issue. In 1975, two years after the UK had become a member of the European Communities, a referendum was called regarding said membership. That referendum had a significantly different outcome: two-thirds of the electorate expressed support for the UK's accession to the Communities.

[6] For more on the results of these negotiations, see Andrew Glencross, *Why the UK Voted for Brexit. David Cameron's Great Miscalculation*, Palgrave Macmillan, 2016.

A state that has benefited from the UK's push toward the enlargement of the European Communities is Romania, who became a Member State in 2007, alongside Bulgaria, following a general move toward integrating countries from Eastern Europe in the EU[7]. Upon its accession to the organisation, Romania was made the subject of a series of special conditions and its participation in the Schengen Area and in the Monetary Union was deferred until the state would fulfil the necessary conditions. Twelve years after its accession, Romania has still not become a member of the Schengen Area and has not adopted the Euro.

This article will present and compare the relationship between the EU and the United Kingdom and Romania, respectively, with regard to these areas of policy where the process of integration has proven more complicated, either due to the state's reticence to fully participate, in the UK's case, or the state's failure to fulfil the required conditions, in Romania's case, with a view to identify the causes and potential solutions to this state of affairs.

## 2. The Schengen Area

The European Communities were founded in the 1950s and took the Member States through an intense process of integration that involved significant changes in national legislation, an economic boom, and several clashes between European leaders based on the differing views regarding the future direction of the Communities[8]. In comparison to this eventful and tumultuous period in European history, the late 1970s and the first half of the 1980s have been called "a period of relative political stagnation in the EEC".[9] While the first steps towards the realisation of the single market had been taken by the implementation of the free movement of goods between 1957 and 1968, the free movement of capital, services and persons were properly put into practice only through the Treaty of Maastricht.[10]

An important step was taken in 1985, with the signing, on 14 June, of the Schengen Agreement by five Member States of the European Communities: France, Germany and the Benelux Economic Union (comprised of Belgium, Luxembourg and the Netherlands). This Agreement was the result of several debates regarding, in particular, the free movement of people between the Member States and the definition of this concept, as well as that of the concept of citizenship[11]. Some Member States held the view that the freedom of movement applied only to their own citizens, which meant that border controls needed to be upheld. Other Member States considered that the freedom of movement should be applied to other citizens as well, and that the territory of the European Communities should be frontier-free.[12] This would necessitate, in turn, particularly thorough controls at the external borders of the European Economic Community (presently, of the EU) as well as the establishment of a common policy regarding visas, asylum and the status of refugees.[13] The Agreement defined several important notions, regulated the way border controls were to be carried out and laid out several rules on the matter of visas, but was not part of the European *acquis* and was not mandatory for the Member States of the Communities who had not signed it.

The Schengen Agreement was later supplemented by the Schengen Convention,[14] signed on 19 June 1990, which concerned the Agreement's implementation. The Convention was integrated in 1999 in the EU's legal framework by means of a Protocol annexed to the Treaty of Amsterdam[15] and allowed for the elimination of all border controls between Member States and the creation of a single external border, where all controls would be carried out according to a unified procedure.[16] Consequently, the policy regarding visas, asylum and border control were included in the *acquis communautaire*[17] as part of the area of freedom, security and justice, and all Member States, except those with opt-outs, became legally

[7] Ten states, most of them from the former Soviet area of influence, had joined the organisations in 2004.

[8] The French President, Charles de Gaulle, envisioned an intergovernmental Community, where the interests of the Member states took precedence, while German-born Walter Hallstein, one of the founding fathers of the Communities and the first President of the Commission of the EEC, supported a supranational approach and a federal Europe.

[9] Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, Sixth Edition, Oxford University Press, 2015, p. 7

[10] Paul J. J. Welfens, *An Accidental Brexit. New EU and Transatlantic Economic Perspectives, Palgrave Macmillan*, 2017, p. 265.

[11] With regard to the notion of citizenship, the Court of Justice stated that the matter remains strictly in the competence of the Member States and must be settled in accordance with their national law. See Massimo Condinanzi, Allessandra Lang, Bruno Nascimbene, *Citizenship of the Union and Free Movement of Persons*, Martinus Nijhoff Publishers, 2008, p. 6. The United Kingdom defined the term "national", referring to those who enjoyed freedom of movement, as including "British citizens; persons who are British subjects and have the right of abode in the United Kingdom, and British Dependent Territories citizens who acquire their citizenship from a connection with Gibraltar. Consequently, other British Dependent Territories citizens and British overseas citizens are excluded". In a unilateral declaration, Denmark stated that EU citizenship is different from the concept of Danish citizenship, as defined by its national law.

[12] Augustin Fuerea, *Manualul Uniunii Europene*, Sixth Edition, Universul Juridic, 2016, p. 50.

[13] Massimo Condinanzi, Allessandra Lang, Bruno Nascimbene, *op. cit.*, p. 205.

[14] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

[15] The Treaty of Amsterdam was signed in 1997 and entered into force in 1999.

[16] Augustin Fuerea, *op. cit.*, p. 54.

[17] The Schengen *acquis* was defined by the Council Decision 1999/435/EC concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis.

bound to join the Schengen Area upon fulfilling the technical requirements.

Since 1985, almost all other Member States of the Communities have integrated the Schengen *acquis*, starting with Italy, in 1990, and even the states that are part of the European Free Trade Association[18] have decided to participate. However, when signing the Treaty of Amsterdam, the Republic of Ireland and the United Kingdom obtained opt-outs regarding the Schengen *acquis*.[19] The Member States negotiated protocols saying they could decide, on a case by case basis, whether to participate in certain acts adopted regarding this matter and to implement them (in the case of the latter two states, the unanimous vote of all states that are party to the Agreement would be necessary). In 1999, the UK asked to participate in certain provisions of the Schengen *acquis*, such as police cooperation, and its request was approved in 2000.[20] The Republic of Ireland followed with a similar request, which was approved in 2002.[21]

The UK's reasoning regarding its decision to opt out of the Schengen *acquis* was that, being an island nation, it had the possibility to better control the access of third country nationals onto its territory.[22] Moreover, an inquiry held by the UK's House of Lords Select Committee on the European Communities had found that, while the abolition of internal frontiers with respect to goods, services and capital was fully possible and advantageous, the elimination of border controls on persons would represent a security risk.[23]

At present, the only Member States of the European Union – excluding the ones who have opt-outs – who do not participate in the Schengen Area are Cyprus[24], Bulgaria, Romania and Croatia. All four states are legally bound to integrate the Schengen *acquis*, according to the Treaties of Accession.[25]

Romania's request to participate in the Schengen Area was approved by the European Parliament in 2011, but was denied by the Council, with particular opposition from the Dutch and Finnish representatives. In December 2018, the European Parliament once again voted – unanimously – in favour of allowing both Bulgaria and Romania to join the Schengen Area. A unanimous decision from the European Council is needed in order to achieve this aim.

While it is to be expected that a recently joined state will not have yet fulfilled the requirements for integrating the Schengen acquis, the debates in Romania's case have been centred on political arguments as much as on technical ones and, as such, the possibility of its joining the Schengen Area remains hard to predict.

## 3. The Economic and Monetary Union

The signing and ratifying of the Single European Act (SEA) was another sign of the quickening pace of European integration, with its stated objective being that of creating, by the end of 1992, a single market where all impediments to the free movement of goods, persons, services and capital were removed[26]. The SEA was signed in 1986 by all Member States, despite the differing views on the relevance of the Treaty: France and Germany saw it "as a means of advancing the cause of political, economic and monetary integration". This view was strongly supported by the Commission, led by French-born Jacques Delors, who proposed, in 1989, "a three-stage plan for full economic and monetary union" and "a social charter of workers' and citizens' rights".[27]

These plans were debated in 1990 and led to the signing, in Maastricht, of the Treaty on European Union (TEU), bringing about several significant reforms, such as "provisions for a Social Chapter (previously known as the Social Charter) and for a common foreign and security policy (CFSP) which envisaged a more influential role for the EU in the international system".[28] Of particular relevance was the Economic and Monetary Union (EMU), which would be built in three stages. The final stage would have to be reached no later than 1999, with as many members as were found to satisfy the convergence criteria for joining the Euro area.[29] The idea of the EMU had existed for many years, but it was always considered that its realisation would necessitate a stronger political

[18] Iceland, Liechtenstein, Norway and Switzerland.

[19] Denmark is a special case. Despite being party to the Schengen Agreement, it is not legally bound by its provisions and can refuse to implement them. See Augustin Fuerea, *op. cit.*, p. 62.

[20] Council Decision 2000/365/EC concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis. For more information, see Augustin Fuerea, *op. cit.*, p. 63.

[21] Council Decision 2002/192/EC concerning Ireland's request to take part in some of the provisions of the Schengen acquis.

[22] Elspeth Guild, "The Single Market, Movement of Persons and Border", *The Law of the Single European Market*, Catherine Barnard, Joanne Scott (eds.), Hart Publishing, 2002, p. 295.

[23] Elspeth Guild, *op. cit.*, p. 298.

[24] Cyprus is legally bound to join the Schengen Area, but has been prevented to do so by the territorial dispute regarding the island's northern part.

[25] For more information regarding Romania's accession to the EU and the Treaty concerning the accession of the Republic of Bulgaria and Romania to the European Union in particular, see Augustin Fuerea, *op. cit.*, Chapter VII.

[26] David Gowland, Arthur Turner, Alex Wright, *Britain and European Integration Since 1945: On the Sidelines*, Routledge, 2010, p. 102.

[27] David Gowland, Arthur Turner, Alex Wright, *op. cit.*, p. 103.

[28] *Idem*.

[29] A presentation of the convergence criteria can be found on the European Commission's website: https://ec.europa.eu/info/business-economy-euro/euro-area/enlargement-euro-area/convergence-criteria-joining_en.

union and deeper integration – something that would be achieved through the Treaty of Maastricht.[30]

The signing of the Treaty of Maastricht showed how opposed the UK was to further integration.[31] During the negotiations regarding the Economic and Monetary Union, the United Kingdom expressed its desire to be excluded from the obligation to adopt the Euro, asking for an opt-out.[32] Most Member States disagreed with this request, but after extended debates it was decided that the UK would be exempt from participating in the final stage of the EMU, on the condition that it would not hamper the other Member States in furthering integration in this area.[33] Considering the fact that the Treaties do not, at present, provide for a legal procedure of opting out of the Monetary Union, it is widely considered that adopting the Euro is a legal obligation for all Member States who fulfil the convergence criteria, especially considering the fact that "for candidate countries, adherence to the aims of economic and monetary union constitutes one of the prerequisites for accession to the EU."[34]

British opposition to the adoption of a single currency had first been expressed by Margaret Thatcher.[35] Her successor, John Major, shared her interest in creating a strong single market and her reticence toward further integration and transfer of national sovereignty, opposing the idea of a single currency.[36] Their position was partially motivated by recent international events that had had a serious impact on the UK's economy: "That Britain joined the EC when the latter was going through one of its periodic bouts of radical change scarcely facilitated a smooth entry. […] The collapse of the Bretton Woods fixed exchange system in 1971, followed by a fourfold increase in international oil prices during 1973-74, triggered off a new phase of monetary instability and sluggish economic activity. So far as Britain was concerned, the situation was aggravated by the impact of the 1974 miners' strike and the major sterling crisis that blew up in 1976. […] All the available evidence conclusively showed that Britain's economic performance was significantly worse than it had been in the years immediately before entry to the EC. It also remained inferior to that of most other Member States."[37]

According to Romania's Accession Treaty, upon joining the European Union, the state became a member of the Economic and Monetary Union, with a derogation from the obligation to adopt the Euro until it would fulfil the convergence criteria. As of 2019, Romania has yet to be considered as having satisfied said criteria and, unlike the case of its participation in the Schengen Area, the arguments against its adopting the euro are of a technical, rather than political, nature.

## 4. The Area of Freedom, Security and Justice

The Treaty of Amsterdam spoke of the importance of creating an Area of Freedom, Security and Justice (AFSJ) comprised of the policy on visas, asylum, emigration and other provisions regarding the free movement of people, as well as the Schengen *acquis*. Following the reforms brought about by the Treaty of Lisbon,[38] the AFSJ forms the subject of Title V of the Treaty on the Functioning of the European Union and has been expanded to include not only the policy on border controls, asylum and immigration, but also police and judicial cooperation in criminal and civil matters.

When signing the Treaty of Amsterdam, the United Kingdom and the Republic of Ireland negotiated another Protocol, distinct from the one that contained the opt-out regarding the Schengen *acquis*. According to this second Protocol, the two Member States were not bound by the provisions concerning the AFSJ, but "could choose whether or not to opt in to proposed measures in this area", in a three-month term. If they did not express an option, they would be considered as having opted-out.[39] The Treaty of Lisbon preserved the Protocol[40] and extended it to the entirety of the ASFJ, in its expanded form, providing that it also applies to "amendments to measures in relation to which those states have previously opted in", which could, if put into practice, render those measures inapplicable and

[30] David Gowland, Arthur Turner, Alex Wright, *op. cit.*, p. 120.

[31] Augustin Fuerea, „BREXIT – trecut, prezent, viitor", *Curierul judiciar*, nr. 12/2016, C.H.Beck, Bucharest, p. 631.

[32] The United Kingdom also obtained an opt-out regarding the Social Chapter of the Treaty of Maastricht, but eventually decided to integrate the *acquis* on this issue. For more on this subject, see Andrew Duff, John Pinder, Roy Pryce (eds.), *Maastricht and Beyond. Building the European Union*, Routledge, 1994.

[33] Roy Price, "The Treaty Negotiations", *Maastricht and Beyond. Building the European Union*, Andrew Duff, John Pinder, Roy Pryce (eds.), Routledge, 1994, p. 50. A similar Protocol was agreed on regarding Denmark.

[34] Niamh Nic Shuibhne, Laurence W. Gormley, *From Single Market to Economic Union. Essays in Memory of John A Usher*, Oxford University Press, 2012, p. 23. Sweden presents an interesting case: while satisfying the other convergence criteria, the state has yet to comply with the formal requirement of participating in the Exchange Rate Mechanism, effectively barring itself from joining the Euro area.

[35] Lee McGowan, *Preparing for Brexit. Actors, Negotiations and Consequences*, Palgrave Macmillan, 2018, p. 19. Margaret Thatcher was Prime Minister of the United Kingdom from May 1979 to November 1990. She was succeeded by John Major, who occupied the office until May 1997. The UK – England, specifically – under Margaret Thatcher has been called "the most centralized state in Europe" and was the state "against which most legal action had been filed at the European Court of Human Rights". See Paul J. J. Welfens, *op. cit.*, p. 142.

[36] David Gowland, Arthur Turner, Alex Wright, *op. cit.*, p. 105.

[37] *Ibidem*, p. 79.

[38] The Treaty of Lisbon was signed in 2007 and came into force in 2009.

[39] Paul Craig, Gráinne de Búrca, *op. cit.*, p. 978.

[40] Lisbon Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice.

lead to certain complications.[41] As before, the two Member States can decide to opt-in at any time.

Contrary to the UK, Romania is a relatively eager participant in the Area of Freedom Security and Justice, being one of the Member States who agreed, in 2017, to establish the European Public Prosecutor's Office as a form of enhanced cooperation.[42]

## 5. The Charter of Fundamental Rights of the European Union

The decision to draw up a Charter of Fundamental Rights was taken in June 1999, during the European Council in Köln, with further details regarding its elaboration being agreed upon a few months later, during the European Council in Tampere.[43] The Charter was drawn up in less than a year, was proclaimed by the European Parliament, the Council and the Commission and was unanimously approved by the European Council in Biarritz, in October 2000. Following the adoption of the Treaty of Lisbon, the Charter of Fundamental Rights gained the same legal status as the Treaties, taking precedence over secondary EU law and all national legislation.[44] Despite the fact that the drawing up and the approval of the Charter did not encounter any hurdles, when the time came to integrate its provisions through the Treaty of Lisbon two Member States, the United Kingdom and Poland[45], negotiated a Protocol meant to limit the legal effects of the Charter.[46] While this Protocol has been considered an opt-out, it has been debated whether its effect is anything more than declaratory. The Court of Justice of the European Union answered the question by ruling that "Protocol No 30 does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol."[47] Said Preamble states that the purpose of the Protocol is that "of clarifying the application of the Charter in relation to the laws and administrative action of Poland and of the United Kingdom and of its justiciability within Poland and within the United Kingdom." This, correlated with the fact that a Member State could not opt-out of the values enshrined in Article 2 of the Treaty on European Union, made the CJEU's ruling unavoidable. [48]

## 6. The safeguard clauses provided by the Treaty of Accession of the Republic of Bulgaria and Romania

Bulgaria and Romania's Treaty of Accession included three safeguard clauses intended to solve certain issues arising from the states' joining of the EU: a general safeguard clause, an internal market safeguard clause, and a justice and home affairs safeguard clause.[49]

In addition to these three provisions, which can also be found in the Treaty of Accession of the ten Member States who joined the organisation in 2004, a special safeguard clause, specific to Bulgaria and Romania, was introduced. According to this clause, the accession of either of the two states could have been postponed by one year, to 1 January 2008, if there had been clear evidence of them "being manifestly unprepared to meet the requirements of membership by the date of accession of 1 January 2007 in a number of important areas". Furthermore, Romania's accession could have also been postponed if "serious shortcomings" had been observed in its fulfilment of "one or more of the commitments and requirements" regarding the area of justice and home affairs and that of competition.

Upon Bulgaria and Romania's accession, the safeguard clause regarding the area of justice and home affairs was invoked and a Cooperation and Verification Mechanism was created by the Commission, in order to monitor the progress of the two states and to ensure that they fulfilled their obligations. While the Accession Treaty states that such measures should be taken in a period of up to three years after the accession and should "be maintained no longer than strictly necessary", it also allows for them to be applied "beyond the period specified in the first paragraph as long as these shortcomings persist". As of 2019, twelve years after the two states joined the EU, the

[41] Paul Craig, Gráinne de Búrca, *op. cit.*, p. 978.

[42] See Article 86 TFEU and Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

[43] Augustin Fuerea, *Manualul Uniunii Europene*, p. 91.

[44] Paul Craig, Gráinne de Búrca, *op. cit.*, p. 394.

[45] In October 2009, the provisions of the Protocol were extended to the Czech Republic, at its request.

[46] Protocol (No) 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. The Protocol contains two articles. The first states that "The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms" and that "nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law." Article 2 provides that "To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom." For more on these Protocols, see Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, Second Edition, Universul Juridic, 2015.

[47] Paul Craig, Gráinne de Búrca, *op. cit.*, p. 395. See also Massimo Condinanzi, Allessandra Lang, Bruno Nascimbene, *op. cit.*, p. 248.

[48] Niamh Nic Shuibhne, Laurence W. Gormley, *op. cit.*, p. 349.

[49] For more on these safeguard clauses, see Augustin Fuerea, *op. cit.*, p. 304, and European Commission MEMO/05/396, available at http://europa.eu/rapid/press-release_MEMO-05-396_en.htm.

Cooperation and Verification Mechanism is still in effect.

On the whole, it is noticeable that in the case of Romania (and Bulgaria), the other Member States have provided the possibility of stricter measures being taken with regard to the fulfilment of obligations and the adoption of the *acquis communautaire*.

## Conclusions

For the UK, every step taken towards further integration has meant the necessity of finding a balance between national interests (which have been considered as diverging from those of the EU), the traditional preference of many British politicians for a less-involved participation, and the interests and well-being of the European Union[50]. While trying to slow down the process of deepening integration in certain areas, like that of social policy or the elimination of internal borders, [51] the UK has been an active supporter of the development of the single market and of the liberalisation of trade.[52] This duality of interests has resulted in the UK being the Member State with most opt-outs. The EU's willingness to allow this can partially be explained by its desire to keep the UK as a Member State, due to its important role on the international stage, its economic power and its shared history and values with the other European states. Yet, following the Brexit referendum, it has become clear that these opt-outs were less effective than hoped for: the UK's desire to maintain greater control over certain areas of competence was apparently not satisfied to a sufficient degree and, at the same time, the integration process between the other Member States was unnecessarily slowed down.

The process has been further hampered by the fact that newer members of the EU have not been able to join the Schengen Area and the Monetary Union, either due to a failure to fulfil the required criteria or, in certain cases, to political circumstances. The idea of a "multi-speed" Europe is not a new one – it was debated as early as the Fontainebleau European Council, in June 1984, when the Member States of the EEC, France in particular, suggested that the states who were prepared to integrate further should be allowed to do so, with the rest joining them at a later date.[53] However, the evolution of the UK's relationship with the EU suggests that, in the future, in order to avoid the fracturing of the European Union, a deeper integration should be prioritised for all Member States, in order to ensure that they do not feel either overlooked by, or disconnected from the rest of European Union

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[50] David Gowland, Arthur Turner, Alex Wright, *op. cit*, p. 79.
[51] Paul J. J. Welfens, *op. cit.*, p. 266.
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[53] David Gowland, Arthur Turner, Alex Wright, *op. cit*, p.103.

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# BREXIT AND THE ROMANIAN PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION – LEGAL ASPECTS AND POSSIBILITIES

**Maria-Cristina SOLACOLU***

**Abstract**

*The first half of 2019 finds the European Union facing two challenges: the rotating Presidency of the Council of the European Union is held by Romania, one of the newest members of the organisation, while the United Kingdom prepares to withdraw, after being the first state to invoke, in March 2017, Article 50 of the Treaty on European Union.*

*Romania assumes this position of great responsibility for the first time since its accession to the EU and finds itself confronted with a task that has raised problems even for other, more experienced, states that have held the Presidency of the Council after the UK notified the EU of its intention to leave. Moreover, March 2019 marks the end of the two-year term provided by Article 50 of the Treaty on European Union for the enforcement of a withdrawal agreement, placing Romania as President of the Council of the EU at the moment when the UK would be expected to officially lose its status as a Member State, unless an extension is agreed upon by the European Council and the UK.*

*In this context, it is important to take note of the progress made in the matter of the UK's withdrawal from the EU, to identify the legal means the Presidency of the Council has at its disposal to ensure that a satisfying solution is reached and to analyse the role that the Romanian Presidency, specifically, plays in this process.*

**Keywords:** *Rotating Presidency – Withdrawal Agreement – Article 50 TEU – Article 218 TFEU – United Kingdom*

## 1. Introduction

The Presidency of the Council of the European Union has been the subject of several debates aimed at improving and adapting it to the ever-changing realities of the intricate international organisation that is the European Union. In recent years, this position has gained considerable importance,[1] with reasons cited for such a development being the necessity for a more robust central administration in the EU and a strong leadership in the Council, the growing complexity of the EU's decisional structure, and the increase of its power, which makes cooperation between institutions even more significant for the Union's well-being.[2]

During the first half of 2019 Romania chairs the Council of the European Union for the first time since its accession in 2007. At the same time, the UK prepares to depart from the EU – the first Member State to do so[3] since the formation of the European Communities in the 1950s. The fact that the projected date of the UK's departure from the EU coincides with the Romanian Presidency of the Council is particularly important for the Member State: Romania has the opportunity to prove its ability and its commitment to advancing the EU's interests by ensuring that the process of withdrawal moves forward as swiftly and as efficiently as possible, in order to limit the negative effects that the uncertainty of the situation has on the Union and on the other Member States. Furthermore, a post-Brexit context could favour the development of a stronger relationship between the two European states in matters of foreign policy and defence. It has been argued that a potential "deep and special partnership" would be beneficial for them, especially considering the fact that both the UK and Romania prioritise the preservation of European security and are supporters of the transatlantic alliance.[4] Romania could help the UK express its interests in front of EU authorities (seeing as the UK would no longer be able to directly vote on matters regarding the EU's Common Foreign and Security Policy) while increasing its own role in the "making of foreign, security and defence policies in the EU and in the politics of NATO"[5].

In this context, it is important to identify the exact role that the Council of the European Union plays, according to the Treaties, in the process of a Member State's withdrawal from the EU, to follow the way this procedure has been put into practice after the UK's decision to invoke Article 50 of the Treaty on European Union and leave the organisation, and to analyse Romania's role as President of the Council during the expected finalisation of the Brexit process.

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[1] Augustin Fuerea, *Manualul Uniunii Europene*, Sixth Edition, Universul Juridic, Bucharest, 2016, p. 138. The Presidency of the General Affairs Council is mentioned as being of particular importance, considering the issues this formation decides upon.

[2] Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, Sixth Edition, Oxford University Press, 2015, p. 42.

[3] Greenland joined the European Communities in 1973, as a county of Denmark, but gained autonomy in 1979 and left the Communities in 1985, due to disagreements regarding the Common Fisheries Policy, becoming one of the Overseas Countries and Territories.

[4] Cristian Nițoiu, Tim Oliver, Florin Păsătoiu, Nicola Chelotti, *Romania and the United Kingdom. The Special Relationship after Brexit*, Loughborough University London and the Center for Foreign Policy and Security Studies, report presented at the Carol I National Defence University, Bucharest, 18 March 2019, p. 8.

[5] *Ibidem*, p. 32.

## 2. The rotating Presidency of the Council

During the drafting of the Treaty of Lisbon[6], the following rules were established regarding the Council's Presidency: the Council meets in various configurations, depending on the subject being discussed, with the list of these configurations and their presidencies determined by the European Council, acting by a qualified majority[7]. The General Affairs Council and the Foreign Affairs Council are exempt from these rules, their existence being mandatory and the latter's Presidency always being held by the High Representative of the Union for Foreign Affairs and Security Policy.

The Council Decision 2009/937/EU adopting the Council's Rules of Procedure established that the Presidency of the Council is to be held by pre-established groups of three Member States, for a period of eighteen months. When deciding upon the composition of these groups, the European Council must respect the principle of equal rotation among Member States and must take into account their diversity and geographical balance[8]. Each of the three states holds the presidency of the Council for a period of six months, with the other two offering support and assistance according to a common programme previously drafted in consultation with the High Representative of the Union, the Commission, and the President of the European Council. The draft programme, which lays out their activities and must be approved by the General Affairs Council[9], covers the upcoming eighteen-month period of their Presidencies and serves as a starting point for each of the state's own six-month programme. It is also possible for the members of the team to decide alternative arrangements among themselves.[10]

The future President of the Council, after consulting with the other two member states that are part of its group, sets the dates for the Council meetings seven months before the beginning of its Presidency[11] and establishes, a week before taking office, the indicative provisional agendas for the next sixth months. Furthermore, during its term, the Member State that holds the Presidency is responsible for setting the provisional agenda for each Council meeting.[12] The provisional agenda is formally adopted during the meeting of the Council. It is divided into two sections, legislative deliberations and non-legislative activities, with each of these sections being further divided into matters that can be decided upon without being discussed, and matters that require debate.

During its six-month term, the President is responsible for convening, on his own initiative or at the request of one of the other Members or of the Commission, the Council[13] and is allowed to develop policy initiatives that interest either the Council in its entirety or the Member State in office. It has been noted that policies which are too narrow in scope, concern strictly the Member State holding the Presidency or go against the interests of most Council members are likely to be criticised and rejected.[14]

The Presidency must plan and chair meetings in all Council formations and preparatory bodies (with the exception of the Foreign Affairs Council), it must ensure that the rules of procedure are respected during these meetings, and it represents the Council in its relations with other institutions of the European Union, with the aim of reaching agreements on legislative projects. In certain circumstances, the President of the Council may be asked to represent or even chair the Foreign Affairs Council, replacing the High Representative, when matters of a commercial nature are being discussed.[15]

One of many important changes brought about by the Treaty of Lisbon is the separation of the President of the Council from the person Chairing the European Council. The latter institution now has its own President, elected for a two-and-a-half-year term, which can be renewed only once. This complicates the task of the President of the Council, who must ensure that its policies and initiatives respect and are aligned with the general strategy set out by the President of the European Council.[16]

## 3. The Romanian Presidency of the Council

The trio of Member States set to chair the Council during the 2018-2019 period is comprised of Romania, Finland and Croatia, with Romania taking over the position during the first half of 2019. This is the first time that the Member State has held the Presidency of the Council since its accession in 2007. The inherent challenges of the Presidency are further added to by the fact that March 2019 marks the end of the two-year period provided by Article 50 of the Treaty on European Union for the negotiation, signing and

[6] The Treaty of Lisbon was signed on 13 December 2007 and entered into force on 1 December 2009.
[7] Art. 16 para. 6 and 9 of the Treaty on European Union and Art. 236 of the Treaty on the Functioning of the European Union.
[8] Council Decision 2009/937/EU adopting the Council's Rules of Procedure, OJ L 325, 11 December 2009, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009D0937 (accessed on 20 March 2019), Art. 1 para. 4.
[9] *Ibidem*, Art. 2 para. 6.
[10] *Ibidem*, Art. 1 para. 4.
[11] *Ibidem*, Art. 1 para. 2.
[12] Paul Craig, Gráinne de Búrca, *op. cit.*, p. 42.
[13] Art. 237 of the Treaty on the Functioning of the European Union.
[14] Paul Craig, Gráinne de Búrca, *op. cit.*, p. 42.
[15] More details can be found on the official site of the Council of the European Union: https://www.consilium.europa.eu/en/council-eu/presidency-council-eu/ (accessed on 20 March 2019).
[16] Paul Craig, Gráinne de Búrca, *op. cit.*, p. 42.

ratifying of a withdrawal agreement between the United Kingdom and the EU.

According to its 6-month programme, the Romanian Presidency's main objective regarding Brexit is to maintain the remaining Member State's unity, to ensure that the UK's withdrawal from the organisation takes place in an orderly fashion and that European citizens and companies are prepared for a „smooth transition towards an EU of 27 Member States". Particular importance is placed on „ensuring clarity and transparency" during the process of withdrawal and on the close cooperation between the Romanian Presidency, the EU's institutions and the other Member States „in order to follow all the institutional procedures arising from such developments, including those related to the implementation of the agreement after 29 March 2019". The programme also mentions that the Romanian Presidency aims to contribute to a strong future partnership between the EU and the UK, after the latter's departure from the organisation.[17]

The brevity of this passage, despite the topic's importance for the European Union, and the rather general terms used can be explained by the fact that, at the moment of the programme's elaboration, there had been little progress made towards the finalisation of the UK's withdrawal process. The mentioned agreement, which was expected to be implemented after 29 March 2019, was approved by the EU, but not by the UK Parliament. Consequently, the future President of the Council was faced with the task of preparing for a situation that could have evolved in multiple, vastly different ways. The provisional agendas for Council meetings covering the term of the Romanian Presidency did not mention the United Kingdom's withdrawal specifically.

The 18-month Programme of the Council, corresponding with Romania's, Finland's and Croatia's Presidencies, mentioned Brexit only in passing, noting that the three Member States, when chairing, in turn, the Council, will „devote all efforts to ensure the effective and timely handling of all work required by the Brexit process, fostering the unity of the 27 Member States".[18]

## 4. The Council's role in the process of negotiation and conclusion of the withdrawal agreement

While leaving the European Union has always been possible,[19] the Treaties did not provide a specific procedure for a Member State's withdrawal from the Union – likely due to a lack of interest in such a mechanism. Article 50 of the Treaty on European Union was introduced by the Treaty of Lisbon specifically to address this omission and states that the conclusion of a withdrawal agreement will take place according to the provisions of Article 218 of the Treaty on the Functioning of the European Union, which governs the process of negotiating, signing and ratifying international treaties between the EU and other organisations or states. Negotiations must follow the guidelines provided by the European Council, with the aforementioned agreement being concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.[20]

Article 218 of the Treaty on the Functioning of the European Union regulates the negotiation and conclusion of agreements between the European Union and third countries or international organisations, establishing that the EU institution with the most authority in this matter is the Council, acting by a qualified majority. The Council is the institution with the power to "authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them"[21]. After receiving recommendations from the Commission or the High Representative, depending on the subject of the agreement, the Council is the one to nominate the Union negotiator, to whom it can address directives, and may also designate a special committee meant to provide consultation during the negotiations. Based on the proposals of the negotiator thusly named, the Council will adopt a decision authorising the signing of the agreement and a decision concluding it. Depending on the subject of the Agreement, the Council must either seek the approval of the European Parliament or simply consult it, before adopting the decision concluding the agreement. While Article 218 does not mention withdrawal agreements specifically, Article 50 of the Treaty on European Union provides that, for this particular type of agreement, the consent of the European Parliament is necessary.

## 5. Timeline of the negotiation and conclusion of the Agreement on the withdrawal of the United Kingdom from the European Union and Euratom

In June 2016, the United Kingdom held a referendum regarding its possible withdrawal from the European Union, with the result of the vote being in favour of leaving the organisation. Immediately after

[17] Programme of the Romanian Presidency of the Council of the European Union, 1 January – 30 June 2019, p. 15, available at https://www.consilium.europa.eu/media/37974/romanian-presidency-programme.pdf (accessed on 20 March 2019).

[18] 18-month Programme of the Council (1 January 2019 – 30 June 2020), Brussels, 30 November 2018, http://data.consilium.europa.eu/doc/document/ST-14518-2018-INIT/en/pdf (accessed on 20 March 2019).

[19] Lee McGowan, *Preparing for Brexit. Actors, Negotiations and Consequences*, Palgrave Macmillan, 2018, p. 50. Prior to the introduction of the withdrawal procedure, it was always possible for a Member State to denounce the Treaties according to public international law rules.

[20] Art. 50 para. 2 of the Treaty on European Union.

[21] Art. 218 para. 2 of the Treaty on the Functioning of the European Union.

the outcome of the referendum was announced, the President of the European Parliament, Martin Schulz, the President of the Commission, Jean-Claude Juncker, the acting President of the Council, Mark Rutte, and the President of the European Council, Donald Tusk, released a joint statement,[22] saying that they respected the UK's decision, which represented the result of a democratic process, and that they were ready to launch negotiations with the UK as soon as possible in order to settle the terms of withdrawal agreement. However, the UK officially invoked Article 50 of the Treaty on European Union on 29 March 2017, which effectively gave the state another year, in addition to the two-year period provided by the Treaty, to prepare for its withdrawal from the EU.

The Council did not wait for the UK's official notification in order to start preparing for Brexit and, in 2016, created a task force dedicated to the issue of the UK's withdrawal from the EU, its main responsibilities consisting of overseeing the negotiations carried out between the Commission and the UK, keeping the Member States informed about these negotiations and providing an overview of the envisioned future of the UK-EU relations. The Commission's own task force and negotiators were put in charge of carrying out the negotiations and working out the technical aspects of this process.[23] The Commission's working procedure and detailed mandate for negotiations were established based on the European Council's guidelines, after consulting with the Council and with its approval.[24]

Upon deciding to leave the EU, the United Kingdom had to give up its place in the rotating Presidency of the Council (the UK was due to occupy the position in the second half of 2017). This led to the adoption of a new list by the European Council, which no longer mentioned the UK, with its place being taken over by Estonia, who was supposed to chair the Council in 2018, instead. Consequently, Romania (like all other countries on the list) had to assume the Presidency of the Council six months earlier than it had been anticipating, a significant change considering the fact that taking on a role of such importance necessitates adequate preparation, especially for a state that has recently become a Member State and has never before held the Presidency of the Council[25]. It must be noted that the UK lost the opportunity to hold the Presidency of the Council despite not having officially notified the EU of its decision to trigger Article 50 of the Treaty on European Union. The fact that the UK had held a referendum on this matter and had publicly announced that it intended to put its result into practice was considered sufficient reason to modify the list of the Member States who were to take over the Presidency of the Council.[26]

On 22 May 2017, the Council, following the rules set out in Article 218 of the Treaty on the Functioning of the European Union and the guidelines established by the European Council[27], authorised the Commission to open negotiations with the UK regarding a withdrawal agreement. At that time, it was expected that the negotiations would focus on issues regarding the freedom of movement, social benefits and competition regulations,[28] and that reaching an understanding on these issues would result in the conclusion of an agreement, but the reality would prove different.[29] Negotiations were officially launched on 19 June.

More than a year later, on 14 November 2018, the negotiators of the EU presented the draft withdrawal agreement that they had agreed on with the negotiators of the UK. They also presented an outline for a political declaration on future EU-UK relations. The next day, on 15 November, the EU's chief negotiator, Michel Barnier, handed the draft of the withdrawal agreement to the President of the European Council, who proposed the deal be finalised during the extraordinary meeting of the European Council scheduled on the 25

[22] Available at http://www.europarl.europa.eu/news/en/press-room/20160624IPR33834/joint-statement-by-schulz-tusk-rutte-and-juncker-on-uk-referendum-outcome (accessed on 20 March 2019).

[23] Lee McGowan, *op. cit.*, p. 80. The leader of the Council's task force was chosen to be the Belgian diplomat Didier Seeuws, former advisor and Chief of Staff to the first European Council President, Herman Van Rompuy (2011-2014), and Director of Transport, Telecommunications and Energy in the General Secretariat of the Council during Donald Tusk's Presidency of the European Council (2014-onwards). The Commission chose as its European Chief Negotiator Michel Barnier, former European Commissioner for Regional Policy (1999–2004) and European Commissioner for Internal Market and Services (2010–2014): European Commission Press release IP/16/2652 available at http://europa.eu/rapid/press-release_IP-16-2652_en.htm?locale=EN (accessed on 20 March 2019).

[24] *Ibidem*, p. 76

[25] Augustin Fuerea, "The exercise of the presidency within the European Union", *Probleme actuale ale spațiului politico-juridic al UE* International Conference, 27 October 2016, Wolters Kluwer Romania, p. 67.

[26] Christophe Hillion, "Le retrait de l'Union européenne, une analyse juridique", *Revue trimestrielle de droit européen*, Dalloz, octobre-décembre 2016. The European Council also decided, in 2016, that a new arrangement regarding the rotating presidencies, including the UK, would be made in case the state announced its decision to remain in the EU.

[27] Council Decision (EU) 2019/274 of 11 January 2019 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 47I, 19 February 2019, available at https://eur-lex.europa.eu/eli/dec/2019/274/oj (accessed on 20 March 2019). "The negotiations were conducted in light of the guidelines of 29 April and 15 December 2017 and of 23 March 2018 provided by the European Council with the overall objective of ensuring an orderly withdrawal of the United Kingdom from the Union and Euratom."

[28] Augustin Fuerea, "Brexit - limitele negocierilor dintre România și Marea Britanie", *Revista de Drept Public*, nr. 4/2016, Universul Juridic, Bucharest, p. 108.

[29] A particularly difficult issue is that of the border between Northern Ireland and the Republic of Ireland. A hard border – necessary between a state that is a member of the EU and one that is not – would break the Good Friday Agreement, which prohibits the creation of such a border. The Agreement is available at https://peacemaker.un.org/uk-ireland-good-friday98 (accessed on 20 March 2019).

November 2018.[30] On that day, the European Council endorsed the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community and approved the Political Declaration on future EU-UK relations.

During the General Affairs Council held on 19 November 2018, in Brussels, the participating ministers discussed the draft withdrawal agreement that had been presented by the negotiators on 14 November and advised the chief negotiator on the elaboration of the political declaration. Three days later, on 22 November, the President of the European Council sent the Member States the negotiated draft political declaration regarding the future relationship between the EU and the UK.

In December 2018, the Commission began the procedure for the signing and the conclusion of the Agreement on the withdrawal of the United Kingdom from the European Union, adopting a proposal for a Council decision on the signing of the Agreement and one for a Council decision on the conclusion of the Agreement.

On 11 January 2019, with Romania holding the Presidency, the Council adopted Decision 2019/274 regarding the signing of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.[31] The Decision authorised the President of the European Council and the President of the Commission to sign the Agreement on behalf of the EU and of Euratom.[32] At the same time, the Council adopted a draft decision on the conclusion of said Agreement, sending it to the European Parliament for approval.[33]

The Agreement mandates the creation of a Joint Committee,[34] comprised of representatives of the EU and of the UK and co-chaired by the two, as well as the establishment of several specialised committees on issues such as citizens' rights or Northern Ireland.[35] The Joint Committee will be responsible "for the implementation and application" of the Agreement and will have the power to make recommendations to the EU and the UK and to adopt, by mutual consent, legally binding decisions that must be implemented by the two.[36] According to the draft Council Decision on the conclusion of the Agreement on the withdrawal of the UK, the Commission will be the institution representing the EU in the Joint and specialised committees and expressing its positions,[37] while the Council will be the one establishing these positions as an exercise of its policy-making, decision-making and coordinating functions.[38] The Commission will also play a major role in direct interactions with the UK, being responsible for providing the state with the information and notifications required in the Agreement, consulting the UK on specific matters and inviting its representatives to attend international consultation or negotiation meetings. All these tasks must be fulfilled after consulting the Council and taking into account its advice.

The United Kingdom is authorised to negotiate, sign and ratify international agreements regarding matters that are part of the exclusive competences of the Union, but these treaties can only enter into force after the end of the transition period, when the UK is no longer be a member of the EU. In exceptional circumstances, the Council can, by means of implementing acts, provide an authorisation for the treaties to enter into force during the transition period.[39] The Council can also authorise Ireland the Republic of Cyprus and Spain to negotiate and conclude bilateral agreements with the UK in matters that are otherwise

[30] The draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November is available at https://ec.europa.eu/commission/files/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-agreed-negotiators-level-14-november-2018_en (accessed on 20 March 2019).

[31] Council Decision (EU) 2019/274 of 11 January 2019 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L 47I, 19 February 2019, available at https://eur-lex.europa.eu/eli/dec/2019/274/oj (accessed on 20 March 2019).

[32] The text of the Agreement was attached to Council Decision (EU) 2019/274. A particularly interesting provision is the one regarding the transition period, during which "notwithstanding all consequences of the United Kingdom's withdrawal from the Union as regards the United Kingdom's participation in the institutions, bodies, offices and agencies of the Union – Union law, including international agreements, will be applicable to and in the United Kingdom". Consequently, the United Kingdom must be treated as a Member State for the purposes of the withdrawal agreement during the transition period. Should the transition period be prolonged, the Council would have to act in accordance with the guidelines established by the European Council. This opens the possibility for the United Kingdom to try and protract the process of withdrawal in order to keep its status of Member State (albeit one not represented in the institutions of the Union).

[33] The draft Council Decision on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community is available at https://data.consilium.europa.eu/doc/document/XT-21105-2018-REV-1/en/pdf (accessed on 20 March 2019).

[34] Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Art. 164.

[35] *Ibidem*, Art. 165.

[36] *Ibidem*, Art. 166.

[37] Draft Council Decision on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Art. 2 para. 1.

[38] *Ibidem*, Art. 2 para. 2. In order to fulfil this aim, the Commission must keep the Council informed on everything related to the meetings of the Joint and the specialized committees.

[39] *Ibidem*, Art. 3. "Given the political significance of decisions granting such authorisations, it is appropriate to confer on the Council the power to adopt such authorisations by means of implementing acts, acting on a proposal from the Commission."

of exclusive EU competence,[40] given the "very specific situations" these countries find themselves in with regard to the UK.[41]

The agreement must be concluded by the Council, acting on a qualified majority, after having obtained the European Parliament's approval. As opposed to the case of modifying treaties or mixed agreements,[42] Article 50 of the Treaty on European Union does not mandate the presence of the other Member States during the signing and the ratifying of the withdrawal agreement.[43] The President of the Council is the one to officially give written notification, on behalf of the EU, regarding the completion of the internal procedure necessary for the entry into force of the Agreement.[44]

In order to enter into force, the Agreement must be signed by the representative of the UK, by the President of the European Council and the President of the Commission. On 14 January 2019, the latter two exchanged letters with the Prime Minister of the United Kingdom, expressing their intention to do just that as soon as the Agreement is approved in the UK's Parliament. After that moment, the process of the UK's withdrawal began to stall – arguably not for the first time since its beginning. Several votes were held in the national Parliament, but the Agreement, in the form negotiated by the EU and the UK, did not gather the necessary support, leaving the EU waiting for a decision, one way or the other, to be taken by the UK.

On 19 March 2019, the Speaker of the UK Parliament blocked the possibility of holding a new vote on the existing Agreement. While negotiating a new deal would be possible in theory, if the EU agreed to it, 29 March 2019 marks the expiry of the two-year term provided by Article 50 of the Treaty on European Union, and various representatives of the EU and of the Member States have already stated that they will not grant the UK an extension without being presented with a serious and precise proposal regarding future actions. On 20 March, the Prime Minister of the UK sent a letter to the President of the European Council, asking for an extension period until 30 June 2019.[45] The answer came that same day, stating that, while a short extension could be possible, it would be conditional on a positive vote on the Withdrawal Agreement in the UK Parliament.[46] On 21 March, the European Union offered the United Kingdom an extension until 22 May 2019, on the condition that the UK Parliament vote the negotiated Agreement. Upon the failure to meet that requirement, a shorter extension, until 12 April, would be offered.

## Conclusions

At the start of the negotiations, it was noted that the two-year time frame provided by Article 50 is rather a short one for an undertaking of such scope, especially since the withdrawal agreement should, ideally, be finalised well before the expiry of said period, in order to allow for the fulfilment of the necessary formalities regarding its approval and ratification by the EU and the Member States. In the beginning of the process, the EU's chief negotiator in the matter of the UK's withdrawal suggested that the agreement should be decided upon in a period of 18 months, with the following 6 months being allocated for its ratification[47]. Over time, it has become clear that those estimations were optimistic: at the end of the two-year period, a withdrawal agreement has been drawn up, but its signing and ratification are held up by the disagreements taking place in the UK Parliament.

The fact that both the negotiations between the EU and the UK and the debates held in the UK's Parliament have been mired by numerous difficulties suggests that the consequences of the UK's withdrawal had not been seriously analysed before the Brexit referendum, and neither had the positives of such a move been properly weighed against the negatives by those who endorsed it.[48] A possible way of preventing such a situation in the future, were another Member State to decide it wants to withdraw from the EU, would be to provide an obligation for that state to prepare a proposal for a withdrawal agreement before being allowed to trigger the application of Article 50 of the Treaty on European Union. While a term longer than the current two-year one might help by allowing more time for negotiations and preparations, it could also prove an unnecessary delay if the Member State does not fully take advantage of it. Considering how intricate the relations between the EU and its members are, and how each Member State has its own set of challenges and special circumstances, it is difficult to envision a single procedure that could be adequately applied to all Member States.

As evidenced by the provisions of the Treaties, of the draft Agreement on the withdrawal of the UK from

[40] As a rule, Member States cannot negotiate agreements – or, indeed, adopt any sort of legislative acts – in matters regarding the EU's exclusive competences.

[41] *Ibidem*, Art. 4.

[42] Mixed agreements are international agreements concluded in matters that do not fall under the exclusive competence of the European Union. Consequently, they must be signed by both the EU and the Member States.

[43] This has been considered in accordance with the use of the qualified majority in the Council, as opposed to an unanimous vote, and with the will of the treaties' authors, whose intention was "to create a simple and efficient procedure in order to limit the duration of the withdrawal process" (unofficial translation). See Christophe Hillion, *op.cit.*, p. 728.

[44] *Ibidem*, Art. 8.

[45] The letter is available at https://www.consilium.europa.eu/media/38668/20190320_may_letter_tusk_extension.pdf (accessed on 20 March 2019)

[46] The answer of the European Council's President is available at https://www.consilium.europa.eu/en/press/press-releases/2019/03/20/statement-by-president-donald-tusk-on-brexit/ (accessed on 20 March 2019).

[47] Lee McGowan, *op. cit.*, p. 51

[48] Augustin Fuerea, „BREXIT – trecut, prezent, viitor", *Curierul judiciar*, nr. 12/2016, C.H.Beck, Bucharest, p. 632.

the EU and the draft Council Decision on the conclusion of the Agreement, the role of the Council in this process is an essential one and the Member State chairing the institution at such a time has a particularly difficult task. If Romania manages to successfully navigate this challenge, proving its capability and its dedication to the well-being of the EU and of the other Member States, it could use this experience to strengthen its relationship with both the European Union and the United Kingdom.

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# CONSCIENTIOUS OBJECTION TO VOLUNTARY ABORTION

**Mihail STĂNESCU-SAS***

**Abstract**

*This paper is the result of exploring the contact zone between the freedom of conscience (and religion) exercised by professionals providing healthcare services, in the form of conscientious objection, and the right to voluntary abortion as invoked by the beneficiaries of these services. Is there a right to voluntary abortion or any positive obligation of the State to provide or to ensure these services are provided on an effective basis, what is the legal nature of the conscientious objection, do the two conflicting rights ever meet in the same plan and, if so, under what conditions one of them prevails or their balance is supposed to stand, at what point discrimination is set to arise in the equation are deeply sensitive topics which have the tendency to elude shaping a comprehensive theory. Without undervaluing the creative effect which court case law might eventually have while settling disputes, the legal science holds the burden to build such a theory, providing answers meant to serve as ante factum guidelines.*

*The broadness of the legal conditions for voluntary abortion should truthfully reflect the general moral attitude within the society concerning the exercise of this choice, since only maintaining this equation can effectively hold the basis for balancing the two conflicting rights, which both express the same principle of personal autonomy.*

**Keywords:** *conscientious objection, voluntary abortion, positive obligations, non-discrimination, balancing conflicting rights*

## 1. Introduction

Voluntary abortion appears to be legal in Romania only because it is not anymore incriminated by the criminal law, starting the abrogation, by Decree-Law no. 1/1989[1], of articles 185-188 of the former Criminal Code, concerning the criminalisation of abortion, and of Decree no. 770/1966 regarding the regulation of the termination of pregnancy. The conscientious objection to voluntary abortion also appears legal just because it is not expressly prohibited.

As the conscientious objection is traditionally associated with different legally recognized avatars, of which the matter of voluntary abortion is just one, the legal science has been quite reluctant to recognizing a general applicability in this regard. Even though it has been defined in reference to a context "when a deeply held belief based on the deeply held moral values of a group or of an individual runs into the demands or determinations of the law"[2], it is barely seen "in most cases [as] the outcome of tolerance"[3]. However, the State is supposed to grant rights, not just to be tolerant. The emphasis on tolerance leads to the idea of the State discretionary power to grant conscientious objections only in separate cases and following solely its sovereign assessment, secured from any charge of discrimination. Its qualification as a right values the true mission of the State and forms the basis for a general application of the conscientious objection, subject only to legitimate restraints under the conditions provided for all restraints to freedom of conscience.

It is therefore no negligible theoretical effort to ascertain that the conscientious objection is provided, as a principle, by article 29 paragraphs 1 and 2 of the Constitution[4], regarding the freedom of conscience, so interpreted in accordance with article 9 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms[5], as stipulated in article 20

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[1] Published in Monitorul Oficial al României no. 4 of 27 December 1989.

[2] Yossi Nehushtan, *Intolerant Religion in a Tolerant-Liberal Democracy* (Oxford and Portland, Oregon: Hart Publishing, 2018), 127.

[3] *Idem*, 137; though, the author rightfully acknowledges that „tolerance is normally accompanied by a grudge" – *Idem*, 20, that is at least by disproval if not by resentment.

[4] Article 29, titled „The freedom of conscience", paragraphs 1 and 2 of the Constitution of Romania, republished in Monitorul Oficial al României, partea I, no. 758 of 29 October 2003, reads: „(1) The freedom of thought and opinions, as well as the freedom of religious beliefs cannot be restrained in any way. Nobody can be constrained to adopt an opinion or to adhere to a religious belief, contrary to his or her convictions. (2) The freedom of conscience is guaranteed; it has to be manifested in spirit of tolerance and mutual respect".

[5] Article 9 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms – https://www.echr.coe.int/Documents/Convention_ENG.pdf, ratified by Law no. 30/1994, published in Monitorul Oficial al României, partea I, no. 135 of 31 May 1994, reads: „Everyone has the right to freedom of thought, conscience and religion; this right includes the freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance".

paragraph 1 of the Constitution[6]. In the same time, the right to voluntary abortion will prove to be generally guaranteed by the Constitution, especially under article 26, concerning the respect for the intimate, family and private life, but also under article 22 regarding the right to life, to physical and psychological integrity, and not to be submitted to an inhuman or degrading treatment. None of the two rights is absolute, as they may be restrained under the general conditions of article 53 of the Constitution, when they tend to manifest against each other.

Both conscientious objection and voluntary abortion are under-regulated legal realities and this situation may lead to a practical difficulty when one of them is pretended to hold supremacy over the other. While our enterprise is a long beat plea for freedom of conscience, it is also an affirmation of the need to balance the conflicting rights.

In this regard, we are to determine the comparable nature of these rights and whether the acknowledgement of an absolute character for any of them, at least in consideration to protecting the rights of others, might result in suppressing the competing right and in discrimination.

Our research follows the Romanian constitutional framework, which includes within the domestic law, according to articles 11 and 20 of the Constitution, the ratified international treaties, of which those regarding human rights take prevalence over the domestic law. Therefore, an increased attention is paid to the case-law of the European Court of Human Rights [hereinafter referred to as ECHR]. However, since the conscientious objection to voluntary abortion has not been addressed directly by the Court, due consideration will be given to the relevant recommendations of the Parliamentary Assembly of the Council of Europe and to comparative law, stemming from the constitutions and secondary legislation of other States.

## 2. The right to voluntary abortion

### 2.1. Is it a right or just a permission?

The premises of this paper are that voluntary abortion is allowed on request, under either broad or restrictive conditions, but in the same time medical practitioners are entitled to manifest their freedom of conscience, in the form of conscientious objection to performing a termination of pregnancy. Should there be no right to voluntary abortion, but instead a right to life of the foetus, the law itself would oppose this practice and a conscientious objection would not be needed any longer.

We narrow our research to the topic of voluntary abortion because we find the situation when choice prevails over necessity to be the core of the matter. Our conclusions will be, *mutatis mutandis*, applicable when necessity outweighs choice, only then the impact of conscience over treatment will be much less significant than in the case of a mere expression of personal autonomy. Omission to apply a scientifically necessary medical procedure cannot be justified in terms of conscience if it leads to affecting life or physical or psychological integrity; it may only allow a prompt referral to a non-objecting practitioner, provided that the patient's life or physical or psychological integrity is not put under any threat.

Voluntary abortion is generally allowed in States practicing Western standards on human rights, in consideration of "health, safety and autonomy of the mother"[7], thus appearing as a component of the right to respect for the individual's private life[8]. The ECHR indirectly acknowledged that this fundamental right encompasses the right to voluntary abortion, finding that the prohibition of such a procedure constitutes an interference with the right provided by article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[9]. Therefore, the Court's assertion that "article 8 cannot be interpreted as conferring a right to abortion"[10] remains to be interpreted only in the sense that this right is not absolute, so it may be restrained according to paragraph

[6] Article 20 paragraph 1 of the Constitution of Romania reads: „The constitutional provisions regarding the rights and liberties of the citizens shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the covenants and with the other treaties to which Romania is a party".

[7] S. I. Strong, *Transforming Religious Liberties. A New Theory of Religious Rights for National and International Legal Systems* (Cambridge: Cambridge University Press, 2018), 282.

[8] This principle is based upon the conception that the right to respect or the private life, mainly its component of personal autonomy, „incorporates the right to respect for both the decisions to become and not to become a parent". – ECHR, Grand Chamber, judgment of 10 April 2007, Evans v. United Kingdom (application no. 6339/05), http://hudoc.echr.coe.int/eng?i=001-80046, paragraph 71.

[9] ECHR, Grand Chamber, judgment of 16 December 2010, A., B. and C. v. Ireland (application no. 25579/05), http://hudoc.echr.coe.int/eng?i=001-102332, paragraph 216; the Court enunciated that this right is not absolute and may be subject to suffer restraints, so that „[t]he woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child" (paragraph 213); „it would be equally legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life" (paragraph 222), the state enjoying a broad margin of appreciation in this regard, due to the lack of international political and scientific consensus related to the moment life begins (paragraph 237) and the ethical nature of the matter (paragraph 233). However, the Court avoided to state whether the unborn are to be regarded as persons, so that the prohibition in question to be interpreted as protecting their rights, but instead found that the sole legitimate aim pursued by the State (despite being proclaimed for "health and/or well-being reasons") was found to be one of ideological nature, namely the protection of the "profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum and which have not been demonstrated to have changed significantly since then" (paragraph 226).

[10] ECHR, Fourth Section, judgment of 30 October 2012, P. and S. v. Poland (application no. 57375/08), definitive on 30 January 2013, http://hudoc.echr.coe.int/eng?i=001-114098, paragraph 96.

2 of the said article[11], but however not in the sense that it exceeds its scope.

For better or for worse, the recognition of a "right to life of the unborn […], equal to the right to life of the mother", as article 40 paragraph 3.3 of the Irish Constitution used to provide until 18 September 2018[12], would entail a set of consequences which are highly unlikely to be assumed: the foetus would be regarded as a person and therefore the abortion would become an interference with the right to life; the circumstances in which the pregnancy occurred, even in cases of rape or under-age, would become irrelevant.

Moreover, in a state of necessity concerning the life of the mother, when only one may or is scientifically likely to survive, a choice would have to be made, since an "equal right" theory becomes useless, according to nothing more than ideological grounds, be they ethical or just political. This eventually leads the matter where it all started, that is in the area of a chosen social ideology favouring natality over choice, the mother over the foetus or vice-versa, where prevailing imperatives are utterly separate from the protection of human rights: a policy to increase or, on the contrary, to decrease the birth rate for mainly economic reasons (to ensure a steady economic growth), but also military (to ensure enough soldiers), ecological (to prevent overpopulation and eventually the destruction of natural resources) or even racist motives (to prevent the need for mass immigration, which appears when the population is constantly declining). And since a mainly political choice would most of the time favour the mother or the foetus in a state of necessity, it will continue to govern the matter in any conditions. Once a mainly political choice gets to prevail outside the paradigm of human rights, the whole debate about the right to life becomes irrelevant.

It is actually the original blending of external moral and political arguments that make the accommodation of the mother's rights to those of the foetus' rights, should the latter be eventually recognized, logically impossible in terms of human rights; if these rights become contending, meaning mainly that the mother does not want to give birth, but also that she endangers her life or health by doing this, one of these rights will have to concede. If there is a risk to the mother's life, it would be ethically impossible to determine whose life is more important, so the choice will be made according to additional criteria. Considering the rights of others, mainly the family members, it will be the mother whose life might appear to be more important; but this is just a social criterium and it is not valid all the time, for example when the mother has no close family. An economic approach aimed to increase the birth rate would favour the mother, since she is an economically active adult, she has other children to raise and at least she may give birth to several children in the near future. Only, allowing an economic approach in this matter might just prove that this is the real motivation followed by the State. After all, the Romanian communist regime did not ban voluntary abortions for ethical reasons, nor by recognizing the right to life of the foetus, but for purely economic grounds, to produce a fast growth of the population. On the other hand, an economic approach aimed to decrease the birth rate, like that followed in China during the one-child policy, would necessarily favour voluntary abortion.

Even the above-mentioned article of the Irish Constitution was logically incompatible with the right to receive information about abortion services legally provided abroad, as the same article stated in order to ensure the compatibility of the overall illegality of voluntary abortion with the right to receive information, as a part of the freedom of expression[13]. If the life of the unborn was really protected equally as the life of the mother, then any kind of aid facilitating a voluntary abortion as an illegal act, including providing information, in conditions exceeding a state of necessity arising from a threat to the mother's life, would also be illicit. It is only the prevalence of the mother's undiminished and legitimate choice, despite voluntary abortion being forbidden, that lead the ECHR to the conclusion that restricting the access to information about abortion facilities abroad is a violation of article 10 of the Convention. However, at least when the prohibition of voluntary abortion applies only on the national territory and there are no restrictions to travel abroad and no concern for physical and psychological integrity is applicable, the Court has not found that this prohibition was, in principle, a violation of article 8 regarding the right to the respect of private life[14].

It follows that the conflict between the right to life of the mother and, if even recognized, the right to life of the foetus, is inextricable in terms of human rights, since a life is as important as the other, no matter the

[11] European Commission of Human Rights, decision of 19 May 1976, Brüggemann and Scheuten v. Germany (application no. 6959/75), http://hudoc.echr.coe.int/eng?i=001-74824, paragraph 5: „the legal regulation of abortion is an intervention in private life which may or may not be justified under Article 8 (2)".

[12] According to the 36-th Amendment to the Constitution of Ireland, article 40 paragraph 3.3 currently reads: „Provision may be made by law for the regulation of termination of pregnancy." – *Bunreacht na hÉireann. Constitution of Ireland* (Dublin: The Stationery Office, 2018), xiv; 154.

[13] Considering that under the Irish law it was not a crime to travel abroad in order to have an abortion, the European Court of Human Rights had found that restricting the provision of information concerning abortion facilities abroad was in violation of article 10 of the Convention, since this information „may be crucial to a woman's health and well-being" and „the injunction has created a risk to the health of those women who are now seeking abortions at a later stage in their pregnancy, due to lack of proper counselling, and who are not availing themselves of customary medical supervision after the abortion has taken place". – ECHR, Plenary, judgment of 29 October 1992, Open Door and Dublin Well Woman v. Ireland (application no. 14234/88 and 14235/88), http://hudoc.echr.coe.int/eng?i=001-57789, paragraphs 72 and 77.

[14] ECHR, A., B. and C. v. Ireland, *precited*, paragraph 241.

social implications, including the effects suffered by other people. This is valid both in a state of necessity, when the mother's life or health is in a scientifically proven danger, and outside such a state, when the pregnancy is the result of a rape or when the mother is herself a child, because the foetus cannot be blamed for the circumstances of its conception. In the end, it is not possible to interfere with the foetus' right to life without killing it, which means that, if its right to life is ever to be recognized, there will be no right to voluntary abortion, no matter the circumstances[15]. Moreover, since we find it hard to believe that it can be proven in due time that a certain pregnancy is absolutely impossible to contribute to the mother's death or injury, or at least to some deterioration of her health, this being actually treated in terms of conjectural (im)probability, any pregnancy involves a risk to life of both the mother and the foetus.

Therefore, in order to avoid the impossible choice in favour of any of them in terms of human rights and the transfer of this choice towards additional external criteria, mainly of political and economic nature, it has to be agreed that the only way to ensure the coherence of the human rights system is, indeed cynically, to prevent the affirmation of the right to life of the foetus, with the consequence of recognizing a right to voluntary abortion[16].

### 2.2. The positive obligation of the State to ensure voluntary abortion services being provided effectively

"Medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service"[17] and therefore falls into the scope of the freedom to provide services, stated in article 56 of the Treaty on the Functioning of the European Union[18]. This does not mean, in terms of EU law, that the provision of these services may not be forbidden in a Member State and, regardless of the doubts expressed about them not being possible to forbid, by a State who decides to ban them on its own territory, to its own nationals even when they access them in another Member State, where they are legal[19], article 56 of the Treaty actually prevents a ban from being exported to another Member State, even in the consideration of the banning State's nationals[20].

Generally, the State cannot be responsible for organizing and facilitating the performance of all that is not prohibited, nor for establishing public services corresponding to all aspects of human freedom which are transposed into rights and freedoms. For example, the individuals enjoy the freedom of religion, but it is not for the State (at least for the democratic one) to create religions and set-up churches; they have the freedom of assembly, but it is not the State's duty to provide reunion halls; they have the freedom of expression, but the State does not have to come up with partners for one to discuss with, a place within the media or instruments of writing. If, however, the State decides to provide public services, like renting reunion halls or selling pens and paper, this does not necessarily mean that it has assumed a positive obligation in this regard.

Theoretically, the mere fact that a medical procedure like the voluntary abortion is not prohibited doesn't necessarily mean that the State is under an obligation to perform it, unless a positive obligation is identified in this regard. But since in practice the State regulates the healthcare system and also provides most of the medical services, operating a healthcare insurance scheme to sustain the system, it becomes responsible for the supply of lawful abortion services, as well as, like any public or private service operator, for the non-discriminatory nature of its services.

Therefore, *ab origine*, there is no obligation for the State to perform these procedures by itself, in State owned facilities and by State employed medical staff, but only to ensure their proper functioning. But when the private market of these services is underdeveloped or when such private services are inaccessible, even for only certain individuals, the State, whose primary role is that of organizer, will have to undertake the role of provider as well.

A positive obligation of the State to actively engage with abortions being carried out arises firstly when the mother's life or physical and psychological integrity are threatened by the pregnancy. In such a case, the positive obligations of the State to act in order to preserve these values correspond to guaranteeing her right to life or, respectively, her right to physical and psychological integrity, the latter falling, as a distinct component, under article 8 of the ECHR concerning the

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[15] According to article 53 paragraph 2 of the Constitution of Romania, a legitimate restraint of a right cannot affect the existence of that right. Hence, there is no possible way to restrain the right to life; once it exists, it is either respected or violated.

[16] Otherwise, there will always be room for equivocal proclamations, like that of the right to life being protected, „*in general*, from the moment of conception", as article 4 paragraph 1 of the American Convention of Human Rights provides. – http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

[17] European Court of Justice, Sixth Chamber, Judgment of 4 October 1991, C-159/90, The Society for the Protection of Unborn Children Ireland Ltd, curia.europa.eu/juris/showPdf.jsf;jsessionid=B9BA9ACFB9FD4DBD6167705C348F3325?text=&docid=97366&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1898071, paragraph 21.

[18] Published in the Official Journal C 326/26 October 2012; according to article 56, first thesis, „[w]ithin the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended".

[19] Paul Craig, Gráinne de Búrca, *Dreptul Uniunii Europene. Comentarii jurisprudenţă şi doctrină*, sixth edition, translated by Georgiana Mihu and Laura-Corina Iordache (Bucureşti: Hamangiu, 2017), 927.

[20] Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law. Cases and materials*, second edition (Cambridge: Cambridge University Press, 2010), 812.

right to respect for private life[21]. When a risk of this kind is exhibited, even when voluntary abortion is generally forbidden and only allowed in such exceptional cases, the State has the positive obligation to provide „an accessible and effective procedure"[22] for establishing such a risk.

Consequently, even when abortion is generally prohibited and only allowed in exceptional circumstances, and *a fortiori* when it is generally allowed, the State holds a positive obligation to preserve the woman's life or physical and psychological integrity by ensuring, when these values are at an immediate or concrete risk, the access to medical services performing voluntary abortions[23].

This positive obligation extends to the situations when abortion is generally allowed in respect for the private life, as a legal manifestation of personal autonomy.

In this regard, it should me borne in mind that abortion holds by its own nature an urgent character, even when life or physical and psychological integrity are not in concrete peril, since the medical risks of this procedure have the tendency to increase during the pregnancy, until a point when abortion is no longer feasible; by that moment, if procrastination is imputable to the State, finding a violation of article 8 of the Convention is unavoidable.

Moreover, when access to a lawful abortion or to receiving a scientifically trustworthy diagnosis regarding the situation of the foetus, in order to make an informed decision to have an abortion or not, is rendered excessively heavy and time-consuming, the suffering induced to the patient may result in a violation not only of the right to respect for the private life, but also in an inhuman or degrading treatment, prohibited by article 3 of the ECHR[24].

## 3. The right to conscientious objection

### 3.1. The legal nature of the conscientious objection

The conscientious objection is a manifestation of freedom of conscience, in the form an opposition to civic or professional duties which entangle with a person's sincere moral convictions about essential individual and social issues. It is a typical individual manifestation of freedom of conscience and one of the most important aspects defining the derogatory nature of this fundamental right, as compared to the freedom of expression, since the general terms of the latter provide only a right to express an opinion, but not a right to resist performing an obligation.

A conscientious objection may be religiously or philosophically grounded, but its constant lies with deeply held moral values, for which a distinction concerning the individual attitude towards religion is irrelevant. In order to refuse a conscientious objection, insincerity must be proven without a doubt.

Its prominent avatar is the conscientious objection to military service, which is recognised equally in the consideration of religious[25] and non-religious[26] convictions. Sometimes it is strategically hidden between different constitutional provisions, as it happens in article 9a paragraph 4 of the Constitution of Austria, related to the alternative military service[27], or in article 42 paragraph 2 letter a) of the Constitution of Romania, providing that the work performed instead of

[21] ECHR, A., B. and C. v. Ireland, *precited*, paragraph 245.

[22] Ibidem, paragraph 267; in this regard, the Court did "not consider that the normal process of medical consultation could be considered an effective means of determining whether an abortion may be lawfully performed in Ireland on the ground of a risk to life" (paragraph 255) and „it is not clear how the courts would enforce a mandatory order requiring doctors to carry out an abortion" (paragraph 260).

[23] In this regard, it has been pointed out that „[a] ban on abortions does not result in fewer abortions but mainly leads to clandestine abortions, which are more traumatic and increase maternal mortality and/or lead to abortion "tourism" which is costly and delays the timing of an abortion and results in social inequities." – Parliamentary Assembly of the Council of Europe, Resolution 1607 (2008) – Access to safe and legal abortion in Europe, paragraph 4, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17638. Consequently, the Parliamentary Assembly invited the Member States to „guarantee women's effective exercise of their right of access to a safe and legal abortion" (paragraph 7.2) and to „allow women freedom of choice and offer the conditions for a free and enlightened choice without specifically promoting abortion" (paragraph 7.3) – Ibidem.

[24] ECHR, Fourth Section, judgment of 26 May 2011, R. R. v. Poland (application no. 27617/04), definitive on 28 November 2011, http://hudoc.echr.coe.int/eng?i=001-104911, paragraphs 159-161; to the same effect, see Human Rights Committee, V.D.A. v. Argentina, views of 29 March 2011, communication no. 1608/2007, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhspbttFNxTkgvXTPJWIZn3vm5evvVMbjUBZtxyjt0k4pqGQ0t5I6FG%2FeF%2FQHB9ks%2FDU0FCDf4pgigJXjf6%2BfTsVEuWpuVhZfLeUcUw%2FlIFaK%2BFXH0UIxHcF%2BGLAv%2BSE9l3Q%3D%3D, where the Committee found a violation of article 7, regarding the right not to be submitted, *inter alia*, to "cruel, inhuman or degrading treatment", of the International Covenant on Civil and Political Rights, adopted on 16 December 1966 at New York by the United Nations General Assembly, ratified by State Council Decree no. 212/1974, published in Buletinul Oficial no. 146 of 20 November 1974; according to paragraph 9.2, the "Committee considers that the State party's omission, in failing to guarantee L.M.R.'s right to a termination of pregnancy, as provided under article 86.2 of the Criminal Code, when her family so requested, caused L.M.R. physical and mental suffering constituting a violation of article 7 of the Covenant that was made especially serious by the victim's status as a young girl with a disability".

[25] ECHR, Great Chamber, judgment of 7 July 2011, Bayatyan v. Armenia (application no. 42730/05), http://hudoc.echr.coe.int/eng?i=001-105611), paragraph 125.

[26] ECHR, Second Section, judgment of 12 June 2012, Savda v. Turkey (application no. 42730/05), definitive on 12 September 2012, http://hudoc.echr.coe.int/eng?i=001-111414, paragraph 96.

[27] Article 9a paragraph 4 of the Constitution of Austria reads: „Conscientious objectors who refuse the fulfilment of compulsory military service and are exonerated therefrom must perform an alternative service (civilian service)." – https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930 _1.html.

military obligations for reasons of religion or conscience does not constitute forced labour.

With all the declaratory tendency to state its exceptional nature, subject to an express provision of the law[28], the conscientious objection is a general principle of freedom of conscience. Therefore, it can be refused only as a restriction of this fundamental right, under the standards of article 9 paragraph 2 of the ECHR[29]. This renders ineffective, at least under the standards of this international instrument, any intention to generally deny it, as a result of interpreting national constitutional provisions, no matter their more[30] or less[31] categoric terms.

There is a difference concerning the effects of the conscientious objection, as it implies duties meant to satisfy exclusively the State's interest, like the military obligations, or happen to be integrated in a framework of conflicting fundamental rights. As this distinction falls outside the scope of this paper, because the first hypothesis is logically excluded in the matter of voluntary abortion, it suffices to point out that dealing with conflicting fundamental rights creates a necessity for balance, meaning that, as a matter of principle, restricting all of them to the concurrence of the balance point, or better to say balance margin, may prove the only way to respect all, meaning not to suppress or render ineffective any of the rights involved and still grant them to most possible extent.

We find it undoubted that voluntary abortion involves a moral choice and fundamental implications for the individual conscience, notoriously sustained by religious or secular doctrines who tend to give prevalence to the value of life of the foetus and its human nature; therefore, there is no point in empirically demonstrating that there are people who, for reasons of conscience (involving both religious and non-religious convictions), so in exercising their fundamental right to freedom of conscience, are in the position to resist a legal or contractual obligation to take part in a voluntary abortion, as a medical procedure.

The fact that medical practitioners have voluntarily chosen their job is irrelevant in respect to the conscientious objection, since this is not an argument to deny it[32].

There is no much need for balancing fundamental rights when, for example, one out of many physicians in a medical facility refuses to carry out a voluntary abortion, because there would be no impediment that the issue is dealt by one of the other physicians. The workload will be possible to balance, considering other medical activities. At least the whole matter may unhappily result in a disciplinary procedure, in which only the doctor's freedom of conscience will be involved, so there will be no reason why, being the only fundamental right in question, it should not prevail over his or her general legal or contractual obligations.

In the modified version the Hippocratic Oath provided by the Romanian Law[33], any physician undertakes the obligation to fulfil his or her profession "with conscience and dignity", as well as not to accept any religious considerations interpose between his or her duty and the patient. Even if this is an obvious alteration of the original oath providing the obligation not to "give a woman a destructive pessary"[34], this modern oath insists upon guarding, even under threat, "full respect for human life from its beginnings", implying that, in a systematic approach, defining the beginnings of life (which is far from a purely scientific concept, since the word is used in its plural form, suggesting a rather ideological meaning) is subject not just to material law, but also to conscience[35]. It follows that the above-mentioned religious considerations, which may not interpose between the doctor's professional duties and the patient, refer only to a duty of non-discrimination on grounds of patients' religion or lack of religion, but not of religious self-neutralization of the physician, by forbidding a conscientious objection as a general manifestation of conscience.

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[28] Adrian-Dorel Dumitrescu, *Obiecţia de conştiinţă în dreptul român şi în dreptul altor state* [Conscientious objection in Romanian law and in other States' law], Dreptul no. 6/2009, 59.

[29] Article 9 paragraph 2 of ECHR reads: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

[30] Article 58 paragraph 2 of the Constitution of Bulgaria reads: „Obligations established by the Constitution and the law shall not be defaulted upon on grounds of religious or other convictions." – https://www.mrrb.bg/en/constitution-of-the-republic-of-bulgaria.

[31] Article 70 of the Constitutional Act of Denmark reads: „No person shall by reason of his creed or descent be deprived of access to the full enjoyment of civic and political rights, nor shall he escape compliance with any common civic duty for such reasons." – https://www.thedanishparliament.dk/~/media/pdf/publikationer/english/my_constitutional_act_with_explanations. ashx. Also, article 6 paragraph 1 of the Constitution of the Netherlands reads: „Everyone shall have the right to profess freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law." – https://www.government.nl/binaries/government/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008/the-constitution-of-the-kingdom-of-the-netherlands-2008.pdf.

[32] Heiner Bielefeldt, Nazila Ghannea and Michael Wiener, *Freedom of religion or belief. An international law commentary* (Oxford: Oxford University Press, 2017), 301.

[33] Article 384 paragraph 1 of Law no. 95/2006 regarding the reform in the field of Healthcare, republished in Monitorul Oficial, partea I, no. 652 of 28 August 2015. This provision attempts to reproduce the Hippocratic Oath as adopted by the World Medical Association's Declaration of Geneva form 1948, in a form which is not anymore reflecting the content of this Declaration, which instead reads: "I will maintain the utmost respect for human life", without any reference to its beginning(s). – https://www.wma.net/policies-post/wma-declaration-of-geneva.

[34] Stephen H. Miles, *The Hippocratic Oath and the Ethics of Medicine* (Oxford: Oxford University Press, 2004), xiv.

[35] B. M. Dickens, R. J. Cook, *The scope and limits of conscientious objection,* International Journal of Gynecology & Obstetrics 71 (2000), 73.

There will be however a need for balance when the exercise of the conscientious objection by several medical practitioners will result in rendering the voluntary abortion service ineffective or significantly difficult, provided that the State has a positive obligation to ensure the functionality of these services, as a guarantee for a concurring fundamental right (respect for the private life, if not other rights), a matter which will be approached further on.

### 3.2. The right to voluntary abortion colliding against the freedom of conscience

Both these rights originate in the principle of personal autonomy, involving a personal critical appreciation of the good, as a common value shared as well by the whole society. It is this common origin that makes any abstract choice between the two rights the result of a moral choice, which is usually ideologically integrated. This remark is no more than a mere application of the general postulate stating that "[e]very individual judges in terms of conscience the orders and the social norms whose addressee is"[36], because any law is, essentially, no more than a result of a conscientious choice and conscience is naturally and continuously challenging its products.

In a case where voluntary abortion was allowed only under restrictive conditions, including when the pregnancy is the result of a rape, the ECHR found that, such conditions being met, the "unwillingness of numerous doctors to provide a referral for abortion or to carry out the lawful abortion as such constituted evidence of the State's failure to enforce its own laws and to regulate the practice of conscientious objection"[37].

In follows that, since the right to voluntary abortion is, under restricted or *a fortiori* under broad conditions, a component of the right to respect for the private life, the State has the positive obligation to ensure the functionality of such procedures; this obligation includes a predictable use of conscientious objections, so that this does not transform into a *de facto* denial of the right in question. Once the State has instituted either broad or restrictive conditions for voluntary abortion, "the legal framework devised for this purpose should be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention"[38].

"States are obliged to organise their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation"[39].

In the presence of a conflict between individual rights, the right to respect for the private life on the part of the patient and the freedom of conscience on the part of the medical staff, it is not a solution of prevalence which is to be sought, but one of proper balance. In principle, there is no way the medical practitioner's right to object is guaranteed differently than by allowing him, when motives of conscience are involved, to refuse the performance of a voluntary abortion. However, if theoretically all doctors were to raise the same issue, there would be none left to perform this otherwise lawful service. Finding a proper balance between the interests involved may be based on the premise that such an extreme scenario is not happening and only some of the medical practitioners actually raise conscientious objections. Should it indeed happen, a rational exercise shows that it would be an expression of the largely shared moral views within the society which would consequently result in more restrictive conditions for voluntary abortion, equating in congruent restrictive conditions for the conscientious objections.

Thus, when conflicting individual rights are involved, it appears that the conscientious objection has a quantitative dimension, showing that its width is indirectly proportional with the percentage of objectors. When they become a majority, either they can change the law, so there will be no need to object anymore, or, not being able to change it because that would make it undemocratic, a similar outcome will apply to their objection.

Therefore, in the case here discussed, the conscientious objections raised by medical practitioners will be more successful as they form a narrower minority; when a physician will not perform a voluntary abortion due to a matter of conscience, but there is a colleague right next door with no impediment in this regard or any other, there are no individual rights to balance; the patient will be easily able to resort to the other physician. When it is more difficult to find another one, due to any practical reasons, the objecting physician will have to refer the patient to a compatible colleague. The ECHR found this practice, together with that of communicating the objection in writing to the patient, to be compatible in principle with both rights involved[40].

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[36] Grégor Puppinck, *Objection de conscience et droits de l'homme. Essai d'analyse systématique*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2972502, 7.

[37] ECHR, P. and S. v. Poland, *precited*, paragraph 81; furthermore, „once the State, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain an abortion. In particular, the State is under a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion" (paragraph 99).

[38] ECHR, A., B. and C. v. Ireland, *precited*, paragraph 249.

[39] ECHR, R. R. v. Poland, *precited*, paragraph 206.

[40] ECHR, P. and S. v. Poland, *precited*, paragraph 107; in that case, the Court however found that this regulated practice was not applied, but instead the facts were „marred by procrastination and confusion. The applicants were given misleading and contradictory information. They did not receive appropriate and objective medical counselling which would have due regard to their own views and wishes. No set

## 4. The need for balance

### 4.1. Ways to balance the conflicting rights

Although we discern isolated conscientious objections from a wide-spread phenomenon, and this distinction can prove itself useful when settling a dispute, it may prove useless in terms of prevention. The legislator may know or not know the frequency and intensity of conscientious objections in the ranks of medical practitioners across the country but is unlikely to always anticipate any significant developments in this regard. A regulatory action is more desirable to intervene outside an already existing conflict, because when acting in a particular ideological context there will be a greater risk for the State's intervention to be perceived as a back up for one of the parties. Because the rules are normally supposed to be set before the game and not changed during its course, the observance of the State's obligation of neutrality and impartiality may impair its possibility to act in order to regulate the rights and obligations of already conflicting parties. Therefore, we find for the adoption of a principled regulatory framework before a conflict between fundamental rights arises, integrated in a philosophy of dynamic balance; the law must be able to react by self-adjusting to society's moral needs.

By Resolution 1763 (2010), the Parliamentary Assembly of the Council of Europe invited the Member States "to develop comprehensive and clear regulations that define and regulate conscientious objection with regard to health and medical services, and which: 4.1. guarantee the right to conscientious objection in relation to participation in the medical procedure in question; 4.2. ensure that patients are informed of any conscientious objection in a timely manner and referred to another health-care provider; 4.3. ensure that patients receive appropriate treatment, in particular in cases of emergency"[41].

These three requirements make up an original solution to the conflict of fundamental rights involved in the matter of voluntary abortion, meant also to prevent any discrimination. There is a particularly wide space for the conscientious objection, since no quantitative cap appears to be set to prevent it, not in terms of numbers of objecting medical practitioners, nor in terms of distance or costs involved. Paragraph 4.1 pleads for an absolute right to object for reasons of conscience, if read in conjunction with paragraph 1, stating that "[n]o person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason"[42]. Balancing the physicians' freedom of conscience to patients' rights, when a voluntary, on request, abortion is in question, seems to remain just a matter of proper information and referral to a non-objecting practitioner.

This original solution stems from assuming a reasonable quantitative equation. If theoretically there was practically or almost no practitioner left to perform a voluntary abortion due to a quasi-unanimous conscientious objection, this would not be a result of a doctors' conspiracy aimed to violate the fundamental right to respect for private life or to discriminate against women whose conscience prescribes or at least allows voluntary abortion or against women who are poor or just uniformed; on the contrary, it would be the result of a twist of general moral opinion about the value of life which served as a legitimate purpose for the Irish constituent when adopting the recently abolished ban on voluntary abortions, that is to institute a restriction upon the right to respect for private life, as approved by the ECHR in the A., B. and C. v. Ireland case, as discussed above in paragraph 2.1.

*A fortiori*, when such an extreme peradventure is not actual, objecting medical practitioners must only promptly inform the patient about his or her conscientious objection and immediately refer her to another practitioner[43]. This firstly implies the duty to obtain information in this regard at an institutional level, a task which cannot be entirely put upon the objecting practitioners. Ultimately the State is responsible for gathering and disseminating relevant information to all medical facilities and indirectly to their employed practitioners, so that the latter, in case they decide to object, can promptly pass that relevant information to the rejected patients.

The ultimate triumph in matter of conscientious objection is, be it for concurrent reasons too, the recognition of a discretionary right to object without

procedure was available to them under which they could have their views heard and properly taken into consideration with a modicum of procedural fairness" (paragraph 108).

[41] Parliamentary Assembly of the Council of Europe, Resolution 1763 (2010) – The right to conscientious objection in lawful medical care, paragraph 4, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17909.

[42] *Ibidem.* This paragraph does not extend, as was stated and criticized (Elena-Ancuta Franţ, *Legislația românească privind avortul în context European* [Romanian legislation on abortion in European context], Analele Științifice ale Universității Alexandru Ioan Cuza din Iași, seria Științe Juridice, no. 1/2013, 62), the applicability of the conscientious objection to legal entities like the hospitals or institutions there referred to, but only deals with the consequences of raising such objection by the individual practitioners, upon the hospitals or institutions in which they activate.

[43] To this respect, article 33 of the Code of Medical Ethics of the Romanian College of Physicians, adopted by Decision no. 3/2016, published in Monitorul Oficial, partea I, no. 981 of 7 December 2016, titled „Refusal to provide medical services" reads: (1) Refusal to provide medical assistance may occur under the strict conditions of the law or if by the request of the individual in question the physician is asked to perform acts which derogate from the professional independence, affect his or her image or moral values or the request is not in conformity with the fundamental principles of exercising the profession of physician, with the purpose and the social role of the medical profession. (2) In any case, the physician will explain the individual in question the reasons for his or her refusal, will ensure that due to the refusal of providing medical services the life or health of the said individual are not endangered and, inasmuch as the refusal is based upon the breach of his or her moral convictions, will refer the individual in question to another colleague or to another medical facility".

any reference to conscience, as provided, for example, by the French Public Health Code[44]. This can also be an example of how the urge to take out the conscience issues outside the public sphere can turn against the recipients of public service, should many medical practitioners make use of that discretionary right.

Nevertheless, the viability of such a solution essentially depends upon the functionality of the equation we have envisaged above. If the objectors eventually form a majority and the still lawful medical service in question is no more properly functional, because the access to it has become practically impossible or significantly difficult, resulting in discrimination against women[45] who, for example, do not afford to travel abroad or to a remote area of the same country in order to benefit from it, and there is no normative change as a result to this moral approach within the medical community, a collision of the conflicting rights will result in a breach of the legal right to a voluntary abortion. If, despite a moral choice largely shared within the society, the law maintains no restraint upon the right to voluntary abortion, it will be the conscientious objection which shall disproportionately bear the cost. So conflicting rights will have to be balanced, either by the way of an evolving legislation or by the way of applying a static legislation; both ways are never detached from the social context, but instead have to provide solutions to the latter's disfunctions.

### 4.2. Coordinates of discrimination in the context of conscientious objection to voluntary abortion

Besides the State's positive obligation in terms of access to voluntary abortion as a medical right, the situation here discussed involves not only this patient right, but also her conscience, as well as the medical practitioner's conscience. For if the medical practitioner's conscience opposes the performance of a legal medical procedure, and the access to it becomes ineffective or significantly difficult for a patient whose conscience, if it doesn't prescribe it, at least it allows it, then there would be a conflict in terms of conscience between the patient and the medical practitioner; the ideological neutrality of the State, which is one of its basic obligations in a democratic society[46], compels it not to take sides in an ideological conflict like that concerning the rightfulness or wrongfulness of the legal abortion, since this matter inevitably involves choices of conscience. If the State backs up the majority of the objecting medical practitioners, so that the individuals who are entitled to a legal voluntary abortion cannot actually obtain it, the State would inherently adopt the ideological position of the former and reject that of the latter. This would amount to discrimination as much as not recognizing any right to conscientious objection.

Therefore, the State is about to discriminate against the medical practitioners if it denies the exercise of the right to object for reasons of conscience as well as against the patients if it allows the medical practitioners to object up to the point the lawful voluntary abortion becomes practically impossible or is rendered significantly difficult. This perspective envisages a need to balance the conflicting conscience rights of medical practitioners on one side and those of the patients on the other.

The Parliamentary Assembly of the Council of Europe highlighted "the need to affirm the right of conscientious objection together with the responsibility of the State to ensure that patients are able to access lawful medical care in a timely manner", showing concern for the fact "that the unregulated use of conscientious objection may disproportionately affect women, notably those with low incomes or living in rural areas"[47], thus resulting both gender and economic status as supplementary discriminatory criteria. This observation is generally related to healthcare services, therefore is also applicable to voluntary abortion.

A separate discrimination issue may involve the circle of individuals who are entitled to object to voluntary abortions, given the diversity of the medical professions and their direct or less direct implication in the performance of such procedures. Conscientious objections are genuinely associated with the physicians who perform voluntary abortions, but the situation of the other medical staff involved in the process is comparable. It has been shown that "[t]he scope of conscientious objection allowed by the law may differ accordingly among different practitioners"[48]. This limits the objectors' group to those who have a close and concrete (or direct) involvement in the abortion procedure, or otherwise said "a certain level of complicity"[49], letting aside those who do not have such an involvement, like the staff who only care for a woman who will or has had an abortion, who prepare the necessary medical instruments or who clean the

[44] Article L-2212-8 of the French Public Health Code reads: „A physician or a midwife is never obliged to perform a voluntary termination of pregnancy, but has to inform the interested person, without delay, of his or her refusal and to immediately communicate the names of practitioners or midwives susceptible to realize such intervention [...]. No midwife or nurse, no medical ancillary, of any kind, is not compelled to concur to an abortion. A private health institution may refuse voluntary termination of pregnancies being practiced in its facilities. However, this refusal may not be opposed by a private health institution authorized to ensure the hospital public service, unless other institutions are capable to respond to the local needs [...]". – https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006072665.

[45] Heiner Bielefeldt, Nazila Ghannea and Michael Wiener, *op. cit.*, 298.

[46] ECHR, Great Chamber, judgment of 26 April 2016, İzzettin Doğan and others v. Turkey (application no. 62649/10), http://hudoc.echr.coe.int/eng?i=001-162697, paragraph 179; see also, Ionuţ-Gabriel Corduneanu, *Neutralitatea religioasă în jurisprudenţa Curţii Europene a Drepturilor Omului* [Religious neutrality in the case-law of the European Court of Human Rights] (Bucureşti: Universul Juridic, 2018), 142.

[47] *Precited*, paragraph 2.

[48] B. M. Dickens, R. J. Cook, *op. cit.*, 72.

[49] Heiner Bielefeldt, Nazila Ghannea and Michael Wiener, *op. cit.*, 295.

surgery room, as well as the medical students who have the obligation, despite their convictions, to learn all the relevant medical information, including that which concerns abortions[50].

It follows that a possible, yet erroneous distinction is to be avoided in what regards nurses and other medical auxiliary staff, following the application of two irrelevant criteria: their ancillary role as compared to the physicians' and their professional subordination to the latter[51], who enjoy a rather independent professional statute. The valid criterium is the nature of the activity in question, not the statute of the objector, so that an objecting nurse will still have to perform any activity which is not in close and concrete connection with the abortion itself; the only thing which he or she may object to is the actual participation to voluntary abortion, consisting of helping the physician to carry it out, from the moment it is initiated until it is completed. Therefore, the conscientious objection does not cover pre-operative or post-operative care.

In cases where the functionality of one or several healthcare institutions, as far as voluntary abortion is concerned, is affected by the great proportion of objecting medical practitioners, a favourable circumstance for discrimination is most likely to be experienced either way.

Raising a conscientious objection cannot be a disciplinary offence, so it can never result in a disciplinary sanction, the less in a disciplinary dismissal, since that would be an inadmissible breach of both freedom of conscience and right to work. A layoff, as a consequence of a post or function being abated, would be equally unjustified, since in principle, precisely for reasons of non-discrimination, posts or functions contained by an organization chart of a medical facility cannot be divided between objecting and non-objecting staff, unless carrying out voluntary abortions is a "genuine and determining occupational requirement"[52]; this is generally not the case, since the medical practice, even only in the field of obstetrics and gynaecology, is notoriously vast; it can only happen if the posts or functions are established precisely for practicing voluntary abortions, which circumvents the possibility of layoffs to specialized abortion clinics.

As regards the acts of employment, when the functionality of voluntary abortion practice is seriously affected by the high percentage of medical practitioners already working in a medical facility, according to the nature of each position, the employer may consider the fact of non-objecting as a "genuine and determining occupational requirement" and therefore may refuse to employ, in this specific context, the practitioners who declare they object or fail to make any statement in this regard. However, nothing impedes the practitioners who did not object to carrying out voluntary abortions at the time of their employment to sincerely become objectors afterwards. They cannot be discriminated against due to this choice of conscience, which cannot in itself be a reason for a layoff. If, however, the employer can prove that he was deceived, because for example the medical practitioner in question has a long history of objecting to voluntary abortions with previous employers, the employment contract can be annulled for undue influence. It will still not be the case for a disciplinary sanction, because the fraudulent conduct regards the act of employment itself and not its exercise.

## 5. Conclusions

In follows that the right to respect for private life encompasses the right to voluntary abortion, which is not absolute, but may be restrained for the protection of morals. A right to life of the foetus does not enter the legal equation, since it cannot be only restrained, but only suppressed.

The right to voluntary abortion, recognized either under broad or restrictive conditions, like those related to foetus impairment, pregnancy resulted from a rape or under-age pregnancy, involves a positive obligation for the State to ensure the functionality of the necessary healthcare services, so that women have an indiscriminate access to such lawful medical services. The State's failure in this regard results in a violation of the right to private life and may also cause violations of the rights to life or to physical and psychological integrity, or not to be submitted to an inhuman or degrading treatment, as well as discrimination based on conscience of belief, gender, social or economic status.

A highly sensitive moral approach regarding voluntary abortion is unavoidable, as well as an ideological stand, either in favour or against it. Hence, it is altogether legitimate that medical practitioners enjoy the right to object for reasons of conscience to carrying out voluntary abortions.

Despite the tendency to attain an absolute right to conscientious objection, this option is conditional upon the functionality of the healthcare system. This may be achieved naturally, if there are enough available non-objecting medical practitioners, or by restraining the right to object, which proves that the affirmation of an absolute right to object, to the limit of the least complicity, is not feasible.

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[50] Learning is to be differentiated from performing, under supervision, a voluntary termination of pregnancy, which even a medical student may object to, invoking an obstacle of conscience. See, B. M. Dickens, R. J. Cook, *op. cit.*, 76.

[51] *Idem*, 72.

[52] Article 4 paragraph 1 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, published in the Official Journal L 303/2 December 2000, reads: „Notwithstanding Article 2 (1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."

There is instead only room for balance and not for the full supremacy of any of the rights involved, which both originate in the principle of personal autonomy. The idea of balance implies that not just one of these rights is supposed to concede to the other, but they both need to be subjected to mutual concession, to the point they both remain in force to the greatest possible extent. In order to ensure the viability of such a system, the State should not forbear restraining both rights involved, because it is the affirmation of just one's false absolute nature which conducts directly to a violation of the other. This statement equally regards the freedom of conscience and the right to respect for the private life.

Nevertheless, restraining the freedom of conscience can never attain the same level of efficacy as restraining the right to voluntary abortion.

In the first case, the restraint may follow a progressive approach, discerning cases when choice prevails over necessity, so that a conscientious objection cannot be allowed up to the point it leads to any rational endangerment of a patient's life or physical or psychological integrity; then, even when abortion is carried out on request, a minimum involvement may be asked from the objecting practitioners, precisely by rendering information and promptly referring patients to non-objecting practitioners, as well as informing their employers about their principled decision to object; also, the employers may assume priority in hiring non-objectors instead of objectors, meaning that they may also decide to make such an inquiry when hiring, should there not be any non-objectors left among the already employed or they be in such short numbers that the functionality of the service in question is affected.

In the second case, there is need for consonance between the way voluntary abortion is morally understood within the society and the broadness of the conditions of its legality.

In the end, the constitutional standards allow the right to voluntary abortion to be restrained for the protection of morals, as a democratically determinable subjective reality, which can be approached gradually, but do not allow that objecting medical practitioners are coerced to carry them out or sanctioned following the exercise of their right to conscientiously object.

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# LEGAL STATUS OF ANTI-DRONE SYSTEMS UNDER INTERNATIONAL LAW

**Andrei-Alexandru STOICA***

**Abstract**

*The idea behind countering drone systems has been an ongoing issue for both states and the international community as it became clear that unmanned vehicles are going to become an integral part of any state's arsenal and infrastructure.*

*As drone technology developed so did the necessity to protect communities, borders and even rights from prying eyes and possible incursions. Furthermore, the requirement to protect communities and high value objectives has been detrimental after drone technology became accessible to a larger demographic, but while a large spectrum of drones can be bought by almost anyone, the same can't be said about counter-drone technology, which is currently sparse or exclusively in governmental control. Most anti-drone systems on the market are variants of existing anti-weaponry devices that were given another capability, but sometimes without meeting the requirements for certification or receiving a proper updated mechanical or software part.*

*This paper will focus on outlining a series of anti-drone systems that are available and how they are being currently used by states inside and outside their borders, but also to show who is allowed to use them and under what circumstances. Furthermore, the paper will showcase why international law is important in governing how counter-drone systems are deployed and used by states and why international law will be a frontrunner in the legalization process of said systems.*

*As a conclusion, the paper will mediate between current legal systems from states that have adopted anti-drone systems and how the international community must ensure the safety of other states and their citizens from the growing threat of unlawful drone deployment*

**Keywords:** *drones, international law, counter-drone, human rights, terrorism*

## 1. The legality of drone systems under current international law.

In aviation, space, or ever roads, drones have achieved a level of implication that robotics and automation failed to gather and as such a drone is considered an unpiloted craft that can be used in such a way that the safety of the pilot is put firsthand, while ensuring less mechanical difficulties.

As such, drones have been around for a long time, some of the earliest recorded usages were from the time period of 1848-1849 when the Austrian Empire attacked Venice with a revolutionary tactic for that time period, an air raid. The air raid was conducted with balloons strapped with explosives while a copper wire acted as a trigger mechanism for dropping the bombs[1]. The bombs did not cause major damage but the psychological impact was devastating to the inhabitants.

Once technology evolved, drones were supposed to help the Allies in World War 2 to carry out bombing runs without the need to put lives in danger[2]. As such, B-24 bombers were supposed to be remote controlled so that they can destroy German bunkers in occupied France, but unfortunately the program ended in a disaster.

Later on, development went from controlled aircraft to controlled missiles, which offered the real proto-drone by today's standards. This marked the usage of surveillance drones in conflicts such as Vietnam, where over 550 drones had been lost and over 3000 intelligence missions were conducted[3].

While these drones had the capability to use weapons during combat situations throughout the Vietnam, Bosnia, Kosovo, Yemen conflicts and culminating with the Taliban insurgency, the first proper drone strike featuring the signature targeted killing nomenclature was in 2001 when the United States of America used a Predator drone to strike Mullah Omar, a Taliban leader, but failed to strike the target and instead caused other insignificant damage to the Taliban cause. This strike alone almost caused the operation to come to a halt[4] and caused a rupture in the chain of command.

The need to equip drones with lethal and non-lethal equipment came after CIA failed to take out Osama bin Laden in 2000, when after flying a drone over bin Laden's compound US forces figured that by the time the Tomahawk missiles would hit the area, bin Laden would have gotten away and would go into hiding. This moment sparked the need to equip drones with equipment needed for different outcomes.

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[1] Ron Bartsch, James Coyne, Drones in society. Exploring the strange new world of unmanned aircraft, Routledge, 2017, ISBN 978-131-5409-65-8.

[2] John Sifton, A brief history of drones, The Nation, 07.02.2012.

[3] Sam Biddle, America's killer drones of the Vietnam War, gizmodo.com, 14.03.2012.

[4] Chris Woods, The story of American's very first drone strike, The Atlantic, 30.05.2015.

Seeing the growing spectrum of activities where drones are active it's only safe to assume that a need to counteract these devices and vehicles from illicit activities is a must in a democratic society that acknowledges the rule of law.

While drone usage has skyrocketed signaling a global market value of over 127 billion dollars[5] , so must the legal framework ensure that only legal drone systems are permitted to operate inside a state's border and outside of it. Drones operate in helping with traffic solutions, energy transportation and production, but also in city and rural infrastructure development and as such the possibility of an illicit action must be countered.

The issue with drone defense mechanism is that the legality mechanism described by Article 36 of the Additional Protocol I to the Geneva Conventions (1949) has to be met before the mechanism is deployed[6]. As such, a minimum legal standard has to be achieved before drones and anti-drone systems are deployed in both conflict and peace activities.

But seeing as how drones have been around for hundreds of years and only after two world wars where they acknowledged through the Paris Convention of 1919 and Chicago Convention of 1944 when unmanned aircrafts (balloons, unmanned planes and guided aircraft) had to be integrated in the airspace of a state and ensure that state actors and citizens respect territorial limitations and also obtain the proper documents to legally own and fly said devices[7]. No aircraft capable of being flown without a pilot shall be flown without an onboard pilot over the territory of another State without special authorization by that State and in accordance with the terms of such authorization. Each State undertakes to insure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft.

However, state practice has downplayed the efficiency of these norms, meaning that both public and private entities have to find other, more long-term solutions that also fall into these legal limitations outlined by current treaties.

## 2. Means and methods of countering the unmanned vehicle threat.

The growing drone technology implementation in agriculture, tourism, law enforcement and transport also brought new threats to these fields, while also endangering data protection legislation.

For example, U.S. forces captured drones belonging to the Islamic State which were supposed to be used as improvised bombers. The sound of the drone rotors gave them away and as such the ground forces managed to take out the drones using standard ammunition[8]. A similar scenario played out in Venezuela in 2018, when two drones had been spotted near President Nicolas Maduro who at that time was giving a speech. One drone exploded near the venue and another missed the mark and crashed, but while the attack did not injure anyone, the psychological impact of the explosion dispersed the crowd.

Another important event in which a drone was countered is marked by the downing of the RQ-170 Sentinel drone that was spying Iranian facilities in 2011[9]. The drone was taken out not with conventional anti-air methods, but instead had its software hacked and flown down without causing real physical damage. Fast forwarding to 2018, Israel confirmed shooting down a drone that was similar to the old RQ-170 Sentinel model that was captured by Iranian forces in 2011[10].

The year 2018 also marked a growing trend of drones being captured or destroyed in armed conflicts as Russian forces captured drones armed with explosives near its army bases near Lattakia (Syria). Of the 13 drones that were identified, 7 where taken out with conventional anti-air methods and 6 had been hacked by electronic warfare units[11]. Albeit primitive looking by todays standards, the makeshift design choice was intended as it helped the craft avoid jammers and radars while also lowering production costs, but still relied on satellite navigation.

Other counter-drone incidents involved the usage of Patriot Missile Defense Systems deployed in Israel, in 2017 and 2018, as a means to enforce the 1974 Agreement on Separation of Forces and as such to enforce the demilitarized zone between Syria and Israel[12]. This sparked a lot of criticism from western states since a standard Patriot missile costs somewhere in between 1 to 6 million USD dollars, while the drones involved in these skirmishes were very cheap.

All these incidents show how easy drone can be used to create cheap and efficient chaos on the battlefield and can spark a new trend in terrorism threats and conducts on civilian targets far away from any battlefields.

An Israel Intelligence Heritage and Commemoration Center report from 2018 on the global

[5] PWC, Clarity from above, PwC global report on the commercial applications of drone technology, May 2016.
[6] Steven J. Barela, Legitimacy and drones: Investigating the legality, morality and efficacy of UCAVs, Routledge, 2016, ISBN 9781315592152.
[7] Martha Magdalena Bradley, Drones and the Chicago Convention, University of Pretoria, 2014, pg. 10-13.
[8] Michael Hamann, Can you legally counter a drone?, Policemag, 16.11.2018.
[9] Alex Spilius, Iran shows off captured US drone, The Telegraph, 08.12.2011.
[10] Jamie Tarabay, Israel: Iranian drone was shot down was based on captured US drone, CNN, 12.02.2018.
[11] Vladimir Isachenkov, Whose drone did the Russian military capture in Syria?, Military Times, 11.01.2018.
[12] Associated Press, Israel again fires Patriot missile at drone from Syria, 13.07.2018.

jihadi phenomenon[13] highlighted that ISIS used drones for terrorism acts and intelligence gathering activities since 2014. A lot of these drones had been acquisitioned from Europe and delivered to Syria and Iraq to be used against the national and foreign forces deployed there.

After the downfall of the Islamic State, terrorists' part of the movement issued threats that retaliatory terrorist acts would be taken against western cities via drones. Propaganda videos developed in Syria and Iraq showed how drones released bombs on unsuspecting targets in cities and caused collateral damage as result.

Further analysis of this type of new-age terrorism revealed that operatives had to fill-out feedback forms on the results they achieved or did not achieve[14]. In the early years of the conflict, the Islamic State tried to use drones as efficient spy planes, but later on changed their tactics to better reflect those of the United States or United Kingdom, both of them using armed drones to strike targets with signature strikes. About one-third of the aircraft, some as small as model airplanes, dropped bombs or were rigged with explosives to detonate on the ground, while Iraqi officials said bombs dropped by the drones, which were primarily quad copters, had killed dozens of governmental soldiers, caused a lot of injuries and it had a particular value as a propaganda tool.

The document also points out that most of these drones had been commercial drones that anyone can buy from a store and had been retrofitted with explosives with ease, making them lethal, but not really a game-changer in the conflict.

The RAND Corporation and World Economic Forum also published a report[15] that explains how there is basically no barrier in acquiring and arming a store-bought drone and how the proliferation of certain emerging technologies has effectively diffused power and made it available at the lowest levels.

This potential to take down airliners, governmental buildings, landmarks or to conduct assassinations has no limit and current means and methods of defense cannot stop this growing phenomenon.

The report also claims that Hezbollah and Houthi rebels have managed to learn, without external aid, how to operate small drones in order to take down air defenses, while also concluding that the worst nightmare for any security service or law enforcement agency is that anyone can drop chemical, biological or nuclear poisoned materials from drones, more so as 2020 will spark a boom in drone transport technology.

One of the most acknowledged events in which drones caused serious discontent was marked by the 2018 Gatwick airport chaos[16] that was caused by individuals who operated personal drones very close to the airport and by doing so almost caused an aviation incident that could cost human lives. The incident led to a 36 hour lockdown and at least 6 arrests, while also causing western based governments to admit that a nationwide counter-drone strategy is required in order to prevent unlawful drone usage.

The problem with the Gatwick incident is that most drone using states had been warned in advance regarding such vulnerabilities. The FBI told the U.S. Senate that drone threats are escalading and that security agencies require new tools in order to protect civilian lives and property[17] and so President Donald Trump gave new powers to federal authorities in order to develop programs, deploy tools and tackle emerging drone threats by removing them, however it would be deemed necessary, from the sky. Since 2017, the Federal Aviation Agency has banned drones over military bases, national landmarks, nuclear sites, airports and other sensitive areas, ever since the 1 million drones' registration mark had been hit.

Others claim that Gatwick was just the tip of the iceberg as terrorists would much rather hit objectives where mass gatherings happen, such as stadiums. These gatherings can average around 40 000 people at a time and as such a terrorist attack would much rather take place there than at an airport[18].

To counter such a threat, the U.S.A. devised a radar that can identify targets based on their physical characteristics, meaning that the radar can identify birds, balloons and drones, while also communicating the flight path to the radar operator. Afterwards, the drone can be intercepted with electronic jammers or lasers. This radar was tested and certified by the Federal Communications Commission in 2019 as the radar was used to protect the Super Bowl LIII event[19].

This radar came as a legal response to a loophole that forbid local law enforcements to tackle drones as these unmanned vehicles could only be targeted and handled by federal agencies. To help local authorities, the Trump administration opened up projects that will help both public and private sectors to control ongoing drone traffic around sensitive areas and as such to deter potential unlawful activities.

The United Kingdom used the Drone Dome[20] to counter drones by soft-killing and ceding control in order to safely land the threat. The Drone Dome was first used in the conflict against ISIS and helped coalition forces to liberate Mosul. The system itself is

[13] Meir Amit Intelligence and Terrorism Information Center, ISIS's use of drones in Syria and Iraq and the threat of using them overseas to carry out terrorist attacks, 29.10.2018.
[14] Eric Schmitt, Papers offer a peek at ISIS drones, lethal and largely off-the-shelf, New York Times, 31.01.2017.
[15] WEForum and RAND Corporation, Drone terrorism is now a reality and we need a plan to counter that, Geostrategy Platform, 20.08.2018.
[16] Gareth Davies, Gatwick chaos: Arrests made over drones after fresh scare, The Telegraph, 22.12.2018.
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[18] Zak Doffman, Forget Gatwick, why the deadliest terrorist threat from drones is not in our airports, Forbes, 27.12.2018.
[19] Haye Kesteloo, Super Bowl drone drama to be prevented with 3D radar system, Dronedj.com, 29.01.2019
[20] iHLS, Israeli technology defeated Gatwick Airport drones, 23.12.2018.

mounted on a moving platform and can jam controls in a 360 degrees arc. The manufacturer also sells a laser mounted system that can hard-kill targets. The radar itself can identify different kinds of targets from up to 5 kilometers away[21].

While technology against technology might seem the proper answer, other states tried to find a cheaper alternative to combat drones. The Netherlands[22] and Russian Federation[23] tried using hawks to hunt drones, but later found out that these birds of prey are not capable in tackling heavier drones and instead tried using falcons to capture drones, both states having success on a small scale and will require a lot of time before it can be implemented in every large city.

Japan saw a need to counter drones after the 2015 Tokyo incident, when a drone carrying a poisonous substance was found on the roof of the Prime-Minister's house. This sparked the Japanese police to train a special taskforce capable of preventing and capturing drones that fly to close to sensitive locations by flying a drone armed with a large net[24].

The Russian Federation on the other hand developed the Stupor gun, an electromagnetic pulse gun that can take out drones and even small aircraft or helicopters by knocking out the link between the operator and his craft. Support documentation explains that the device is capable of suppressing navigation and transmission channels used by unmanned aerial vehicles, as well as their photo and video cameras within the electro-optical range of frequencies[25].

While most the aforementioned equipment is found mostly in the hand of specialized operators that are part of state public authorities, a lot of accessible anti-drone equipment can be bought by individuals who want to protect their property from unlawful operations.

For example, SkyWall100[26] is a shoulder mounted gun that fires a homing projectile, which opens up and captures the drone with a net, then pulls the drone down to the ground with a parachute, making it a non-lethal approach to drones. On the other hand, the DroneShield[27] is a gun that fires electromagnetic pulses towards the drone, terminating the connection with its operator and so allows the gun owner to control the drone and land it without destroying it.

Both these options are based on already tested equipment that is found in the arsenal of army and law enforcement agencies. Also, it's important to note that a lot of other similar equipment have been showcased, most of these means and methods of countering drones having spawned a plethora of similar competition.

However, the most efficient anti-drone system was the software-lock that drone manufacturers integrated from the start, at least in advanced drones that offer their own operating system. For example, the Chinese drone manufacturer, DJI, developed a software based mechanism that prevents the drone from flying in an unlawful manner or close to protected areas, while also making the drone to refuse commands if the operator does not update the drone to meet legislative criteria[28]. The software-lock also offers a kill-switch meant to allow authorities to neutralize a threat preemptively, but unfortunately the locking software was later hacked by different hacker groups and was easily bypassed by anyone interested.

This prompted DJI to integrate a new mechanism instead of the lock, a mechanism that requires the user to pass a flight knowledge quiz that also involves understanding legal aspects of lawful flight[29]. The software was tested in the United Kingdom, Australia and China and could be implemented by other drone manufacturers at a later stage.

One of the shortcomings of inefficient drone traffic control and improper registration in a national registrar is that crimes get more efficient due to new technologies being introduced into the fray. For example, the United Kingdom face a growing number of drone operators that act as drug dealers and use their drones to smuggle drugs inside prisons[30]. A similar practice was also spotted in Canada, Australia and the United States of America.

To counter the drug carrying drones, prisons started using more barb-wire as an efficient low tech solution, but are also testing anti-drone electronic jammers and guns.

Still these solutions are in a testing phase and current legislation found in almost all drone operating states does not offer enough of a guarantee that operators will have a lawful conduct nor does it offer enough protection for potential victims of unlawful conduct.

Without a proper certified anti-drone mechanism, states have to resort to improvised solutions while testing methods of countering drones and certifying these methods to ensure a legal and fair use. For example, Germany and the United Kingdom have been testing an automated response system that connects to different and existing gathering tools (satellite, radar, cctv) and afterwards deploys a counter drone that after

[21] Times of Israel, UK army said to use Israeli-made system to end drone chaos at London airport, 21.12.2018.
[22] Thuy Ong, Dutch police will stop using drone-hunting eagles since they weren't doing what they're told, The Verge, 12.12.2017.
[23] Moscow Times, Kremlin trained falcons capable of taking down drones, 29.01.2018.
[24] Rhiannon Williams, Tokyo police are using drones with nets to catch other drones, The Telegraph, 21.01.2016.
[25] Tass, Russian Defense Ministry develops electromagnetic gun to counter drones, 22.08.2017.
[26] OpenWorks youtube channel, video presentation of said equipment can be accessible at this link: https://www.youtube.com/watch?v=M6tT1GapCe4.
[27] DroneShield gun promotional video can be found at this link: https://www.youtube.com/watch?v=fpmVTbBB0Qc.
[28] Mike Murphy, DJI is letting people override its software that prevents its drones flying in restricted areas, Qz.com, 06.07.2016.
[29] DJI, DJI introduces knowledge quiz for drone pilots in the UK, 21.12.2017.
[30] BBC, Well-organized gang flew drones carrying drugs into prisons, 30.08.2018.

it acquires its target it captures it with a net-gun[31]. However, the manufacturer has yet to certify the mechanism and also claimed that such technology is still in early stages, meanwhile other incidents such as Gatwick can happen anytime.

Meanwhile, drone incidents continue to rise and the potential of these types of conducts to cause a tragic event will continue uncontested. In China a person was detained for flying up-close to a commercial airliner that was doing a landing maneuver near an airport[32], while in Canada a drone hit a plane, causing light damage, with the owner remaining unidentifiable and forcing the government to start a real legal reform[33].

## 3. The legal standpoint regarding anti-drone systems.

Drone legislation has been passed in a number of states, in thanks to the International Civil Aviation Organization and European Union paving the way and thus ensuring that states have a similar legislation in regards to operators and their obligations to fly or operate under strict guidelines, anti-drone technology is relatively new and has yet to fully comply with article 36 of the Additional Protocol I to the Geneva Conventions (1949) or other international covenants.

The problem with legislation is that major players in the drone industry, such as the United States of America, forbid usage of counter-drone technology to the general populace and only certify state actors to handle with such technology. Counter-drone mechanisms have been tested during armed conflicts, but in an internal state affair, it could cause collateral damage and could be considered disproportionate[34]. For example, by using a drone jammer it would affect not only the targeted drone but also other gadgets, radio-communication devices and even the health of living beings.

Authorities could end up violating national statues regarding wiretapping, sabotage and computer fraud laws if the countermeasures are deployed without a clear understanding of the rules and regulations that apply. The common denominators in counter-drone technology are detectors and defenders. These terms are being advertised as counter drone technology are not really counter technology but are just drone detectors, the systems can't really do anything to stop drones, rather they identify the drone and its operator and also alert police forces in order to locate the drone operator on the ground and force the drone to the ground.

In the European Union detectors (radars) that have the possibility to detect drones have been tested and will be fully integrated in the European Aviation Safety Agency and EUROCONTROL air traffic and navigation system once the unified airspace regulation will be adopted.

Although many radars exist, they do not all comply with the laws, because they either use the right frequencies but are not yet certified or they do not use the appropriate frequency for a given state. Frequencies allocation is not the same for every state and all of these allocations must be done by a certified authority[35]. Also, most radars are placed near seaports or airports and have a technical radius of detection so a lot of space inside a state remains uncovered.

Other methods of detection include acoustic, optical and infrared detection, but all of these have shortcomings when dealing with homemade drones or drones that are not equipped with telecommunication capabilities. For example, unmanned underwater vehicles have low acoustic and electromagnetic signature, making them difficult to locate by these means, thus making them ideal for underwater intelligence gathering, mine detection and neutralization and can also traverse the polar ice cap[36].

While almost all radar systems are certified and article 36 (Additional Protocol I, Geneva Conventions of 1949), some are currently being developed to be integrated inside a drones, meaning that drones can identify drones in their respective field of activity. For example, the JY-300 is a Chinese drone, equipped with an autonomous module that can perform take-offs and landings, also the drone can be mounted with sea-target detection radar, synthetic aperture radar and optical and electronic surveillance apparatus[37].

As noted, the identifying a target does not equate to neutralizing the threat and so it must be used in conjunction with other methods.

The most common target-neutralizing methods described are the classic radar and conventional lethal or non-lethal ammunition. This means that the Convention on Certain Conventional Weapons[38] (1980) and its 5 protocols has to have its criteria met beforehand in armed conflicts. Out of the protocols, Protocol IV[39] has an interesting prohibition regarding the usage of lasers seeing as how lasers are not expressly prohibited unless they were designed to inflict blindness.

[31] iHLS, Drone traffic prompts anti-drone security experimentation, 21.02.2019.
[32] Euan McKirdy, Drone's operator detained for flying near Chinese airplane, CNN, 17.01.2017.
[33] Sherisse Pham, Drone hits passenger plane in Canada, CNN, 16.10.2017.
[34] Jonathan Rupprecht, Ability to stop drone attacks in U.S. is lacking, Forbes, 21.12.2018.
[35] GovernmentEuropa, The legal and technical requierments for countering drone technology, 08.06.2018.
[36] Michael Schmitt, International law and the military use of unmanned maritime systems, International Review of the Red Cross (2016), 98 (2), 567–592. doi:10.1017/S1816383117000339.
[37] Zhao Lei, Flying radar is first early-warning drone, ChinaDaily, 10.11.2018.
[38] Entered into force in December 1983.
[39] Came into force in July 1998.

However, drones and their operators cannot be blinded since the Protocol does not prohibit attacks against binoculars, periscopes, telescopes, and other optical equipment because the attack does not affect the operator who in most cases watching from very far away or is behind a screen and allows for attacks on electronic optical equipment, because damaging it would not cause human injury, as such drones only get their internals destroyed and not the human operator.

Legally countering drones can also be done with firearms and depending on who the shooter is (private person, police force, and army), weapons can be used from small scale and small stopping power, such as pistols, to heavier ordinance such as missiles or shells.

Jamming and hacking seem like the more elegant solution since a drone requires telecommunication channels to function, and in most cases the link between operator and drone is not encrypted.

Both jamming and hacking represent a kind of approach that has side-effects, meaning that it is indiscriminate and disproportionate if used without proper planning. For example, the United States of America through the Federal Aviation Agency in 2018[40] explained in a circular letter sent to airports that jamming technology can create a host of problems, such as electromagnetic and radio interference affecting safety of flight and air traffic management issues.

The object of jamming is to render radio transmissions unintelligible by causing interference, as such, but by using said jamming devices civilians and law enforcement agencies could very well fall short on the standards developed by the International Telecommunication Union in 2016 regarding Radio Regulations[41] and also the Union`s Constitution[42]. The risks associated with counter-drone methods involve the usage of blocking transmissions that are reserved for special situations (police, medical or firefighters) and can even block air traffic control radar beacons.

Jamming in armed conflicts can however be permitted as long as it does not violate article 8 of the Hague Convention for the Protection of Cultural Property[43] and the attack complies with Rule 8 of the Customary International Humanitarian Law adopted by the International Committee of the Red Cross[44]. As such, civilian communication lines have to be protected from jamming as they are not military objectives per-se, yet numerous military manuals and official statements consider that an area of land can constitute a military objective if it fulfils the conditions contained in the definition and in turn a jammer can hit that entire area, drones included, without it being considered a violation of international humanitarian law.

Drone jamming, done in either civilian or armed conflict situation, has to also comply with article 36 of the Additional Protocol I, as the device must be certified by a state authority and has to have a legal basis to operate. Most states have criminalized the interference with lines of communication and as such only state actors could legally take down a drone with jamming devices, this means that the law prohibits willful or malicious interference to government communications; subjects the operator to possible fines, imprisonment, or both.

Hacking (or spoofing) on the other hand is subject to a series of conventions and guidelines that are not legally binding, except for customary law that is common in all situations of armed conflict and international human rights law. For example, the Tallinn Manual 2.0[45] applies the doctrine of state responsibility, codified mainly in the International Law Commission's Articles on State Responsibility (2001) and so any kind of cyber operation targeted towards any specific terminal (including drones) translates to international responsibility for a cyber-related act that is attributable to the state and that constitutes a breach of an international legal obligation, neither physical damage nor injury is required for a cyber-act to be an internationally wrongful act and geography is not determinative in determining state responsibility.

While traditional counter-drone methods such as lasers or bullets can offer a near irrefutable indication of attribution of an activity to a state's actors, jamming and hacking cannot be so easily be traced. However, all state actors implicated in the usage of hacking and jamming technology must respect human rights law regardless.

As an example of how the legal system could react to counter-drone mechanisms, a U.S.A. national court had analyzed a case regarding the shooting down of a drone that was hovering near private property. The local judge in Kentucky that judged the criminal charges that were brought against the drone slayer stated that he had the right to shoot the drone since it was an invasion of privacy. Later, the decision was appealed to a District Court, the appeal was dismissed as lacking of subject matter jurisdiction and thus the protection of private property against drones saw a surge in the need of proper anti-drone devices[46]. It's important to point out that the drone slayer case happened in a state (from the United States of America) that allows citizens to fire weapons more freely, other states from the U.S.A., Europe or other places will not

[40] Office of Airports Safety and Standards, U.S. Department of Transportation Federal Aviation Administration, 19.07.2018, accessible at https://www.faa.gov/airports/airport_safety/media/Counter-UAS-Airport-Sponsor-Letter-July-2018.pdf.
[41] Radio Regulations Articles, 2016, ITU.
[42] ITU, Geneva, adopted in 1992.
[43] Entered into force on 7.08.1956.
[44] Jean-Marie Henckaerts , Louise Doswald-Beck, Customary International Humanitarian Law, Vol. I, 2009, ISBN 978-0-521-00528-9, pg. 29-32.
[45] Eric Talbot Jensen, The Tallinn Manual 2.0: Highlights And Insights, Georgetown Journal Of International Law, Vol. 48, 2017, pg. 735-778.
[46] Dusty Wooddell, The 'Drone Slayer' Has Case Dismissed By Federal Judge After Shooting Down Neighbor's Drone, Fstoppers, 27.03.2017.

tolerate illegal weapon discharges and will require interested parties that suffered from unlawful drone usage to seek protection from state authorities.

Currently the Federal Aviation Agency and the European Union Aviation Safety Agency both have similar classification for types of drones, some being in the same category as aircraft and so using counter-drone mechanism could be a criminal act since some drones fall under a special category that has a very special legal protection.

In 2018, a man in Texas was arrested for criminal mischief after he shot a drone that was operated by his neighbor. The drone was not on his private property but on the neighbor's side but the attacker claimed that it caused some light damage to the trees near his house and as such protected his property. Since the drone was not violating his property, the attack was deemed as a criminal offense[47].

As counter-drone systems allows the possibility to take-over the drone and its controls, state legislation requires that operators (in certain categories) be certified and/or own a pilot license for that type of vehicle. This means that if a person counters a drone by taking over the drone, which said person should own a certification to also operate it as operating without proper papers could also lead to administrative measures and even criminal offenses.

In a Congress Report compiled by the United States Government Accountability Office[48] found that over 6000 drone sightings near sensitive objectives had been reported in the U.S.A. since 2014, but only 49 of these were followed by a legal action. In most cases, the operator could not be identified and the drones rarely show up on current radar technology. Until a unified space for both traditional aircraft and drones is set up, small flying drones will continue to cause problems for authorities.

As it stands I.C.A.O.'s Manual on Remotely Piloted Aircraft Systems[49] and JARUS's recommendations[50] are the only generally civilian and commercial norms that are accepted on an international scale, and as such offer the best perspectives for states to adopt a stance on countering drone threats. What the Congress Report compiled by G.A.O. did outline was that only a handful of states (members of the international community) adopted national legislation that requires drone operators to obtain operational certificates and to register with a national registrar, thus allowing an uncontrolled proliferation of unmanned vehicles.

Currently, the United States of America has started a legislative reform to allow governmental agencies to mitigate drone threats that come close to sensitive areas, while also exempting counter-drone activities from federal criminal laws[51], while the European Union adopted the Drones Amsterdam Declaration[52] in order to implement the U-space Demonstrator Network, a system that will allow better security and privacy legislation and enforcement mechanisms in order to prevent unlawful usage of drones.

As drones become smaller and faster so must the response to unlawfulness be on par with the development of said drones. In the future, soldiers will have to carry anti-drone equipment when going on the battlefield and so military squads will compromise of drone and anti-drone users, with their respective gear[53].

## 4. Conclusions

To summarize, counter-drone legislation is an integral part of drone legislation, one cannot function without the other, but technology has evolved in a rapid burst and so states must identify the best solution to counter not only legally manufactured drones but also homemade drones that function on other frequencies and with different load-outs than the commercially available ones.

As more states open registrars for different kinds of drones and adopt better detection capabilities, so will homemade drones have to comply to universally accepted standards or face legal action from state authorities in order to comply. There are enough counter-drone devices, both work-in-progress and traditional to ensure that private property and privacy are protected from unlawful conduct and also to protect military objectives. The only downside is that everyone is going for the cheaper alternative instead of trying to identify solutions that do not require the usage of force or tampering.

Such solutions are already offered by international organizations in the form of registrars, universal design standards and the possibility to impose fines and even jail time to those who do not comply to socities rules. Unfortunetly, society had to endure the growing fear of ISIS terror threats of improvised drone bombs to grasp the problem while other incidents where human lives where put in harms way, such as the 2017 Seatle incident where a person got 30 days of jail time and a fine for crashing a drone in a person and causing said person to be knocked unconsciously[54].

The year 2017 also saw the incident between a civilian drone and an army helicopter, back when the United Nations General Assembly was in session. The army helicopter was doing a patrol mission, while the

[47] Haye Kesteloo, Man shoots gun at neighbor's drone, Dronedj, 19.11.2018.
[48] GAO, Small Unmanned Aircraft Systems FAA Should Improve Its Management Of Safety Risks, GAO-18-110, May 2018.
[49] DOC 10019, ICAO, 2015.
[50] Accessible on https://rpas-regulations.com/community-info/jarus/.
[51] DHS Science and Technology Directorate, Countering Unmanned Aircraft Systems – Fact Sheet 2018, DHS.gov.
[52] Amsterdam 28 November 2018, accessible at https://ec.europa.eu/transport/sites/transport/files/2018-drones-amsterdam-declaration.pdf.
[53] Maj. Hassan Kamara, Rethinking the U.S. Army infantry rifle squad, Military Review, Army University Press, March-April 2018.
[54] Ben Popper, Man gets 30 days in jail for drone crash that knocked woman unconscious, The Verge, 27.02.2017.

drone was in a no-fly zone, and so the operator was found guilty of flying the drone in the no-fly zone.

Unless states move to adopt a common position on how to treat unlawful conduct, then drone countering devices will remain needed and must be certified in order to be used by law enforcement agencies and private contractors or civilians.

The lack of express legislative actions in counter-drone devices should be seen as an inaction of state actors, but rather it should be seen as a continuation of adapting current legislation to current issues.

However, unless a unified space for drones to be accepted in is not developed, then the proliferation of drones will remain a problem that will have to tackle and so even a soft-ban of drone could happen, a move that may seem counter-productive to the current economy where aautomation represents a key development in combating lack of human resources. Current estmations point out that 2030[55][56] will be the year of autonomy in jobs, where drones and robots in general will overtake the number of people and so being able to counter rouge or hijacked robots will be deemed mandatory.

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# COOPERATION AND VERIFICATION MECHANISM(CVM) REPORT 2018 AND THE CHALLENGES OF THE JUDICIAL SYSTEM

**Florin STOICA***

**Abstract**

*Although it is an increasingly popular theme in the romanian public space, justice, as a power in a state, faces European challenges and internal challenges. Current legislative changes impact or halt the progress made during the ten-year mechanism of cooperation and verification of romanian justice. We wonder if the eleventh year is a crossroads one for the judiciary, or if it is a year of rearranging the progress made in the ten years of monitoring. We also raise the question of the effect of this public service and the impact it shall have on the population. If at this moment Romania has a black spot in the European filter regarding justice and if this public service serves the public interest are the premises from which we will go during this study. The obvious progress made so far can be jeopardized by this controversial period of the system, the period in which this state power is subject to political and public pressure. Could civil society influence the outcome of the latest Cooperation and Verification Mechanism (CVM) Report, or politics is the one that attracted this result, there are two other key questions for the context in which Romania is at this moment. Activating the famous Article 7 of the EU Treaty, dubbed the media "nuclear weapon" against Member States that violate the values of the Union, is one of the challenges that the Romanian state has to face.*

**Keywords:** *Judicial system, legislative changes, cooperation and verification mechanism, public service, justice*

## 1. Introduction

To begin with the starting point of the establishment of the Cooperation and Verification Mechanism (CVM), namely, with the date on which the Benchmarks Objectives were adopted as a part of the CVM , notable progress is being made, regarding the Case-law of the Court of Justice and the ECHR, standards, best international practices[1] and the availability of comparative information regarding the national judicial systems found in the EU[2] which also contribute to picturing the local landscape in an objective manner , the evolution of the judiciary system and the fight against corruption in Romania.

In 2017, the European Commission noted the progress which the romanian state had had in ten years of monitoring by the cooperation and verification mechanism and at the same time provided twelve recommendations aimed at completing the monitoring process. The European authorities therefore considered that the recommendations of January 2017 are satisfactory and shall clearly lead to the conclusion of the CVM[3], the only impediment being the national one, namely whether the evolution of the situation would have clearly reversed the meaning of progress. On this subject, the Council's proposal was to put an end to the cooperation and verification mechanism for Romania when the four milestones in place shall be achieved in a sufficient manner[4].

National challenges regarding judicial independence have had repercussions at the level of the Council and the Commission, which emphasized to the romanian authorities, the importance of complying with the community legal framework and the obligations arising as a result of the statute of member and of adhering to the accession treaty.

From the theses of the latest CVM report, we know that the majority of the measures taken by the romanian state have prompted the Commission to reconsider the basis on which the overall assessment has been built. In its actions, the Commission considered the negative opinions, which the Venice Commission issued, aiming the legislative changes made by the competent romanian authorities.

In terms of the latest monitoring report, we need to realise whether current legislative changes have made an impact or stopped the progress achieved in these ten years of cooperation mechanism and verification of the romanian justice and should realise whether we are witnessing an evolution or involution of the romanian judicial system. In the following, we

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[1] The most important are developments in the case law of the Court of Justice in the field of judicial independence, the case law of the European Court of Human Rights (ECHR) on the right to a fair trial, the United Nations Convention against Corruption, Venice on European standards regarding the independence of the judiciary, as well as the indicators of the European Commission for the Efficiency of Justice (CEPEJ)

[2] Including Dashboard Of side to the EU On Justice: http://ec.europa.eu/justice/effective-justice/scoreboard/

[3] COM (2017) 44 - https://ec.europa.eu/info/files/progress-report-romania-2017-com-2017-44_en. Following the conclusions of the Council of Ministers of 17 October 2006 (13339/06), the mechanism was established by Commission Decision of 13 December 2006 (C (2006) 6569).

[4] Council conclusions on the Cooperation and Verification Mechanism, 12 December 2017 https://ec.europa.eu/info/sites/info/files/20171212-st15587_en.pdf. The four benchmarks that apply to Romania are presented in the accompanying technical report on page 1.

shall try to analyse the effects and recommendations of the report on the romanian system of justice.

## 2. Content

### 2.1. Current Premises

Not only the socio-political context, but also judicial and social factors shall be considered the most relevant for the romanian state's ability to perform reforms of its own judicial system. Thus, on an X-ray of the romanian national system, we find that the difficulties in stabilising consist of inadequate legislative practices, confrontations between the political system's actants, but also the difficult media context. At a simple reading, we would be tempted to emphasise that these shortcomings are not subject to the CVM report, but indirectly the impact on the progress of judicial reforms is felt strongly.

Following the report in year 2017, progress stagnated, and the up above mentioned factors did not suffer any changes, but on the contrary, attracted an unfavourable image and context to the progress of justice.

Thus, fundamental legislative changes, adopted hastily, without consultation, the media landscape, the press attacks on magistrates, the conflict between authorities, the pressure on civil society, the implications of the Constitutional Tribunal, public demonstrations are part of the factors that generated concern at the level of the European Union authorities and which attracted the involution of an independent judicial system and the reform of judiciary against high-level corruption.

With the entry into force of the GDPR, Member States are required to ensure the protection of freedom of expression and information in relation to the mass-media.

Facing the european authorities, the motivation to adopt legislative changes by speeding them up, namely the protocols of cooperation between judicial institutions, mainly the criminal prosecution bodies and the romanian intelligence service, were a source of systemic abuses, especially in Corruption cases, is not a solid foundation. Thus, the recommendations of the european assessors lead to conducting independent surveys to establish the implications of other entities and to determine whether systemic deficiencies have been recorded.

## 3. Progress towards the January 2017 report and the current context

The foundation of the previous report necessitated the reconsideration of two key areas, namely the judiciary acts and the legal safeguards for the independence of the judiciary. The Commission and has paid particular attention to the revocation of the chief prosecutor of the Anti-Corruption Directorate.

Thus, the three judiciary acts, drawn up and in force since January 2004, govern the judiciary, the statute of judges and prosecutors, the functioning of the courts and prosecution offices and the Superior Council of Magistracy. The CVM Report of January 2017, attracted the attention of the romanian authorities on the necessity for an open, transparent and constructive legislative process in which the independence of the judiciary is to prevail.[5] The reform of the romanian judicial system can ensure its durability if the opinion of the Venice Commission is taken into account.

Although the laws of justice are now amended, these amendments in force [6] , contain a number of measures which instead of strengthening the judiciary system, they weaken its independence, and are likely to undermine the independence of legal actors and therefore lead to a decrease in trust in the judiciary.

Among the most problematic legislative changes, include the creation of a special section of prosecution for investigating offences committed by magistrates, the new provisions on the material liability of magistrates for their rulings, restrictions on freedom of expression in the case of magistrates but also the new provisions on the revocation of members of the Superior Council of Magistracy[7].

All these mentioned changes are not consistent with the recommendations of the last report, which involved legislative amendments to the procedure of appointing high-ranking prosecutors. Thus, the result of these changes materialised in the strengthening of the role of the Minister of Justice[8] and in weakening the character of independence of the judiciary. External observers, including the Venice Commission, the Group of States against GRECO corruption[9] noted that these changes could lead to the undermining of the independence, efficiency and quality of the judicial system.

All these assessments do nothing but highlight the constitutionality check and the socio-political context, which is an important factor in making these legislative amendments.

The judgment in the case Baka/Hungary, 23 June 2016 The European Court of Human Rights outlined

[5] The Council of Europe's Consultative Council of European Judges (CCJE), in its previous opinions, made the following recommendation: "Judicial authorities should be consulted and involved in the development of any legislation on the status and functioning of the judiciary." "The Position of the Judiciary and Its Relationship with the Other Powers of the State in a Modern Democracy", Opinion no. 18 (2015).

[6] Law no. 207/2018 for amending and completing the Law no. 304/2004 on judicial organization came into force on July 20, Law no. 234/2018 for amending and completing the Law no. 317/2004 on the Superior Council of Magistracy came into force on October 11, Law no. 242/2018 for amending and completing the Law no. 303/2004 on the status of judges and prosecutors entered into force on 15 October

[7] Emergency Ordinance no. 92/2018 introduces further amendments to the revocation procedure.

[8] Concerning Romania, the Venice Commission highlighted the need to ensure greater independence for prosecutors (Opinion 924/2018).

[9] Greco-AdHocRep(2018)2, 23 martie 2018

that any interference with the freedom of expression of a Judge in a high position requires strict supervision and aspects of the functioning of the Judicial system must be rewarded a high degree of protection, in accordance with the right to freedom of expression.

### 3.1. Independence of the judiciary and judicial reform

Among the most important recommendations of the CVM report of 2017, the establishment of an independent system for appointing high-ranking prosecutors and the establishment of a code of conduct for parliament members.

Successive reports have revealed the inefficiency and the deficiency of the selection system of high-ranking prosecutors. The Commission notes the limited role of the Superior Council of Magistracy and the power given to the Minister of Justice in this procedure. Unlike the previous report, during the last period under analysis there was no progress to be achieved in this respect and the romanian authorities avoided to ask for the advice of the Venice Commission. Instead, the Parliamentary Assembly of the Council of Europe notified the institution[10] referred to. The opinion of the Venice Commission specifically refers to the importance of making changes, so that the appointment and revocation process is neutral and objective, thus ensuring a balance between the functions of different institutions[11]. All amendments brought to the legal package of laws of justice led to the weakening of the role of the Superior Council of Magistracy and the role of the President of Romania in the process of appointing high-ranking prosecutors. This can only be noted as a regression in relation to this recommendation.

In The Code of Conduct for parliament members, where clear provisions on mutual respect between institutions and respect for the independence of the judiciary should have been included. However, this recommendation has also not been complied with and has not made progress. Thus, during the year 2018, the criticisms that covered the judiciary, as a whole was constant. These critics came from government and parliament representatives, and their effect translates into the weakening of the trust in the judiciary.[12]

Although the 2017 report took note of the adoption of a code of conduct by the Parliament and the Government, the socio-political context and the turning point recorded by the judiciary system in 2018, lead to a setdown in this area. Thus, the Commission was misinformed of the cases in which proceedings were initiated in Parliament, which could be the answer to a statement that prejudices the independence of the judicial system.

Recommendation 3 referred to the completion of the process of reform for the Code of Civil Procedure, and this evolution illustrates the lack of stability in the development of key legislative acts. Although in December 2016, a new deadline was set, namely 2019, for the implementation of the other provisions of this code. The CVM report of November 2017 noted that measures were being adopted to establish the necessary infrastructure to respond to the new system. However, in June the Parliament adopted amendments that made substantial changes to the code of Civil Procedure, namely the elimination of the Council Room stage in civil procedure. The High Court of Cassation and Justice challenged many of the amendments at the Constitutional Court.

The reform process also takes into account the conclusion of the current phase of the amendments targeting the Penal Code and the Code of Criminal Procedure. The amendments reflected the need to adapt to the decisions of the Constitutional Court and to transpose EU directives[13]. Nevertheless, commencing with the bill adopted in the year 2017, the amendments added before the debate of the law adopted in 2018 were contrasting as these radically changed the content of these norms.

These changes constitute a profound revision of the codes published in the year 2014, referring to the procedural aspects of criminal investigations and procedure, as well as to the balance between the public interest in sanctioning criminal offences, the rights of victims and the rights of suspects. At the same time, these changes restrict the scope of corruption as a criminal offence, which would lead to a setback of the recorded advances. However, these amendments have not entered into force at the time of the publication of the report, as they were being challenged by the Constitutional Court[14]. But not only constitutionality was the issue of these changes, they have also raised problems of a legal and political nature.

To these amendments, the Venice Commission[15] was very critical, stressing on concerns about the status of law by the fact that offences remain unpunished, the lack of quality of legislation at hand, the shortcomings in drafting and the contradictions with the case-law of the European Court of Human Rights and international obligations of the country, in particular, the fight against corruption. The Venice Commission recommends reassessing the changes made to criminal

[10] in April 2018, the Parliamentary Assembly of the Council of Europe requested the Venice Commission's opinion on changes to the laws of justice.

[11] Opinion no. 924/2018 of the Venice Commission, 20 October 2018. The Venice Commission admitted that it might be necessary to amend the Constitution in order to make changes to ensure a fair balance between the role of the different institutions.

[12] See Recommendation CM / Rec (2010) 12 of the Council of Europe about Judges: Independence, Efficiency and Responsibilities, paragraph 18: "If commenting on court decisions, the executive and legislator should avoid criticism that would undermine the independence of the judiciary or weaken trust the public in justice. "

[13] For example, the EU directives on the presumption of innocence and the freezing and confiscation of offenses.

[14] The decision regarding the Criminal Procedure Code of 12 October and the Criminal Code decision of 25 October 2018

[15] Opinion No. 930/2018 of the Venice.Commission

codes in such a way as to draw up a robust and coherent legislative proposal.

Transparency and predictability of the legislative process for legislation regarding the reform of the judicial system and the fight against corruption is another problematic remark of the CVM report. Since most of the proposed provisions have not enjoyed a certain degree of transparency and clarity. The fact that in the opinion of the Commission of Venice on the laws of justice was found that major problems remain in these laws, also the concerns that changes to the Criminal Code and the Procedural Code may not be compatible with the legal obligations undertaken by Romania at EU level and also internationally, illustrates the risk of these accelerated procedures. Thus, it cannot be considered that this process is in line with the recommendation.

The efficiency of the judicial system translates also in compliance with the judgements and enforcement of these judgements given by courts[16]. Following a conviction handed down by the European Court of Human Rights in 2016, Romania proposed to the Committee of Ministers of the Council of Europe an action plan aimed at solving structural problems caused by non-enforcement of judgments against the State.[17] With regard to this action plan, steps are being made in order to make progress, thus a set of measures to be taken are being presented to the government. Proposals refer to amendments of the legal framework in order to ensure timely implementation and a mechanism to monitor and prevent the late execution of judgements in which the Member State is the debtor. The Ministry of Justice and the Superior Council of Magistracy also record further progress on the computerised register of Judgments in which the state is debtor or creditor.

Regarding the structural reforms that target the judicial system, the CVM report of 2018 noted the progress on the implementation of an action plan which establishes structural reform measures which are to be taken by 2020 for the development of the judiciary, noting that this should be an instrument that brings considerable advantages to users of the judicial system and to strengthen public confidence. The action plan also addressed issues such as the creation of a permanent mechanism for dialogue between the representatives of these three state powers and updating the informatic system in terms of data protection[18].

Recommendation 7 referred to the Transparency and accountability of the Superior Council of Magistracy, a measure that has no advance and no regression because the political context has put difficulties in the optimal functioning of this body.
The Superior Council of Magistracy encountered increasing difficulties in maintaining the approach described in its priorities, the government rejecting a number of its opinions. The report from year 2017, underlined the importance of presenting public reports by the Superior Council of Magistracy, regarding all activities carried out, in order to defend the independence of the judiciary and to protect the reputation, independence and impartiality of magistrates. However, the SCM has not publicly issued a firm measure even if the public opinion was quite hostile to this professional category.

### 3.2. Integrity framework and National Integrity Agency

The placing in service of the system PREVENT is one of the achievements of the current report, this system has the role of preventing conflicts of interest in public procurement procedures by creating an ex-ante verification mechanism and by providing the possibility for the contracting authorities to remedy the problems before awarding the contract. There are currently no shortcomings in the implementation of this project, the system being fully operational and the National Integrity Agency's (NIA) reports recording of positive results[19]

In addition to warnings, PREVENT has led also to a greater awareness among contracting authorities. The preventive approach gains ground and the increasing will of the great majority of the contracting authorities to remove potential conflicts of interest before the signing of contracts, demonstrates its quality. The CVM report notes the legislative amendment regarding the possibility of imposing a fine on the contracting authority that does not respond to alerts received through the PREVENT system.

However, the report emphasises that, although the balance sheet of the agency remained constant regarding the cases of incompatibility and conflicts of interest of an administrative nature, the stability of the legal framework for integrity still faces challenges. In particular, two legislative proposals were adopted by the Parliament, which include mentions about a perscription period of three years for the facts leading to the occurrence of conflicts of interest or

[16] Guidance on Article 6 of the European Convention on Human Rights - Right to a fair trial (civil dimension), http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf.

[17] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168064dda63

[18] The Superior Council of Magistracy, the National Institute of Magistracy, the National School of Clerks and the Judicial Inspection successfully applied for projects within the specific objective 2.3 of the Administrative Capacity Operational Program. The Public Ministry also implements several projects funded under the same strategic objective.

[19] From the start of operations in June 2017 to September 1, 2018, PREVENT analyzed 16,102 procurement procedures with a cumulative value of approximately EUR 15,470 million. Eight percent of the procedures under review related to EU funds. ANI issued 57 integrity warnings, some of them on high-value purchases. The total amount of the value of the procurement procedures for which an integrity alert has been reported is EUR 112 million. In 48 cases, contracting authorities eliminated possible conflicts of interest. In 9 cases, the potential conflict of interest was not addressed. ANI launched a conflict of interest investigation in two of these cases.

incompatibilities[20] and the regime of penalties for conflict of interest in the case of local elected officials. The report also notes the challenge of financial resources of the National Integrity Agency, these becoming increasingly limited[21].

The implementation of judgements relating to Parliament members has since 2016 been the concern of the International Observers, whereas it is necessary to clarify the rules on incompatibilities and conflicts of interest in such a way as to meet the CVM refference objective concerning the adoption of ' binding decisions that can lead to the application of dissuasive sanctions.

The Commission considers that there is significant progress as long as functioning of the Prevent System is ensured and as long as the clarity of the rules issue is solved.

### 3.3. Fighting corruption at a high level

The various movements that took place since the last report, evolution which ocurred since the CVM Report from November 2017 led the Commission to reexamine its evaluation. This practice of putting pressure on institutions that have a central role to play in the fight against corruption raises concerns about their ability to continue to achieve results and therefore to the irreversibility of the fight against corruption.

The Commission underlines in a critical sense, the pressure to which the National Anti-Corruption Directorate (NAD) was subjected, pressure that affects its independence. Harsh criticism from the media and high-ranking politicians, but also the failed attempts to appoint the chief prosecutor, have attracted many doubts about the process. Thus, regarding the legal framework, the amendments to the Criminal Code and the Code of Criminal Procedure, adopted by Parliament before the summer period, could also undermine the fight against corruption. The impact of corruption has been highlighted in widespread, frequent criticism about these changes. Therefore, investigations, prosecutions and convictions were put into danger and the facts considered corruption offences were restricted. Moreover, also noted by the opinion of the Venice Commission[22] that emphasizes: "Taken separately, but in particular, having the view of their cumulative effect, many changes will severely affect the effectiveness of the criminal justice system in Romania with regard to combating different forms of criminality, including corruption-related offences, offences committed with violence and organised crime.

Recommendation 10 is centered on the Parliament's responsibility for its decisions reffering to applications for the authorisation of preventive measures and also on applications for authorisation to investigate a Member of Parliament when he/she holds or has held the function of minister. Provision, which was provided by the fundamental law reflecting many parliamentary systems where immunities exist for the protection of members of parliament in the exercise of their mandate for which they were elected. The recommendation relates to the application of this competence.

During the year 2018, there was no follow-up action in relation with the Government's invitation to amend the legislation in order to enlighten the fact that ministerial immunity applies only to actions undertaken by ministers during their term of office.

The recommendation also proposed the presentation of reports regarding decisions and organising a public debate. A starting point in this direction is that the debates held in parliamentary committees and plenary sessions are transmitted live and can be viewed online also in a later stage.

With regard to this recommendation, the Commission reconfirms its conclusion in the year 2017, namely the need for further efforts in this area. In order to close this benchmark, Objective 3 from the current report of the Commission proposes additional recommendations.

### 3.4. Fighting corruption at all levels

Starting from the latest report, in 2017, reffering to the national anti-corruption strategy, progress has been made, by organising thematic evaluations of public institutions with the aim of verifying how these institutions define the risks of corruption in key areas and the measures in place to prevent incidents like these. The Commission appreciated the publication of the first monitoring report[23] done by the Technical Secretariat of the Ministry of Justice, in March 2018.

Among the objectives of the strategy is to increase the performance terms of the fight against corruption by imposing criminal and administrative sanctions.

Since the establishment of CVM reports, a key point has also been the development of the National Agency for Administration of Divested Goods (NAADG). It is currently fully operational and continues to develop its work. The Commission notes the progress made in the development of a national integrated system for monitoring the measures taken by the authorities at each stage of the process of recovering the goods. The Commission recommends the agency to develop activities regarding the public and social reuse of confiscated property, where the legislation provides support for the civil society projects such as those in the field of legal education, prevention of crime, assistance to victims and other public interest projects.

[20] Law for Completing Law No. 176/2010 on Integrity in Exercise Functions and Public Officials

[21] From about 33 million RON in 2016, to 22.5 million RON in 2017. In 2018, the budget was subsequently reduced to 18 million lei (ANI requested an additional 1.5 million lei but was not approved).

[22] Opinion No. 930/2018 of the Venice Commission

[23] Report of Progress on Implementation of the National Anti corruption Strategy 2016-2020 in Year 2017 https://sna.just.ro/Rapoarte+de+monitorizare.

As with the other benchmarks, also in this case it proposes further efforts in order to make progress towards concluding this benchmark. Corruption prevention is hampered by the political developments which undermine the credibility of progress.

## 4. Conclusions

Even though during the year that has passed since the last report, Romania has taken steps to implement some of the recommendations, the negative measures are questioning the progress made and implemented successfully in the decade of monitoring.

If initially, through the draft of amending the legislation regarding the judiciary it was attempted to discover the most effective legislative solutions that can improve the work and organisation of the judicial system, activity, quality of which is directly influenced by the quality of the human resources that perform justice, in all its shapes: professional knowledge, balance, maturity, seriousness and dedication, currently by the entry into force of the revised legislation the advances that by far seemed implemented, had been cancelled.

Instead of shutting down the justice monitoring process now acquires new valences and new recommendations. Thus, the remedies to which the report for the year 2018 refer to are the revision of legislation by complying with the recommendations of the international observers. The Commission also recommends suspending the implementation of the current legislation.

The sensitive recommendations of the current report also take into account appointments and revocations in the judiciary, but also to remedy deficiencies in codes and their implementation, which must be in terms of compatibility with the european law and other international instruments to which Romania is a party.

Faced with the latest challenges, Romania may face activation of Article 7, a rather difficult situation for its economic position.Often qualified as an "institutional nuclear weapon", Article 7 may eventually lead to the suspension of certain rights of a Member State, in particular its right to vote in the EU Council.

Strengthening reforms and enhancing legislation appears as a necessity to the multiple analyses carried out by various internal and international entities. Even if the organisations in the field criticize these draft laws, the revision is essential, and completion of the system's institutional reform process cannot be achieved otherwise. Political actants need to assume responsibility and clarify these dysfunctions. We can define them as dysfunctions, as Romania's multiple convictions to the ECHR are an indirect consequence of this situation. The conclusion of the reform process and the remediation of all shortcomings in the justice system will lead to the lifting of the measures put in place for Romania as in Bulgaria's situation.

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# RECENT ADMINISTRATIVE CHANGES OF THE ADMINISTRATIVE LITIGATIONS LAW NO. 554/2004

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**Abstract**

*The common law instances or the administrative instantces competence over the litigations that have administrative contracts as object have been the subject of many doctrinary disputes but not only, the legislation being inconsistant over more than 25 years, from 1990-now.*

*The recent modification of the administrative litigation law no. 554/2004 shed light over many aspects regarding the litigations that have administrative acts considered illegal as objects but also over the instance's competence to solve litigations regarding administrative contracts. The increase of the limit that determines the material competence of the administrative and fiscal litigation from tribunals and Courts of Appeal to solve administrative litigations from 1.000.000 to 3.000.000 lei but also the elimination of the filtre procedure for the recourse that the High Court of Cassation and Justice has competence over are only some of the legislative modifications that we are going to present in the curent study.*

*The current study's object is, on one hand to inventory the most important legislative modifications brought to administrative litigation and, on the other hand to confirm the fact that the legislator has taken into account the doctrine and jurisprudence to modify the legislation, being a well known fact that the administrative law domain was many years in the situation in which the law was left behind the society's evolution, not having a codification, like there is in civil or criminal law.*

**Keywords:** *the administrative litigation Law no. 554/2004, administrative contracts, article 52 from the Constitution, the recourses filtering procedure, competence.*

## 1. Introduction

The public authorities administrative acts are subject to some formal regulations that flows from their character as acts of power, essentially these being acts of authority. The legality of the administrative acts but also their opportunity are two aspects that have made the object of administrative litigations and the national jurisprudence is rich under this aspect. Law no. 212/2018 for the modification and completion of Law no. 554/2004 of the administrative litigation and other normative acts[1] has managed to bring those essential modifications taken from the evolution of the society in administrative litigation matter, with the extraordinary contribution of the jurisprudence created in the last years.

The constitutional ground for the administrative litigation is article 52 from the Constitution entitled *the right of the plaintiff of a public authority.* Line (2) of article 52 expressely states: "the conditions and limits of exercising this right are esteablished by organic law". In our case, the organic law that the legislator of Law no. 554/2004 of the administrative litigation[2] refers to. The jurisprudence of both the Constitutional Court but also the European Human Rights Court has admitted the possibility of some limitations brought through law to exercising the free access to justice[3]. "The existance of the judicial constant does not preclude the process of law's change, of its permanent evolution[4]", the doctrine states. On the other hand, the national legislator is also forced to always keep in mind that the legislation armonization with the communitary acquis[5] but also with the tendences that come out of the social evolution. In this regard we share the oppinion according to which: "Any state has its right legislated, in accordance to its own socio-political exigences, with the traditions and values that it proclaims[6]". Also, yet again it is confirmed the affirmation according to

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[1] Law no. 212/2018 for the modification and completion of Law no. 554/2004 of the administrative litigation and other normative acts, published in the Official Gazette no. 658, July 30th 2018.

[2] Law no. 554/2004 of the administrative litigation, published in the Official Gazette no. 1154 from December 7th 2004 with the subsequent modifications and completions.

[3] Tudorel Toader, *Romania's Constitution reflected in constitutional jurisprudence*, Hamangiu Publishing House, Bucharest, 2011, p.52.

[4] Laura Cristiana Spătaru Negură, *European Union Law – a new judicial typology*, Hamangiu Publishing House, Bucharest, 2016, p. 47.

[5] "The (UE) communitary acquis – or the (union) communitary acquire represents the totality of judicial norms that regulate the activity of the European Communities (European Union), of their institutions, the (European Union) communitary policies. The (EU) acquis includes, thus, the institutive and subsequent Treaties, the adopted legislation by the (EU) communitary institutions throughout the time (regulations, directives, decisions, recommendations and advice ), the CJUE jurisprudence, adopted declarations and resolutions in EU, the common actions, the adopted positions and acts in PESC and the cooperation in the justice domain and internal affairs and the international accords to which the EU is part of" (Augustin Fuerea, *The European Union Book*, 6th edition, reseen and added, Universul Juridic Publishing House, Bucharest, 2016, pp. 37-38 ).

[6] Elena Anghel, *Constant aspects of law*, in CKS-eBook proceeding, 2011, Pro Universitaria Publishing House, Bucharest, 2011, pp. 594

which: "the obligativity of right's rules is assured, when needed, by the coercitive states's force[7]".

Thus, in the current study, our attention is focused only on the legislative modifications brought to administrative litigation, which we choose to present selectively. The methods we used are comparative method, deductive method and more.

## 2. Content

Law no. 212/2018 for the modification and completion of the administrative litigation Law no. 554/2004 and other normative acts that we choose to present selectively in the following pages, brings important clarifications over the competence, both material and territorial, of the administrative litigation instances but also the litigations that have administrative contracts as object but not only.

### 2.1. About the competence

Article 10 of the administrative litigation Law no. 554/2004 was modified from many points of view, regarding the competent instance to solve the administrative and fiscal litigation: both the territorial but also the material competence.

*New aspects about the material competence*

The legislative modifications regard, on one hand the *limit* that establishes the instances competence from tribunals to Courts of Appeal, administrative and fiscal litigations sections, and on the other hand it fixates the *competence for litigations referring to non-refundable finance from the European Union.*

The doctrine showed[8]: "the material competence for the substance of the matter is regulated by the law based on two criteria: the emitting public authority of the illegal act positioning in the system of the public administration (central/local authorities); the value of the toll, tax, contribution, custom debt that is the object of the contested administrative act. Thus, there are two types of competence, depending on the object of the administrative act. So, if the object of the administrative act is not toll, tax, contribution or custom debt, the competence is established after the position of the emitting organ, the amount of the asked compensation being irrelevant[9] ".

About the *limit, the value criteria*, it is increased from 1.000.000 to 3.000.000 lei.

Thus, line (1) from article 10 has the following wording: "The litigations regarding the administrative acts emmited or closed by local or country public authority, but also those that regard taxes and tolls, contributions, custom debts, and their accessories up to 3.000.000 lei are solved in their substance by the administrative fiscal tribunals, and those regarding the administrative acts emitted or closed by the central public authorities and those that regard taxes and tolls, contributions, custom debts and their accessories bigger that 3.000.000 lei are solved in their substance by the administrative and fiscal litigation sections of the Courts of Appeal administrative and fiscal sections, if by organic law it is not mentioned otherwise".

A new modification regards the competence for the *litigations that refer to the non-refundable finance from the European Union* in the sense that the exclusive competence of the Court of Appeal for these litigations has been eliminated, thus article 10 line ($1^1$) states: "the demands regarding administrative acts that have as an object the non-refundable financing from the European Union are solved according to the ammount criteria, and the demands that have as an object administrative acts that cannot be evaluated in money are solved according to the autority's rank, according to the rules mentioned in line (1)". By 2018 article 10 line ($1^1$) stated: "all the demands regarding the administrative acts emitted by the central public authorities that have as an object amounts representing non-refundable financing from the European Union, no matter the amount, are solved in their substance by the administrative and fiscal litigation sections of the Courts of Appeal".

This legislative modification also has many aspects: it eliminates the exclusive competence of the Court of Appeal for such litigations; the expression " in its substance " vanishes; it imposes the two criteria , the value and the rank of authority one and for this type of litigations regarding the administrative acts that have as an object amounts representing the non-refundable financing from the European Union.

*New aspects regarding the territorial competence*

Article 10 line (3) from the administrative litigation Law no. 54/2004 has two thesis:

Thesis 1 – "the plaintiff natural or legal person of private law adresses solely to the instance from its domicile or its headquarters ".

Thesis 2 – "the plaintiff public auhtority, public institution or assimilated addressed solely to the instance from the domicile or the headquarters of the plaintiff". Prior to this modification, the territorial competence was alternative in the sense that article 10 line (3) had the following wording: "the plaintiff can address the instance at his domicile or the one at the defendant domicile". Which means that the option of choosing the instance belonged to the plaintiff. Nowadays, on one hand the possibility of choosing between two instances is eliminated and on the other hand it delimitates the plaintiff natural person from the plaintiff public auhtority.

Also new, there is a new line (4) to article 10 that has the following wording: "the territorial competence of solving a cause will also be respected when the

[7] Roxana Mariana Popescu, *Introduction in European Union Law*, Universul Juridic Publishing House, Bucharest, 2011, p.12

[8] Gabriela Bogasiu, *The administrative litigation Law. Commented and adnotated, 3rd edition revised and added*, Universul Juridic Publishing House, Bucharest, 2015, p.314.

[9] The High Court of Cassation and Justice, administrative and fiscal sections, dec., no. 3090 from June 15th 2007, republished in Gabriela Bogasiu, *op. cit.*, p.314.

action will be introduced in the plaintiff's name by any person of public or private law, regardless of its quality in the litigation". This new line regards the administrative law in which the action is introduced in the name of the plaintiff by the People's Lawyer, prefect, the Public Ministry, the National Agency for Public Functionaries etc.

**2.2. Regarding the filtre procedure for the recourse**

With a different occasion we showed that: "the entry into force of the new civil procedure Code in February 2013[10] meant for the administrative litigations, as novelty, the applicability of a new filtering procedure of the recourses, for the recourses that enter into the competence of the High Court of Cassation and Justice". Studies about the recourse in the administrative litigations have been written into the national doctrine, but, in our oppinion, the most ample material is a study published in the Public Law Magazine[11] because this annalyzes the recourse not only in theory but also in practice, jurisprudential, the author being a High Court of Cassation and Justice, administrative and fiscal section judge.

Doctrine shows that: "although there has been another attemp of introducing the recourse filtre procedure through EGO no. 58/2003 regarding the modification and completion of the civil procedure Code[12] it was abrogated through Law no. 195/2004 regarding the EGO no. 58/2003[13] and through the New civil procedure Code it was reintroduced for the recourses that are in the competence of the High Court of Cassation and Justice[14] ". We critized on that occasion the recourses filtering procedure: "in our oppinion, nowadays, the filtering procedure applicabile to the recourses in the administrative litigations matter practically signifies an abolishion of the double degree of jurisdiction[15]". We concluded at that moment that: "having in mind what we showed in the current study, we consider that in reality there is no need for the filtering bench to analyse the admisibility in principle of the recourse to the High Court of Cassation and Justice but that all the elements analysed by the filtering bench can be very well brought into discussion at the first term with the parts present[16]".

And, in another oppinion, it was stated: "about the filtering procedure of the recourses (...), at least the activity of the administrative and fiscal litigations Section in this regard was burdned by the requirements of article XVII from Law no.2/2013, especially until the apparition of Law no. 138/2014, but also having into consideration the volume of activity, in the works being the litigations solved by the Old civil procedure Code but also those solved by the New civil procedure Code and the accute lack of personnel (judges, magistrates, assistants and clerks )[17]".

Thus, during 2018 through Law no. 212/2018 the administrative litigation Law no. 554/2004 was modified that, through other modifications, eliminated the filtering procedure. This means that what we anticipated was confirmed by the judicial practice that being: the inutility of this procedure but also the burden for the administrative and fscal Law from the High Court of Cassasion and Justice. Concretely, article 20, line 2, 2nd thesis of the administrative litigation Law no. 554/2004 was modified: "the recourse suspends the excutioning and is judge urgently. The procedure forseen at article 493 from the civil procedure Code is not applied in the administrative litigation matter[18] ".

**2.3. Regarding the administrative contracts**

**2.3.1. About the term the action should be introduced, the mentions about the verbal process of finalizing the conciliation procedure**

Thus line (1) letter e) is abrogated; it had the following wording: "the date of the verbal process of finalizing the conciliation procedure, in the case of the administrative contracts ".

**2.3.2. Any mentioning of the conciliation is thus eliminated,**

such as the content of article 7 about the first complaint

- The introductive part is eliminated and letter b) of line (6) is modified: the first complaint in the case of the actions that have as object administrative contracts have to be made in a 6 month term that have to flow (...).

**2.3.3. The problem of the litigations competence that have as objects administrative contracts, delimitating:**

- Litigations that show up in the first phases of the closing of the administrative contracts, legal litigations or the anullment of the administrative contracts.
- Litigations that flow from the executing administrative contracts.

[10] Law no. 134/2010 regarding the civil procedure Code, republished in the Official Gazette no. 247/2015 ( with the latest modification through EGO no. 1/2016 for the modification of Law no. 134/2010 regarding the civil procedure Code, but also some connex normative acts, published in the Official Gazette no. 85/2016); law no. 76/2012 for the applicability of Law no. 134/2010 regarding the civil procedure Code, published in the Official Gazette no.365/2012, apud Elena Emilia Stefan, *Considerations on the recourse in the administrative litigation matter* in RDP no. 1/2016, p.79.

[11] See also Eugenia Marin, *Specific aspects regarding the recourse solutioning by the High Court of Cassation and Justice in the administrative litigation matter*, RDP no. 4/2015, p. 48-80.

[12] Published in the Official Gazette no. 460 from June 28th 2003, *apud* Eugenia Marin, *op. cit.*, p. 73.

[13] Published in the Official Gazette no. 470 from May 26th 2004, apud Eugenia Marin, *op. cit.*, p.73.

[14] Eugenia Marin, *op.cit.*, p.73.

[15] Elena Emilia Ștefan, *op.cit.*, p.79.

[16] *Ibidem*, p.86.

[17] Eugenia Marin, *op.cit.*, p.76.

[18] We would like to remind you that the article 493 from the civil procedure Code is entitled *the filtering procedure for the recourses.*

Thus, for the first category of litigations, thesis 1 of article 8, line (2): " *the administrative litigation instance* is competent to solve the litigations that show up in the first steps of the closing of the administrative contracts and any litigations tied to the closing of the administrative contract, including the litigations that have as an object the anullment of an administrative contract". For the second cathegry of litigations – 2nd thesis of article 8, line (2): "the litigations that flow from the executing the administrative contracts are in the *solving competence of the civil instances of common rights* ".

**2.3.4. For some "b", it also fixates the competence either of the common law instance or of the administrative litigation instance, delimitating the moments:**

- Litigations that flow from the formalities before the closing of the contract, those regarding the nullity of the contract etc.
- Litigations that flow from the execution of the contract.

It is about Law no. 101/2016 regarding the remedies and the attack ways in matter of attributting the public aquisition contracts, of sectorial contracts and of concession contracts of works and service, and also for organisation and functioning of the National Counsel of Solutioning of the Contestations[19].

Thus, line (1) of article 53 from Law no. 101/2016 (...) is modified: " the processes and the requests regarding the accordance of the damages for the repairment of the prejudices caused in the attribution procedure, and those regarding the anullment or nulity of the contracts are solved in first instance, urgently, by the administrative and fiscal litigation section of the tribunal in the circumscription where the contractant authority has its headquarter, through benches specialised in public aquisitions".

Line ($1^1$) is introduced: "the processes an demands that flow from the execution of the administrative contracts are solved in first instance, urgently, by the civil instance of common law in the circumscription in which the contractant authority has its headquarter ".

Line ($1^2$) is introduced: "the actions mentioned at line (1) and ($1^1$) can also be introduced in the instances of the place where the contract has been closed, if in such a place there is a functioning unit that belongs to the contractant authority ".

**2.4. Other legislative modifications regarding the first procedure**

Article 7 of the administrative litigation Law respectively:

"Before we address the administrative litigation competent instance, the person that thinks it was wronged in one of its rights or in a legitimate interest through an individual administrative act that is addressed to the person, it must ask the emitting public authority or the higher ranked authority, if it exists, in a 30 day term from the communication of the act, the revocation in whole or in part. For strong motiffs, the plaintiff, recepient of the act can introduce the prior complaint, in case of the individual administrative acts and more than 30 days but not later than 6 months from the emmitting date. The 6 months term is a prescription term ".

About the damaged third party, "it can introduce the prior complaint in 30 day term from the moment the damaged person knows, in any way, about the content of the act. For strong motiffs the prior complaint can be formulated over the 30 day term but not later than 6 months from the date that it knows, in any way about its content (...)". Thus, for the damaged third party, the term flows from the date he knows.

## 3. Conclusions

The administrative litigation Law no. 554/2004 has passed through recent legislative modifications, surprised by us, selectively in the current study. The most important regard the competence, both material and territorial of administrative and fiscal litigation but also the elimination of the filtering procedure for the recourses that are in the High Court of Cassation and Justice competence.

The most pregnant conclusion that we have reached at the end of our analysis is that law is dynamic and not static. The social reality and the society's evolution forces the law to always be updated and even more in the administrative law domain, in which the administrative authorities, daily, are put in situations to make decissions. In the same order of thoughts the doctrine says: "No state has a legislation that is effective for all the times[20] ".

We consider that we have accomplished the objective of our study by surprising the legislation in regards of the administrative litigation, but the legislative modifications the are left unmentionned will be the object of another study that we intend on writing, also using the relevant jurisprudence.

[19] Law no. 101/2016 regarding the remedies and the attack ways in matter of attributting the public aquisition contracts, of sectorial contracts and of concession contracts of works and service, and also for organisation and functioning of the National Counsel of Solutioning of the Contestations, published in the Official Gazette no. 393 from May 23rd 2016 with modifications and completions.

[20] Laura-Cristiana Spătaru-Negură, *Old and New Legal Typologies*, in CKS-eBook 2014proceedings, Pro Universitaria Publishing House, Bucharest, 2014, p. 354.

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# RECENT MODIFICATIONS OF THE CONTRAVENTION JUDICIAL REGIME

**Elena Emilia STEFAN**[*]

**Abstract**

*The legislation in the contraventional law domain has recently been modified, an opportunity to analyse in the current study the main modifications brought and their impact on the public and private activity. Now it is already known that, towards the end of 2017 the prevention law was addopted and then a government decision was addopted for the establishment of the contraventions that get under the new law incidence but also the remediation plan.*

*During 2018, other legislative modifications intervened regarding the contravention judicial regime, modifications that had impact on the ongoing activity on the level of public and private domain authorities, such as, amongst others, the modification of the payment term of the contraventional fines and many more. We will focus on these aspects in the current work, this being our primary objective. Also, a secondary objective of this work refers to the fact that, through the case study we propose, we wish to surprise, from the activity of different public authorities, the dinamic of the contraventional sanctions applicability. Therefore, the most notable study methods used in the current study are: the statistic method, the deductive and informational method.*

*In the end, we will draw the conclusions that we have reached from our documentation over the analysed subject.*

**Keywords:** *the Government's Ordonance no. 2/2001 regarding the contraventional judicial regime, the contraventional fine, sole payment account, warning, the Romanian Court of Counts.*

## 1. Introduction

When this study is being written, in Romania there is no administrative or administrative procedure Codes, like there is for criminal or civil law. Like we mentioned in a prior study[1], in the contraventional law at the end of 2017 and begining of 2018 one could notice: "(...) the recent adopting of Law no. 270/2017 from December 12th, 2017 for prevention (hereinafter reffered to as prevetion Law[2]) and of the Government's Decision no. 33/2018 regarding the establishing of the contraventions that go under the prevention Law no. 270/2017, and of the remediation plan model[3], with new legislative character". In this context, we are signaling wat another author has noticed: "No state has a legislation that is valid for all the times[4] ".

It is more than a year since the forementioned legislative modification intervened, year in which it has begun to chrystalyse, step by step and jurisprudence about the abiding or not abiding the remediation plan, this being in fact the prevention law philosophy, the temporary clemence for the offender of not being sanctioned with a fine directly but with a warning and establishing a term in which it has to abide what was being suggested in the remediation plan by the agent. Like it has already been mentioned, recently, in doctrine: "the contraventions domain is without a doubt a domain with profound and more complex implications in the day to day life of the citizens and thus in the administrative practice of the suthorities with attributions in matter[5] ".

The administrative deviation is, perhaps, the most common form of breaking the law. "To eliminate any arbitrary situation in apreciating the social danger degree of a deed in order to qualify it as being a contravention or a crime, through normative acts it is expressely mentioned in what category a certain illicit conduct is classified[6]", another author shows. "In the European Human Rights Court[7], the contravention is considered a criminal fact (…)[8]", noticed in the specialized literature. "The European Union Law embraces the monism theory, meaning the existance of a single judicial order that encompasses in a unitary system the international and national law[9] ".

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[1] Elena Emilia Ștefan, *"Tools to ensure the prevention of contraventions*" ("Instrumentele care să asigure prevenirea de contravenții") in CKS-eBook proceedings 2018,pp.681-686, http://cks.univnt.ro/cks_2018_archive/cks_2018_articles.html, last accesed on 16.03.2019.

[2] Law no. 270/2017 from December 22nd, 2017 of prevetion, published in the Official Gazette no. 1037 from December 27th, 2017.

[3] Government's Decision no. 33/2018 regarding the establishing of the contraventions that go under the prevention Law no. 270/2017, and of the remediation plan model, published in the Official Gazette no. 107 from February 5th, 2018.

[4] Laura-Cristiana Spătaru-Negură, *Old and New Legal Typologies*, in CKS-eBook proceedings 2014, Pro Universitaria Publishing House, Bucharest, 2014, p. 354.

[5] Dana Apostol Tofan, *Administrative Law*, volum II, 4th edition, Bucharest, C.H.Beck Publishing House, 2017, p.371.

[6] Cătălin Silviu Săraru, *Administrative Law. Fundamental public law problems*, C.H. Beck Publishing House, Bucharest, 2016, p.214.

[7] About the jurisprudence part in the international law, in general, check out Roxana-Mariana Popescu, *Introduction in the European Unon Law*, Universul Juridic Publishing House, Bucharest, 2011, p. 41.

[8] Dana Apostol Tofan, *Administrative Law*, op.cit., p.379.

[9] Laura-Cristina Spataru-Negura, *The European Union Law – a new judicial typology*, Hamangiu Publishing House, Bucharest, 2016, p. 190.

But in the current study, we do not wish to approach the European Union acquis[10]and neither the jurisprudence of the European Union Court of Justice regarding the contravention but we will focus on the national legislation in this domain.

## 2. Content

Law no. 203/2018 regarding the efficiency measurements of paying the contraventional fines[11] represents the modification act of G.O. no. 2/2001 regarding the contraventions jurdicial regime[12]. Like it was shown in doctrine: "any state has its law legislated, in accordance to its own socio-political exigences, with traditions and values that ir proclaims[13]".

Concretely, amongst the most important legislative modifications brought to this normative act regard:

- The fine's payment term

In the presentation of motives of the law[14] it is mentioned: "because the 48 hour term may be insufficient to quickly identify certain amounts of money, it is proposed *an intervention on the conditions in which half of the minimum of the fine mentioned in the sanctioning normative act is paid*. Therefore, there is a general rule (not only for the situations in which through special laws this possibility is mentioned) to pay half of the minimum of the fine in *a 15 day term from the date the verbal-process was handed over*. Exceptions from this rule will be established through special laws only if the payment terms will be bigger than 15 days ".

- The constitution of a sole payment account opened at the State's Treasury

destined to collect the contraventional fines. According to article 6 of the Law, the payment in cash of the contraventional fines is possible at any unit of the State's Tresury, at the cash registers of the territorial administrative units / subdivisions or at any entity that is established through applicability norms to the present law, no matter the domicile of the natural person. It is of utmost importance that, in case of unpaid fines on the grounds of present law, the offender is not forced to prove the payment to the agent.

- The electronic debt title

is formed and it has the contravention verbal process data. The debt title is then transmitted electronically, to the organ that the agent is part of, the competent fiscal organ for collecting the fiscal debts.

- The content of contravention constation verbal process changes.

Article 16 from G.O. no. 2/2001 (...) line 1 shows that "is mandatory for the contraventional official record to mention: the date and place where it is closed; name, surname, quality and institution of the agent; name, surname, domicile and identity number of the offender, the description of the contraventional fact with indication of the date, hour and place where it was done, but also it has to show the circumstances that can serve to apreciate the gravity of the fact and the evaluation of the possible damages caused; the indication of the normative act through which the contravention is established and sanctioned; the insurance society, in case the fact produced an accident; the possibility to pay half of the minimum amount mentioned in the normative act in a 15 day term; terms in which it can be atacked in justice and the instance where the complaint can be submitted ". In article 16, it is expressly mentioned *the 15 day term to pay the fine*, unlike the 48 hour term from the prior reglementation.

- The lack of some nemtions in the official report that get its annullment

are also modified: " the lack of one of the mentions regarding the name and surname of the agent, the identity number for the persons that have such a code, and, for the legal person, lack of name and of its headquarter; of the done deed and the date when it has been comitted or the agent's signature". The nulity can also be given ex officio.

Of course, there are many more legislative changes, but we only wanted to mention these in the content of our analysis.

## 3. Case study

In the following, we analysed, selectively, the activity of some public authorities to observe if there were any violations of the contraventional legislation but also in the case of detection of some situations, if any contraventional sanctions were applied and what the sanctions were. Thus, the selection took into account the activity of the General Inspectorate for Emergency Situations, of the Romania's Counts Court, of Romanian Police, of the Medium National Guard, of

[10] "The (UE) communitary acquis – or the (union) communitary acquire represents the totality of judicial norms that regulate the activity of the European Communities (European Union), of their institutions, the (European Union) communitary policies. The (EU) acquis includes, thus, the institutive and subsequent Treaties, the adopted legislation by the (EU) communitary institutions throughout the time (regulations, directives, decisions, recommendations and advice), the CJUE jurisprudence, adopted declarations and resolutions in EU, the common actions, the adopted positions and acts in PESC and the cooperation in the justice domain and internal affairs and the international accords to which the EU is part of" (Augustin Fuerea, *The European Union Book*, 6th edition, reseen and added, Universul Juridic Publishing House, Bucharest, 2016, pp. 37-38 .

[11] Law no. 203/2018 regarding the efficiency measurements of paying the contraventional fines, published in the Official Gazette no. 647 from July 25th, 2018.

[12] Goverment's Ordinance no. 2/2001 regarding the contraventions jurdicial regime, published in the Official Gazette no. 410 from July 25th, 2001, with the ulterior modifications and addings.

[13] See Elena Anghel, *Constant aspects of law*, in CKS-eBook proceedings 2011, Pro Universitaria Publishing House, Bucharest, 2011, p. 594.

[14] See: http://www.cdep.ro/proiecte/2015/500/50/4/em682.pdf, last accessed March 10th, 2019.

the State Inspectorate for Traffic Transport Control, of the National Authority for Sanitary Veterinary and for Food Safety, of the romanian Gendarmerie. And so it was surprised the dynamic for the contraventional sanctions applicability during 2017 or 2018.

From the activity of **General Inspectorate for Emergency Situations - GIES**[15], in the emergency situations prevention, the document entitled "*The evaluation of the activity in the year 2018"*, section *Control and inspection*, by comparing 2017 to 2018, one can notice:

- "Number of prevention controls grew from 39.978 in 2017 to 40.031 in 2018
- The number of detected deficiencies dropped from 160.381 in 2017 to 147.704 in 2018
- The number of fines gre from 22.2017 in 2017 to 41.401 în 2018 ".

About the activity *Romania's Counts Court*, from the 2017 activity report[16] of the institution, one can notice: " During 2017 there were 16 control activities, through which the following were noticed: in the case of five public entities, the aspects included in the complaints were not confirmed; the other 11 checked public entities a number of 46 irregularities from legality, three of which were fixed during the control". In the same report the following is noticed: "the consequence for the irregularities from legality were: 143,8 thousand lei prejudice, out of which during control 1,55 thousand lei were collected (...); the control actions had the following consequences:

- Five contraventional fines amounting to 26 thousand lei were applied to four public entities
- 11 decisions containing 44 measures regarding the irregularities from legality were emitted
- a number of three contestations were formulated against three emitted decisions (...) ".

From the **Romanian Police** activity, we mention the 2018[17] activity report (the document entitled: the evaluation of the conducted activities by the General Direction of Bucharest during 2018). In the public Order domain, page 29 of the report it is mentioned that: "75.196 contraventional sanctions were applied, amounting to 21,61 million lei, out of which 58.933 (78%) contraventional sanctions to Law no. 61/1991". At page 32 it is showed that: "security systems: 8.319 controls carried out (...): 2.301 applied contraventions, 3 certificates revoked, 3.361 given notices, 1.034 schools checked under the aspect pf security, out of which 104 doorms ".

At page 34, traffic safety, it is mentioned: "activities of maintaining and imposing the law: 5.386 executed missions, 485 actions for the fighting the main generating causes of serious accidents, 179.216 established contraventions (...) ".

Regarding the **Medium National Guard activity**, in the activity report on 2018[18] is mentioned: "in the Medium National Guard during January 1st – December 31st, 2018, a number of 39.841 inspections in the pollution and biodiversity domain, biosafety and natural protected arias were done (...). A number of 1.570 warnings were given and 2.606 contraventional fines, amounting to 39.121,420 lei. 140 activity stopping dispositions were enforced, 1 activity stopping disposition, 53 proprositions to suspend the medium accords / authorisations. 25 criminal complaints were formulated (...) ".

At pages 3 and 4 of the same document it is mentioned: "checking the townships' sanitation state and communication ways – between March 20th and July 15th, 2018 an unplannified thorough control was taken to check the townships' sanitation state and communication ways. As a result, 2.323 inspection actions and control were done (2.263 to local public administrations, 7 to roads / railroads administrators, 18 to economic agents / natural persons and 35 to sanitation operators. Following these controls (...) a number of 313 warnings and 611 contraventional sanctions were given amounting to 2.137.200 lei, like this: 595 to local public administrations, amounting to 1.535.000 lei; 6 to economic agents / natural persons, amounting to 79.000 lei; 10 to sanitation operators, amounting to 523.200 lei ".

In the same document it is stated that: following these controls, it was noticed that, from the 2.263 local public authorities, 701 UATs have not implemented the selective collecting system of towship waste. From 595 contraventional sanctions applied to local public administrations, 69 contraventional sanctions were given, amounting to 928.000 lei and 131 warnings for the lack of implementing the township waste collecting system ".

Regarding the **National Authority for Consumers Protection – NACP**, from the 2017[19] annual report it is apparent, from noticing the *Contraventional sanctions applicability*:" (…) the irregularities regarding the consumers' protection domain was noticed, in 43.420 cases constraventional sanctions were applied, amounting to 79.53 million lei. The official records ratio of applied fines is: 39.7% to groceries; 30.9% to non-groceries; 9.9% grocery services; 1.7% financial services; 2.4% other segments ".

Regarding the activity of **The State Inspectorate for Traffic Transport Control** SITTC[20]from the public informations for the 3rd trimester of 2018:

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[15] See:https://www.igsu.ro/media/comunicate/Evaluare_IGSU.pdf, last accessed March 23rd, 2019, page 8 of the document entitled " The evaluation of the activity in the year 2018 "

[16] See : http://www.curteadeconturi.ro/Publicatii/Raportul%20de%20activitate%20pe%20anul%202017.pdf, last accessed March 23rd, 2019, file 55 of the report.

[17] See: https://b.politiaromana.ro/files/pages_files/Bilant_2018_site.pdf, last accessed March 10th, 2019; March 23rd, 2019.

[18] See: https://www.gnm.ro/staticdocs/Raport_activitate_GNM-2018.pdf, last accessed March 23rd, 2019.

[19] See: http://www.anpc.gov.ro/galerie/file/544/2018/R2017.pdf, page 8, last accessed March 23rd, 2019.

[20] See: http://www.isctr-mt.ro/informatii_doc_164_raport-de-activitate-isctr-pe-trimestrul-iii-2018_pg_0.htm, last accessed May 23rd, 2019.

"Following the control and inspection activities carried out by the inspectors from the State Inspectorate for Traffic Transport Control, in the 3rd trimester of 2018, in 48.823 vehicles / vehicles ensambles were checked in traffic, out of which 43.055 held by romanian operators / transport enterprises and 5.768 held by (...). With this occasion 9.608 official records of contravention were made: 9.029 for romanian operators / transport enterprises and 579 for foreign transport operators. 2.853 vehicles were checked in traffic for the maximumd dimensions and / or masses for which 297 official records of contraventions were done. Also, from the technical point of view 1.506 vehicles were checked in traffic and 955 official records for contravention were made. Also, 2.105 controls were done at the headquarters of the enterprises (...) at the end of which 528 official records for contraventions were done ".

Regarding the **Romanian Gendarmerie** activity, the institution's activity report for 2018: "during public order missions 15.165 crimes were noticed, 15.975 authors were identified and 130.255 contraventional sanctions were applied, amounting to 34.389.764 lei[21]".

From the activity of **National Sanitary Veterinary and for Grocery's Safety Authority - NSVGSA[22]** report for 2017: " during 2017, the public clerks from the Litigation Service have inssured the interest defence for NSVGSA in 373 cases, out of which 26 cases had the annullment of an administrative act as an object, 14 cases had the suspenssion of an administrative act as an object, (...), 15 cases had a contraventional complaint as an object, 6 cases had execution complaints as an object, (...)", mentioned at page 10, from the document.

## 4. Conclusions

Last legislative modifications that have occurred in contravention domain, we consider they come in handy for the sanctioned ones. The relaxation for th payment term for the contraventional fines, from all domains, in the sense of its growth from 48 hours to 15 days or the establishment of a sole way to pay, are just two of the measures that we apreciate to be a progress in the philosophy of the contraventional sanctions aproach by the legislator.

The case studies, from the domain we have chosen, to public but also private institutions, domains such as traffic transport, sanitary veterinary, public order, traffic police etc. have underlined the fact that, all the domains subjected to the control have revealed contraventional legislation breaches, for which diverse contraventional sanctions were applied both in 2017 and 2018 and the amount was fairly big.

In conclusion, through our analysiswe consider we have achieved the purpose and objectives established in realising this study, that of presenting the modifications to contraventional legislation, and through our case study, we surprised the dynamic of the contraventional sanctions applicability, in diverse domains.

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[21] See: http://www.jandarmeriaromana.ro/sites/default/files/Resurse/Documente/primaPagina/Raport%20activitate%202018.pdf, last accessed March 23rd, 2019.

[22] See: http://www.ansvsa.ro/download/raportari_ansvsa/rapoarte_activitate_ansvsa/Raport-Activitate-ANSVSA-2017.pdf, last accessed March 23rd, 2019

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# FREEDOM OF SPEECH. CONSIDERATIONS ON CONSTITUTIONAL COURT'S DECISION NO. 649/2018

**Cristina TITIRIŞCĂ***

**Abstract**

*Pursuant to article 30 paragraph (1) of the Constitution, freedom of expression is inviolable, but according to article 30 paragraphs (6) and (7) of the same Constitution, it cannot prejudice the dignity, honour, private life of the person and nor the right to one's own image, being forbidden by the law the defamation of the country and the nation, the exhortation to war of aggression, national, racial, class or religious hatred, incitement to discrimination, territorial separatism or public violence, as well as obscene, contrary to good morals. The limits of freedom of expression fully accord with the notion of freedom, which is not and cannot be understood as an absolute right. The legal and philosophical concepts promoted by democratic societies admit that a person's freedom ends where the other person's freedom begins.*

**Keywords:** *freedom of speech, freedom of expression, limits, Constitutional Court, decision*

## 1. Introduction

In the autumn of 2018, some changes to the Chamber of Deputies' Regulations, which essentially concerned the following issues, were subjected to the Constitutional Court's analysis:

a) the imposition of a ban on MPs concerning the adoption of defamatory, racist or xenophobic behaviour and languages and the holding of placards or banners in parliamentary debates;
b) the imposition of a sanction for deviations from the Regulation, worded as follows: „without prejudice to the right to vote in the plenary sitting and subject to a strict compliance with the rules of conduct, temporary suspension of the MP's participation in all or part of the activities of the Parliament for a period of two to thirty working days".

The decision of the Constitutional Court in question[1], whose considerations will be given below, has brought to the attention of law specialists, as well as the general public, the complex content[2] of the freedom of expression, enshrined at constitutional level by the provisions of article 30 of the Basic Law[3], which is why we believe that the legal community will find the use of a paper which addresses, in a systematic manner, the emphasis added in the case-law of the Constitutional Court of Romania.

## 2. The political dialogue and the freedom of expression

With regard to the above-mentioned prohibition, the Court held that by its Decision no.77/2017 regarding the Code of conduct for deputies and senators, the legislator has established in article 1 para. (3) that „Deputies and Senators have the duty to act with honour and discipline, taking into account the principles of separation and balance of powers in the state, transparency, moral probity, responsibility and obedience of the reputation of the Parliament". As to the conduct to follow, article 6 of the Code provides that „Deputies and senators must ensure, through attitude, language, conduct and carriage, the solemnity of the parliamentary meetings and good progress of the activities conducted into the parliamentary structures" [para.(1)] and „not to use offensive, indecent or calumnious expressions or words" [para.(2)].

Thus, through this decision of the Parliament of Romania, the reputation of the Parliament is recognized as a value protected through regulations and rules of conduct, alongside with the principles of separation and balance of state powers, transparency, moral probity and accountability. The reputation of the Parliament, as the sole legislative authority of the country is valued, according to the conditions in which the deputies and senators act with honour and discipline, adopting the

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[1] Judgment of the Constitutional Court no.649/2018, published in the Official Gazette of Romania, Part I, no.1045 of 10 December 2018;

[2] In this regard, see, widely, Muraru, Ioan and Tănăsescu, Elena Simina (coord.), 2008, page 89 et seq.;

[3] According to article 30 of the Romanian Constitution, with the marginal name „Freedom of expression": „ (1) Freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, whether by spoken words, in writing, in pictures, by sounds or any other means of communication in public, is inviolable. (2) Any kind of censorship is prohibited. (3) Freedom of the press also involves free founding of publications. (4) No publication may be suppressed. (5) The law may require that the mass media disclose their financing sources. (6) Freedom of expression shall not be prejudicial to dignity, honour, privacy of person, nor to one's right for his own image. (7) Defamation of the Country and Nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism, or public violence, as well as any obscene conduct contrary to morals are forbidden by law. (8) Civil liability for any information or creation released for the public falls upon the publisher or producer, author, producer of an artistic performance, owner of copying facilities, or radio or television stations, subject to the law. Indictable offences of the press shall be established by law".

attitude, language, conduct and the outfit that would ensure the solemnity of the parliamentary meetings and the good progress of activities into the parliamentary structures.

Also, according to article 232 of the Regulation of the Chamber of Deputies, as it was amended through the single article point 5 of the Decision of the Chamber of Deputies no.47/2018, „Deputies, as representatives of the people, exercise their rights and meet their duties throughout the whole time of the legislature for which they were elected. Deputies are obliged, through their behaviour, to keep the dignity of the Parliament, to follow the values and the principles defined in the Statute of the MPs, in the Code of Conduct of Deputies and Senators, as well as into internal regulations. The behaviour of the deputies is characterized by mutual respect and should not compromise the ongoing parliamentary works, the maintaining of the security and internal order" [para.(1)]; „In parliamentary debates, deputies are bound to obey the rules of conduct, of courtesy and parliamentary discipline, to refrain from committing deeds that prevent or hamper the activity of other MPs, from using or showing provocative, injurious, offensive, discriminatory or calumnious expressions" [para.(2)].

Based on the constitutional provisions of article 61 on the role and the structure of the Parliament and of article 64 on the internal organization of each Chamber of the Parliament, the Constitutional Court underlined, in its case-law, that „each Chamber is entitled to set, within the limits and with respect of the constitutional provisions, the rules of organization and operation, which, in their substance, make up the Regulation of each Chamber. As a result, the organization and functioning of each Chamber of the Parliament are established through its own regulations, adopted through the decision of each Chamber, with the vote of the majority members of that Chamber. Thus, in virtue of the principle of regulatory autonomy of the Chamber of Deputies, established in art.64 paragraph (1) first sentence of the Constitution, any regulation concerning the organization and the functioning of the Chamber of Deputies, who is not provided by the Constitution, may and must be established through its own Regulation. Consequently, the Chamber of Deputies is sovereign in adopting the measures considered needed and advisable for its good organization and operation"[4].

The Court also retained that, „in the field of parliamentary law, the main consequence of the elective nature of the representative mandate and of the political pluralism is the principle suggestively enshrined by the doctrine as *the majority decides, while the opposition expresses itself*. The majority rules whereas by virtue of the representative mandate received from the people, the majority opinion is allegedly presumed that reflects or meets the majority opinion of the society. The opposition expresses itself as a consequence of the same representative mandate, underlying the inalienable right of the minority to make known its political options and to oppose, in a constitutional manner, the majority in power. This principle assumes that through the organization and the functioning of the Chambers of the Parliament, it is ensured that the majority decides only after the opposition had a chance to express itself, and the decision which it adopts is not obstructed within the parliamentary procedures. The rule of the majority involves necessarily, in the parliamentary procedures, the avoidance of any means that would lead to an abusive manifestation on the part of the majority or of any means which would have as scope the prevention of normal conduct of the parliamentary procedure. The principle of *the majority decides, while the opposition expresses itself* necessarily implies a balance between the need to express the position of the political minority on a certain issue and the avoidance of use of means of obstruction for the purpose of ensuring, on the one hand, the political confrontation in Parliament, respectively the contradictory character of the debates, and, on the other hand, the fulfilment by the Parliament of its constitutional and legal powers.

In others words, parliamentarians, either from the majority or from the opposition, must refrain themselves from abuse in exercising their procedural rights and respect a rule of proportionality, that would ensure the adoption of decisions following a debate public beforehand. As regards the legislative process and the parliamentary control on the Government or the realization of the other constitutional powers, parliamentarians, in exercising of their mandate, are, according to the provisions of article 69 paragraph (1) of the Basic Law, «in the service of the people». The parliamentary debate of the important issues of the nation must ensure the compliance with the supreme values enshrined in the Basic Law, such as the rule of law, political pluralism and constitutional democracy". This is the reason for which the Constitutional Court found that „it is necessary the exercise in good faith of the constitutional rights and duties, both by the parliamentary majority and the minority, and the cultivation of a conduct of the political dialogue, which does not exclude beforehand the consensus, even if the motivations are different, when the major interest of the nation is at stake"[5].

Just for realization of this wish of political dialogue, it is forbidden the use, in the parliamentary works, of offensive, indecent or slanderous expressions or words, as well as the adoption of a hostile behaviour that would remove any possibility of communication between political entities, having some politically different views, sometimes even to the contrary. So being, not only occurs as natural, but as needed the regulation brought into the Regulation of the Chamber of Deputies, according to whom „it is prohibited the disruption of the parliamentary activity, the uttering of

[4] Judgment of the Constitutional Court no.667/2011, published in the Official Gazette of Romania, Part I, no.397 of 7 June 2011;
[5] Judgment of the Constitutional Court no.209/2012, published in the Official Gazette of Romania, Part I, no.188 of 22 March 2012;

insults or slander both from the tribune of the Chamber and in the hall of the plenary, of the committees or of the others working bodies of the Parliament". Apart from the fact that it determines the violation of the duties regarding the compliance with the rules of honour and discipline incumbent to each deputy, the manifestation of an inappropriate or offensive behaviour may determine the prevention or the impairing of the activity of other parliamentarians, thus constituting the premise for the disruption of the activity of the entire legislative forum. In conditions in which the statement of reasons in support of a legislative initiative, the proposal of amendments, the presenting of pros and cons opinions, their debate, therefore the political dialogue at the tribune of the Parliament or in committees, or the activities through which the Parliament fulfils its constitutional functions, represent issues related to the essence of parliamentarism, the prohibition of the disruption of parliamentary activity by uttering insults or slander or through adoption of denigrating, racist or xenophobic behaviour and languages give phrase to the need to discipline this dialogue and to create the premises for the compliance with the principle *the majority decides, while the opposition expresses itself*.

On the other hand, the principle cited ensures the right of the opposition to freely express itself, to make known its opinions, to express criticism on the positions adopted by the parliamentary majority. In exercising their mandate, deputies and senators are in service of the people and, respecting in good faith the constitutional rules and the parliamentary procedures established through the Regulations of the two Chambers, are obliged to defend the interests of the citizens they represent, by adopting an active, advised and responsible behaviour, to comply with the general interest.

Moreover, such as any citizen of Romania, the parliamentarian has the freedom of expression, guaranteed by article 30 of the Constitution, and, according to article 72 paragraph (1) of the Basic Law, he does not respond legally for the vote or for the political views expressed into the exercising of the mandate. But he/she is called to find the best suitable means of expression, which, on the one hand, ensure the exercising of the mandate with objectivity and probity and which, on the other hand, do not hinder the progress of the activities of the legislator.

## 3. Limitation of the parliamentarian's freedom of expression and the sanction by suspending his/her activity

Regarding the newly introduced provisions, namely the thesis that, in parliamentary debates, deputies „do not carry placards or banners", the Court has determined that they do not contradict the provisions of article 30 of the Constitution.

In order to determine as such, the Court has held that, given the definitions of the Explanatory dictionary for *placard* and *banner*, these are ways of expressing ideas in visual, written or drawn form, used in public areas, sometimes with the occasion of public demonstrations, for the purpose of transmitting a message, a slogan or a catchphrase.

It is true that under article 30 para. (1) of the Constitution, freedom of expression is inviolable, but it is not an absolute right. In this sense, article 57 of the Constitution provides for the express duty of the Romanian citizens, of foreign citizens and of stateless citizens to exercise their constitutional rights in good faith, without breaking the rights and freedoms of others. An identical limitation is also provided in article 10 paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which „The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary", as well as in article 19 paragraph 3, of the International Covenant on Civil and Political Rights, which sets that the exercise of the freedom of speech involves special duties and responsibilities and that may be subject to certain restrictions which are to be expressly provided by law, taking into account the rights or reputation of others. Being a norm with a restrictive character, to circumscribe the framework in which the freedom of expression can be exercised, the enumeration made by art. 30 para. (6) and (7) is strict and restrictive[6].

By regulating the duty of deputies that, in parliamentary debates, they do not adopt denigrating, racist or xenophobic behaviour and languages, and neither to carry out placards or banners, the Chamber of Deputies, in virtue of its autonomy of regulations, transposed at an infra-constitutional level the limits of the freedom of speech established by the constitutional norm. In other words, the statutory provision prohibits the denigrating, racist or xenophobic behaviour and language, regardless of the way in which they manifest themselves, including the written way by posts displayed on placards or banners. The ban does not target the wording of the political message itself through the placard or banner, but only the content of the message, that should not circumscribe to the „denigrating language, racist or xenophobic". The use of different forms of expression of political opinions must circumscribe the framework, the purpose and the reputation of the legislator, must respect the solemnity of the plenary sittings of each Chamber and must not

[6] Judgment of the Constitutional Court no.629/2014, published in the Official Gazette of Romania, Part I, no.932 of 21 December 2014;

harm the image of the Parliament and, even less, its activity. Therefore, it is necessary for the freedom of expression, the limits of which are set only by the Constitution, to find appropriate forms of manifestation, that, on the one hand, answer the imperative of the parliamentary right of the opposition and of each deputy or senator, individually, to express themselves and to make known their opinions , political positions and, on the other hand, are not just a declaration of rights, without being followed by a real debate on political opinions, legal arguments presented by MPs into the formal framework of the activity of the legislator.

As such, the Court found that the provisions of art.153 par. (3) of the Regulation of the Chamber of Deputies meet the requirements, on the one hand, of the freedom of expression of deputies, enshrined in article 30 paragraph (1) of the Constitution, and on the other hand, the constitutional limits of this freedom, provided by article 30 paragraphs (6) and (7) of the Basic Law.

Regarding the sanctioning of the deputy by prohibiting him/her from participating in the activities of the Parliament for a certain length of time, the Constitutional Court retained its unconstitutionality. Analysing the criticism of unconstitutionality, the Court held that, in principle, some legal obligations must be matched by legal sanctions, in case of failure of their observance. Otherwise, the legal obligations would be reduced to a simple goal, without any practical result into the social space relations, thus being cancelled the very reason for the legal regulation of some of these relationships. If the Regulation of the Chamber states the actions of deputies which constitute deviations from the parliamentary discipline, it imposes the establishment, in same framework, of sanctions applicable to the guilty person.

Thus, the new regulation provides as disciplinary sanction, applicable to MPs, the temporary suspension of his/her participation at a fraction of or at all activities of the Parliament, for a period contained between two and thirty working days. The rule provides, however, that the temporary suspension „Does not bring touch to the right to vote into the plenary session", being taken „subject to the strict compliance of the rules of conduct".

Upon the disciplinary penalties applicable to members of the Parliament, the Constitutional Court ruled, during the *a priori* constitutionality review exercised on a law for the amendment and supplementing of Law no.96/2006 on the Statute of MPs[7]. With that occasion, the Court found that the regulation of disciplinary sanctions of the MP found in conflict of interest, consisting of the „ban on the participation in the works of the Chamber he/she belonged to, for a period of no more than six months", affects the parliamentary mandate. The Court held that „the parliamentary mandate is a public dignity acquired by members of the Chambers of Parliament through election by voters, in view of exercising through representation their national sovereignty, a conclusion based primarily on the following constitutional provisions: article 2 paragraph (1) – „National sovereignty belongs to the Romanian people, who shall exercise it through their representative bodies established as a result of free, periodic and fair elections, as well as by means of a referendum", article 61 paragraph (1) first sentence – „Parliament is the supreme representative body of the Romanian people [...]" and article 69 paragraph (1) – „ In the exercise of their authority, Deputies and Senators are in the service of the people". The Constitution also establishes, in article 63, the duration of the office of the Chamber of Deputies and of the Senate , and in article 70, the moment when deputies and senators enter on the exercise of their office, respectively „upon the lawful convention of the Chamber whose members they are, provided that credentials are validated and the oath is taken... ", as well the time/ cases of termination of the office, respectively „when the newly elected Chambers have lawfully convened, or in case of resignation, disenfranchisement, incompatibility, or death".

Therefore, the Court found that the newly introduced provisions into the Law no.96/2006 contravene „the constitutional provisions on the rule of law and of those who configure the legal regime of the parliamentarian office". In this respect, the Court held that „the representativeness of the parliamentary office, as it is established by the provisions of the quoted provisions of the Basic Law, has important legal consequences. One of these refers to the duties of the MP, which are exercised continuously, from the moment when he/she enters into office until the date of the termination of office, the legislator having the duty not to hinder their fulfilment by means of the regulation it adopts. Participation in the sittings of the Chamber is a duty which relies on the essence of the parliamentary office, as it results from the whole set of constitutional provisions that enshrine the Parliament, included into the Title III, Chapter I of the Basic Law. This is regulated specifically by Law no.96/2006 on the Statute of MPs in article 29 paragraph (1) – a text that did not suffer any change through the law subject to the constitutional control, being characterized by the legislator as a legal and moral obligation. Consequently, preventing the MP to attend the sittings of the Chamber he/she is part of, for a period of time which represents half a year out of those four years of mandate of the Chamber constitutes a measure likely to prevent him/her to accomplish the office given by voters. Taking into consideration that every MP represents the nation in its entirety, the conditions for the effective exercise of the office must be provided for, conditions which must be considered when regulating disciplinary sanctions".

[7] Judgment of the Constitutional Court no.81/2013, published in the Official Gazette of Romania, Part I, no.136 of 14 March 2013;

For these considerations, the Court found that the provisions of Law no.96/2006, as subsequently amended and supplemented, are unconstitutional.

Given the identical hypothesis that targets the matter of the disciplinary sanctions applicable to deputies, the Court appreciated that the arguments on which it based the admission solution pronounced beforehand by the Court are applicable in full to this situation. So, since the duties of the MP are exercised continuously, from the moment when he/she enters into office until the termination of the office, the legislator, through the regulations it adopts, whether laws or regulations, cannot prevent their fulfilment. Just as the Court held into the decision cited above, the participation in the sittings of the Chamber he/she belongs to is a duty of the essence of the parliamentary office, as it results from the whole set of constitutional provisions and rules that govern the Parliament, so that any norm or regulation that affects the way in which the MPs meet their legal and constitutional duties constitutes a violation of his/her constitutional statute.

The criticized norm provides for the thesis according to which the disciplinary sanction „does not touch the right to vote within the plenary". But this provision is not likely to remove the unconstitutional effect of the temporary suspension. The duties of the MP, inherent to the constitutional office are not limited to the exercise of the right to vote into the sittings of the Chamber, and since the sanction concerns the suspension of the participation of the deputy to a part or to all activities of the Parliament for a period contained between two and thirty working days, it is obvious that this would prevent him/her to exercise the office in fullness of his/her rights and duties.

## 4. Conclusions

As stated above, the freedom of expression cannot be understood as an absolute right. Moreover, the Romanian Constitution, in article 53, as well as the international documents on human rights, such as the Convention for the Protection of Human Rights and Fundamental Freedoms or the International Covenant on Civil and Political Rights, admit the possibility of reasonable lowering of the level of protection offered to certain rights in certain circumstances or moments, subject to certain conditions, as long as the substance of the rights is not attained[8].

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# DEATH PENALTY IN INDONESIA: WHAT AND WHY? IS IT NOT AGAINST UNIVERSAL HUMAN RIGHT PRINCIPLE?

**Rima Yuwana YUSTIKANINGRUM**[*]

**Abstract**

*Even though Indonesia has ratified International Covenant on Civil and Political Rights (ICCPR) in 2005 which directly recognizes the right to life, at the same time Indonesia has committed to apply the death penalty in its law system. Strengthened by the Constitutional Court of the Republic of Indonesia through its verdict, the legality of the death penalty implementation in Indonesia cannot be void, considering the natures of the Court verdict which are final and binding. However, the issue of the death penalty is debatable among society because it is clear that under article 28I paragraph (1) of the 1945 Constitution to protect its people right to life. Besides, the ineffectiveness justice system in Indonesia also become one of the main grounds for cons groups to propose to the government for abolishing the death penalty as a form of punishment in the Indonesian law system. Aiming to comprehend this issue reasonably, this paper is not only going to explore the grounds of the government of the Republic of Indonesia for promoting and supporting the death penalty as one of real punishment in Indonesia but also explain the details of types crimes in which can be sentenced a death. Under article 6 paragraph (2) of ICCPR, there is a room for a country which has not to abolish the death penalty to sentence a death but only for only the most serious crimes. Thus, Do the type of crimes which can be convicted a death in Indonesia meet the definition of the most serious crimes agreed by international law and the national security interest? If so, Is this policy against the human right to life? This article will expose some scholars' arguments, cases, jurisprudence, and verdicts to show the standing of the author in this issue.*

**Keywords:** *Death Penalty, Indonesia, 1945 Constitution, Right to Life, the most serious crime*

## 1. Introduction

The paper covers the grounds of the government of the Republic Indonesia for applying the death penalty in its law system, despite at the same time Indonesia has ratified ICCPR, which directly recognizing the right to life for all people. This issue has become a hot issue since this topic is never ended among society. However, it is clear that in this stage, it is essential to bear in mind that not all the types of crimes can be sentenced to death in Indonesia. Since the finding reveals that drugs narcotics dealers' cases are a crime which its defendant mostly sentenced to death, this paper will elaborate the grounds of the government and the district court to sentence a death to the defendant for drugs narcotics cases. Also, since the Constitutional Court of the Republic of Indonesia ("the Court") has been affirmed that the death penalty is constitutional under the law, this paper will explore the perspective of the Court regarding the death penalty in such a particular case. Accordingly, in the end, the readers can find the answers to these kinds of questions.

1. Does such a case meet the definition of the most serious crimes which notably agreed by international laws and the national security interest?
2. If so, is this policy against the principle of the human right to life?

and then comprehend the grounds of the government of the Republic of Indonesia ("the government") to the supports death penalty under the Court's perspective.

This topic is necessary to discuss because it is important to straighten out misunderstandings among society about the implementation of the death penalty in Indonesia. The recent research published that the most type of crime which sentenced a death is that drugs (narcotics) cases.[1] It reaches about 63.5% of the total cases which sentenced death. It is safe to submit that the government commits to fight drugs (Narcotics) cases and consider it as a crime which equals to the most serious crimes. By ratifying United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substance 1988 ("the Convention") through Act Number 7 Year 1997, the Court affirms that sentencing a death for drugs (narcotics) cases is a form of Indonesia as a state parties and it is a form of national implementation which following as consequence of ratifying the Convention.[2]

However, there are many negative speculations addressed to the district courts, which has authority to handle this such of cases, such as the accusations of unfair trial proceedings and ineffective trial process before sentencing the death penalty to the defendant. At the same time, those groups of people also submit that drugs (narcotics) cases are not supposed to be considered as one of the categories for the most serious crimes under international law perspective.

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[1] ICJR. Naskah Fair Trial in Indonesia. Accessed March 2019. http://icjr.or.id/data/wp-content/uploads/2019/01/15012019_NASKAH-FAIR-TRIAL-FULL_15-JANUARI_FINAL.pdf. p.130

[2] The Court Verdict for the case number 2-3/PUU-V/2007, p.425

Accordingly, misperceptions about the death penalties for drugs cases which is supported by the government grows more extensive from time to time. By writing this topic in this paper, the writer submits that the public needs to know well about the government's considerations of supporting the death penalty. It is also essential in this stage to clarify the missing points about this issue which is likely to lead the public's perceptions or opinions about the government or the district courts in Indonesia.

To answer the questions above, the writer uses research based-desk methodology to gather all academic information needed in this paper. The resources which used are that related Court verdicts, the national or domestic laws, the international laws, the research findings, and some journals articles.

Regarding the question about the relation between the paper and the already existent specialized literature, it submits that the existence of this paper serves as a complementary paper. Aiming for balancing the debate about the death penalty in Indonesia, this paper stands on pro groups, but it will be more concern on elaborating the Court and the government's perspective on supporting the death penalty in Indonesia.

## 2. Right to Life: Non-Derogable Rights and Death Penalty in Indonesia

Those who argue that by sentencing death penalty as punishment after committing in a crime, such as drugs dealers cases in Indonesia, it means that there is an act which attempts to abolish one of the people non-derogable right, namely right to live. Under international law, the right to live is a right which is protected and recognized under article 6 paragraph (1) of ICCPR. In other words, the commitment for not arbitrarily deprived of people's lives is a form of another way to affirm that everyone in this world, including a criminal, has the same right to life and has a right to be protected. Recognizing the same spirit as article 6 paragraph (2) of ICCPR[3] about the right to life, Indonesia has its national law which acknowledges and preserve the right to live. Under article 28A and article 28I paragraph (1) of the 1945 Constitution ("the Constitution"), it is clear that every person shall have the right to live and to defend his/her and existence. Thus, it is safe to submit that Indonesia is a state which commits to protecting its citizen's right to live. However, it is essential to bear in mind that discussing about death penalty, it means that the court has obligations to consider some aspects before taking a decision, such as the death penalty perspective itself, the categories of crimes which can be sentenced a death, criminals sentenced to death, victims perspective, and perspective of the victims' families.[4]

Further, for answering the arguments which concern on non-derogable rights in death penalties cases, the Court submits that these views eliminate the quality of the evil nature from a crime which threatened with the death penalty. What means by this is that the crimes, which are threatened by the death penalty, are such crimes which attacking other people's rights to life directly or indirectly. In this stage, criminal punishment shall be seen as an effort to restore the social harmony which has been disturbed by those kinds a form of crimes. As a way to restore social balance, abolishing criminal punishment in the law system is hurt justice among society. In this stage, the Court also highlights the big question, "why does the defense of the criminal's right to life, who is threatened with capital punishment, is more valuable than the defense of the victim's right to life?"

### 2.1. The Limitations

Under article 29 paragraph (2) of Universal Declarations of Human Rights[5] ("UDHR"), it is clear that in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due to recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society. It is safe to submit that there is no absolute way to exercise right and freedoms but limited by law to secure and respecting other people's right and freedom. In national law, article 28J paragraph (2)[6] of the constitution and article 73 of Act Number 39 the Year 1999 about Human Rights ("Act of Human Rights") regulate same spirit and rules as article 29 paragraph (2) of the UDHR

Article 28J paragraph (2) of the Constitution stipulates:

> "In exercising hi/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of moralilty, religious values, security and public order in a democratic society."

Regarding non-derogable rights, on a national scale, there is a law explaining about the right to life in Indonesia and mentioning two limitations about right to life. Under article 9 paragraph (1) and its explanation of Act of Human Rights, it is safe to submit that right to life can be limited into two points, namely:

1. In the case of an abortion for the benefit of his/her mother's life;
2. In the case of capital punishment based on a court decision.

[3] For more detailed about ICCPR, it can be seen through https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf.
[4] The Court Verdict for the case number 2-3/PUU-V/2007, p.405
[5] UDHR. Accessed March 26, 2019. http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf
[6] Further detailed about the Constitution can be read throgh https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_174556.pdf.

Under only to the two reasons above, the right to life can be limited.

Article 6 paragraph (2) of ICCPR stipulates:

"In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance woth the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court."

In this stage, it is safe to submit that right to life cannot be applied entirely absolute and ICCPR allows states parties to impose capital punishment in their respective national laws. However, the UN Commission on Human Rights identified this limitation as one of the critical safeguards 'guaranteeing the protection of the rights of those facing the death penalty." And the UN Human Rights Committee has called upon states to abolish [capital punishment] for other than the "most serious crimes".[7]

### 2.2. The Most Serious Crimes

Drug-related executions are on the rise in some regions, including Iran, Indonesia, and China.[8] In Indonesia, the majority of those who sentenced a death penalty is that the convicted person in the drugs cases. The percentage for drugs dealers case reaches around 63.5%, and premeditated murder cases get the second largest rate, namely 24.5%. The rest, for premeditated murder accompanied by other criminal acts cases and premeditated murder accompanied by criminal acts of rape against children cases respectively reach 7% and 5%.[9] It is essential to bear in mind that there are 4.5 million people in Indonesia suffers from drug-related problems, and around 1.2 million people of them cannot be cured. It means that there are approximately 33 to 50 people each day die because of it.[10] Comparing to the number of people who suffered caused by drugs narcotics in 2007, 4.5 million is a massive number of people. The data shows that in 2007, the number of drugs narcotics suffered people reach about 15.000 people a year.[11] In other words, less than ten years, the number of drugs narcotics victims increased dramatically. Moreover, data in 2007 revealed that the community funds which spent in drugs narcotics cycle are about 292 trillion per year. This data proves that the spread of cycling of illicit drugs trafficking is widespread.[12]

Based on the data mentioned above, it is clear to submit that in Indonesia, drugs dealers cases are considered to be a type of crime which can endanger the generation in Indonesia. Seeing from the significant impact can be caused by the danger of drugs narcotic cycle in Indonesia, the government needs to maximize the necessary step to prevent the threat grows bigger. A death penalty is an answer for the defendant who is legally proven distributing drugs narcotics before the court. In this point, the debatable about the death penalty emerges. Many people start questioning the law system in Indonesia. Most of them also start asking about the international legal basis which defining drugs cases as a type of the most serious crimes.

These cons groups submit that drugs cases do not meet the requirement of the most serious crimes by adding the argument that the submission of categorizing drugs cases as one of the most serious crimes is against the international definition. Besides, the UN Human Rights Committee and the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stressed that drug crimes do not meet the definition of the most serious crimes.[13] The UN Human Rights Committee has indicated that the definition of 'the most serious crimes' is limited to those directly resulting in death.[14] Further based on the reports of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions have consistently emphasized that 'the death penalty must under all circumstances be regarded as an extreme exception to the fundamental right to life, and must as such be interpreted in the most restrictive manner possible.' Therefore, from the perspective of UN Human Rights treaty bodies and special rapporteurs, the interpretation of the most serious crimes has to satisfy[15]:

1. 'Most serious crimes' should be interpreted in the most restrictive and exceptional manner possible;
2. The death penalty should be considered in cases where the crime is intentional and results in lethal or extremely grave consequences;
3. Countries should repeal legislation prescribing capital punishment for economic, non-violent or victiumless offences.

Regarding argument which stated that drugs cases do not meet the definition of the most serious crimes, the Court in this stage submits [16] that phrase "the most

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[7] Rick Lines, "The Death Penalty for Drugs Offences: A Violation of International Human Rights Law", p. 14 https://www.researchgate.net/publication/237484349_The_Death_Penalty_for_Drug_Offences_A_Violation_of_International_Human_Rights_Law.

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[10] M Iman Santoso, "The Pros and Cons of the Death Penalty for the Drug Abuse in Indonesia"

[11] The Court Verdict for the case number 2-3/PUU-V/2007, p.377

[12] The Court Verdict for the case number 2-3/PUU-V/2007 p.380

[13] Felicity Gerry and Narelle Sherwill, "Human Trafficking, Drug Trafficking, and the Death Penalty", Indonesia Law Review 6, (2016). 270

[14] Rick Lines, "The Death Penalty for Drugs Offences: A Violation of International Human Rights Law", p. 17 https://www.researchgate.net/publication/237484349_The_Death_Penalty_for_Drug_Offences_A_Violation_of_International_Human_Rights_Law

[15] Ibid, page 18

[16] The Court Verdict for the case number 2-3/PUU-V/2007, p.422

serious crimes" under article 6 paragraph (2) of ICCPR cannot be read separately with the phrase "in accordance with the law in force at the time of the commission of the crime.", Which also stipulates in the same article. In the national level, the applicable law is that Act about narcotic drugs, meanwhile in international level, the applicable law is that the Convention. As a consequence of ratifying the Convention, Indonesia obliges to maximize the effectiveness of law enforcement measures in respect of those offenses as stipulated under article 3 paragraph (6) of the Convention.

Besides, Indonesia shall consider the drugs crimes as a serious offense as mandated under article 3 paragraph (5) of the Convention. By interpreting the articles in the Convention systematically, the attacks which mentioned in the Convention classify as particularly serious crimes. Further, the Court also notes that if the offenses specified in the Convention consider as particularly serious crimes compared to the other crimes, which has been recognized as the most serious crimes, such as genocide crime and crimes against humanity, then there is no different substantively between the two groups of crimes. It is because both groups of crimes adversely affect the economic, cultural and political foundation of society and bring a danger of incalculable gravity. Accordingly, the Court affirms that drugs narcotics cases are equals to the most serious crimes as referred under article 6 of ICCPR.

In different pages, the Court also declares that Indonesia is a state which has the largest Muslim population in the world and becomes a member of the Organisation of Islamic Cooperation. Accordingly, it is essential for Indonesia to consider the content of the Cairo Declaration on Human Rights in Islam[17]. Under article 2 (a) of Cairo Declaration, it is stipulated that:

"Life is a God-given gift and the right to life is guaranteed to every human being, It is the duty of individuals, societies and states to protect this right from any violation, and its prohibited to take away life except for a Shari'ah prescribed reason."

Based on those rules, the writer submits that the state has no authority to sentence a death to a man without a clear regulation, laws, and purpose. In other words, the countries which recognize death penalty as a form of punishment in its law system, the aim must be related to the state's obligation to protect its national security and public safety purpose. If a state arbitrarily takes away other people live without clear purpose and prescribed reason, under Islamic law, it is prohibited. In this case, the government of the Republic of Indonesia obliges to obey the Convention's mandates and keep the social harmony in sync. By considering drugs narcotics cases as one of the most serious crimes, Indonesia attempts to protect its national security and public safety purpose. As mentioned above, there are 4.5 million people in Indonesia suffers from drug-related problems and around 1.2 million people of them cannot be cured.[18] Thus, based on those data that drugs narcotics cases only bring adverse effect to society, threaten public safety which leads to national security in Indonesia, it is safe to submit that those reasons meet the standard of prescribed reason referring under article 2 (a) of the Cairo Declaration and sentence a death to those drugs narcotics dealers are allowed.

Moreover, based on the survey result conducted by Indo Barometer 2015, it shows that about 84,1% of Indonesians agree that the drugs dealers deserve a death penalty punishment because drugs endanger Indonesians generations' life.[19] Accordingly, most of Indonesians comprehend well that the impact caused by drugs narcotics endanger its state safety.

### 2.3. Death Penalty Against the Constitution and Principle of Human Right?

National Anti-Narcotics Agency ("NANA") affirms that perpetrators of narcotics crimes do not only eliminate the right to life, but also disturb the social harmony among society and damage the young generation. Further, NANA states that the impact of drugs narcotics can also omit the freedom of thought and the right not to be enslaved.[20]

Regarding the human right violated in the death penalty issue, it is essential to comprehend the human right which recognized in the Constitution. As mentioned earlier that there is a limitation stated in the constitution under article 28J paragraph (2). What limits the people right in Indonesia are that stating in the article 28J paragraph (2), namely: the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society; and the norms in the PANCASILA.

PANCASILA, pronounced Panchaseela, is the philosophical basis of the Indonesian state.[21] In other words, Pancasila is a guidance for the government to run the state, to be a direction of the development and the ideals of the Indonesia. PANCASILA comprises five inseparable and interrelated principles, namely:

1. Belief in the One and Only God;
2. Just and Civilized Humanity;
3. The Unity of Indonesia;

[17]The Cairo Declaration on Human Rights in Islam (1990) can be read further through https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/2TheCairoDeclarationonHumanRightsinIslam(1990).aspx

[18] M Iman Santoso, "The Pros and Cons of the Death Penalty for the Drug Abuse in Indonesia"

[19] Institute For Criminal Justice Reform (ICJR), Menyelisik Keadilan Yang Rentan: Hukuman Mati dan Penerapan Fair Trial di Indonesia. Accessed March 26, 2019. p.287

[20] The Court Verdict for the case number 2-3/PUU-V/2007, p.377

[21] http://www.indonezia.ro/republic.htm

4. Democracy Guided by the Inner Wisdom in the Unanimity Arising Out of Deliberations Amongs Representatives;
5. Social Justice for the Whole of the People of Indonesia.

Prof. Achmad Ali, former National Commission on Human Rights has stated that there are two principles inside PANCASILA in favor of death-sentenced for the most serious crimes, namely: the first principle and second principle. The meaning of the two laws contained in PANCASILA cannot be separable. It is essential to bear in mind that there must be a balance of injustice by taking into account the position of the victims of narcotics crimes. The justice cannot be seen on the perpetrator side only, but it shall recognize the victim side.[22]

Considering the impact of drugs narcotics circle which threaten to omit other people's right and potentially damage other's people live, it is safe to submit that it is against the ideology of a state, especially a goal and the idea of the government as mentioned under the Constitution. In other words, there is no respect and recognition of the rights and freedoms of others in drugs narcotics dealers cases because they are well-proven acting beyond their limit in term of recognizing other people right to live well and well aware that their actions can harm and risk other people life. It is safe to submit that this such a crime against consideration of morality, religious values, security and public order in a democratic society, as mandated under article 28J paragraph (2) of the Constitution.

## Conclusion

There are 4.5 million people in Indonesia suffers from drug-related problems, and around 1.2 million people of them cannot be cured. It means that there are approximately 33 to 50 people each day die because of it. Comparing to the number of people who suffered caused by drugs narcotics in 2007, 4.5 million is a massive number of people. The data shows that in 2007, the number of drugs narcotics suffered people reach about 15.000 people a year. In other words, in less than ten years, the number of drugs narcotics victims increased dramatically. Moreover, data in 2007 revealed that the community funds which spent in drugs narcotics cycle are about 292 trillion per year. This data proves that the spread of cycling of illicit drugs trafficking is widespread rapidly.

In this stage, it is essential to bear in mind that In Indonesia, the majority of those who sentenced a death penalty is that the one in the drugs cases. It reaches about 63.5% of the total death penalty cases in percentages. Indonesia considers drugs narcotics cases as equals to the most serious crimes. Although there are many groups of people who disagree with this rule, the government keeps supporting this such a capital punishment for drugs narcotics cases. Besides, the Court through its verdict submits that phrase "the most serious crimes" under article 6 paragraph (2) of ICCPR cannot be read separately with the phrase "in accordance with the law in force at the time of the commission of the crime.", Which also stipulates in the same article. In the national level, the applicable law is that Act about narcotic drugs, meanwhile in international level, the applicable law is that the Convention. As a consequence of ratifying the Convention, Indonesia obliges to maximize the effectiveness of law enforcement measures in respect of those offenses as stipulated under article 3 paragraph (6) of the Convention.

In addition, Indonesia shall consider the drugs crimes as a serious offense as mandated under article 3 paragraph (5) of the Convention. By interpreting the articles in the Convention systematically, the attacks which mentioned in the Convention classify as particularly serious crimes. Further, the Court also notes that if the offenses mentioned in the Convention consider as particularly serious crimes compared to the other crimes, which has been considered as the most serious crimes, such as genocide crime and crimes against humanity, then there is no different substantively between the two groups of crimes. It is because both groups of crimes adversely affect the economic, cultural and political foundation of society and bring a danger of incalculable gravity. Accordingly, the Court affirms that drugs narcotics cases are equals to the most serious crimes as referred under article 6 of ICCPR.

Then, does the death penalty against the principle of human right, especially the right to life? As mentioned above that there is a limitation regulated in the law system, either in the international level or on a national scale. In the international level, it is regulated under article 29 paragraph (2) of UDHR which is also similar to article 28J paragraph (2) of the Constitution. It is safe to submit that under both laws; there is no absolute way to exercise the human right. Specifically, stipulate that we are the people have to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others based upon considerations of morality, religious values, security and public order in a democratic society. Furthermore, under article 9 paragraph (1) and its explanation of Act of Human Rights, capital punishment based on a court decision is one out of two reasons that right to life can be limited in Indonesia. Accordingly, the death penalty has a legal basis in Indonesia, and those legal bases are in line with international law and respect the human right principle.

By presenting the implementation of the death penalty in Indonesia, the writer expects that the wider society, especially the international community, can comprehend the reasons on why the government supports the death penalty for drugs cases. Also, this paper is expected to answer those who are question the

[22] This statement is read before the Court and it is written in the Court Verdict for the case number 2-3/PUU-V/2007, p. 378-379

legal basis of death penalty implementation in Indonesia. Since this is a sensitive issue and many people are likely to take misperception about Indonesia and its policy, the writer hopes that this paper can give a clear description of the death penalty issue. In this section, the writer also suggests to the other writers or researchers to do some research about the death penalty system in Indonesia. Many scopes can be dug in details, such as the specific law of death penalties, the judges' consideration while handling the case, or the possibility of Indonesia to abolish the death penalty in the future when drugs cases do not exist anymore.

To sum up, sentence a death to the drugs narcotics dealers is in line with the laws, including national/domestics and international; and respect and recognize the human right principles. In this stage, the writer also invites the other researchers to take part in this issue by researching the death penalty in Indonesia.

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- The 1945 Constitution
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# TRENDS IN INTERNATIONAL TAX PLANNING: NEW QUALIFICATIONS AND TAX JURISDICTION SHOPPING

**Vladimir TROITSKIY***

**Abstract**

*In 2015 the unprecedented leak of 11,5 million files from Mossack Fonseka, one of the world's biggest offshore law firms, echoed around the globe after demonstrating variety of sophisticated ways in which the wealthy can use offshore tax jurisdictions. It brought public concern about tax evasion to an exceptional level and put pressure on governments to make world financial system even more transparent. The Panama Gate became a strong trigger to start the last phase of new international tax control system formation.*

*Six years before, in 2009, a meeting was held by The Organization for Economic Co-operation and Development (OECD) in Mexico City. Although the official agenda pointed at transparency and global economic growth as targets, some commentators described the goal of this gathering as "creating a global high-tax cartel". The practical output of this meeting was establishment of the new global "tax standard" based on a wide information exchange between the tax authorities. The OECD negotiators persuaded eighty-seven states to join the standard.*

*Since 2010, with the enactment of the Foreign Account Compliance Act, known as FATCA, by the United States, the free flow of money, which seemed to be an essential attribute of open market, doesn't look that free any more. FATCA now requires non-US financial organizations – foreign financial institutions - to implement advanced compliance system and report directly to the US Internal Revenue Service (IRS). Due to the size of the US economy and globalized world economy the number of those affected directly or indirectly is overwhelming.*

*The article is analyzing changes in international tax planning as a business process and a type of consulting service through research of regulatory changes and law enforcement practices worldwide. Particular focus will be made on several jurisdictions that used to provide or still offer now beneficial tax regimes.*

**Keywords:** *tax planning, tax optimization, low tax jurisdiction, offshore, compliance*

## 1. Introduction

The fundamental changes in international tax regulations taking place in the course of last two decades have virtually redrawn international financial systems, letting the freedom of capital movement become history and turning the banking secrecy into a combination of words with no semantic meaning. This all happened within twenty years after governments leaded by OECD adopted their views that tax havens or offshores were causing the tax shortfall in the industrialized countries. That changed the hierarchy of the core principles in regulating international markets. Freedom of entrepreneurship was widely replaced by the principles of tax harmony, avoidance of tax competition, transparency and ability of governments to get "fair share".

The described situation inevitably caused transformation of tax planning process for companies and individuals. Though changes were stretched in time, the comparison of the tax-planning process twenty years ago and today would bring us to "revolution" as a more appropriate characteristic of this change rather than "evolution". It is not just that tax planning is far more difficult now than it has ever been before but it is also about the revision of the very nature of this process.

With a very slight degree of exaggeration we can state that the practice of international tax, enforced by the developed countries, turned to consider governments the ultimate clients of banks and even tax advisors. In fact, one of the main concerns for a modern bank now is to dutifully make sure all clients and their operations fully comply with all possible rules and "recommendations" of regulative authority, which means complying with the dictates of every tax system worldwide in case bank works with any type of foreign transactions. International tax planners and advisors have been transformed into agents of the tax authorities spending time and clients' money on researching numerous complex regulations.

There were several publications released in recent years covering various topics of new tax planning reality. A comprehensive review of planning techniques without taking into account a specific jurisdiction was made in 2017 by authors of "Fundamentals of international tax planning" edited by Raffaele Russo[1], which is a new edition of previously published work. A more practical guide to international tax planning incorporating real life case studies was published by Rohit Gupta in 2015 under the title "Principles of International Tax Planning"[2]. One of the

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[1] Russo, Raffaele, ed. Fundamentals of international tax planning. Amsterdam: IBFD, 2017.

[2] Gupta, Rohit. Principles of International Tax Planning. Taxmann, 2015.

most recent comprehensive publication under the title "Principles of International Taxation" by Lynne Oats, *Angharat Miller, Emer Mulligan presents tax planning in a global context, explaining policy, legal issues and planning points central to taxation issues*[3].

Some more specific studies address particular jurisdictions or types of business planning activities. In 2018 and 2019 several publications appeared reviewing tax planning issues for particular countries in regards to specific types of businesses. The 4th Edition of International Taxation in Canada - Principles and Practices, by Jinyan Li, Arthur Cockfield, J. Scott Wilkie released in 2018 provides a Canadian view on policy governing international tax rules as well as how foreign tax laws interact with Canadian laws[4]. Meyyappan Nagappan published "The Indian approach to taxing virtual presence" analyzing complex nature of taxing IT services[5], "Chile's approach to the taxation of the digital economy" by Manuel José Garcés addresses related issues but with the focus on Chile and MERCOSUR regulations[6]. Due to the dynamic nature of the subject, earlier publications can mostly be used as a good source of information to conduct a comparative study and review changes in international tax planning.

This article focuses mostly on identification of trends in international tax planning rather then on a comprehensive research of tax planning mechanisms and practices or tax regulation in particular jurisdiction. Such study based on analyses of legislation and real cases from various jurisdiction with particular attention to problem of tax planning qualification, tax compliance growing importance and nature of modern tax jurisdiction shopping will enable drawing conclusions on what is tax planning process now after such drastic policy changes that took place in course of last two decades.

## 2. Tax optimization and its legal qualification

The legality of the very idea of business allocation and structuring aimed at tax optimization is widely questioned. Many governments strongly believe that taxes do not distort the allocation of resources by private enterprises and therefore companies which consider taxes as a cost of business operations should be treated as engaging in illegal activities. This thought that would sound ridiculous twenty years ago is becoming the dominant point of view for the world tax authorities. Yet in 2017 in the article "New trends in international tax planning and international tax control"[7] , I was referring to the IRS website recommending US taxpayers along with other useful tips to choose the corporate structure and place for domiciliation so that a business would pay minimal taxes. This recommendation is not there anymore. It was replaced by a much more neutral one. "The business structure you choose influences everything from day-to-day operations, to taxes, to how much of your personal assets are at risk. You should choose a business structure that gives you the right balance of legal protections and benefits."[8] The broad interpretation of this text still allows the entrepreneur to infer that tax optimization criteria is something that is allowed to be considered while choosing the corporate structure, but it is now far more ambiguous. It would be still wrong to say that new tax philosophy is that private business operations generate the maximum tax for the government to distribute to various social groups but the shift in tax policies that could be observed in a course of the last ten years is drastic. Earlier, tax planning consisted of jurisdiction shopping, proper business structuring, meaning potential necessity to split business between several units, selection of appropriate corporate form, structuring business processes the way it would minimize the tax base, consider all possible allowances, deductions, rebates, exemptions, and so on as well as any other imaginable measures to diminish tax burden as soon as they are not directly forbidden by law. Now most of these steps moved to the "gray zone" and are often treated as illegal. So, what is the extent to which entrepreneurs are still free to do anything to structure their businesses in case such activities cause tax savings?

There is no unequivocal answer. Practice of courts and tax authorities worldwide allows to say that the criteria widely applied are whether such structuring, choice of jurisdiction and other steps were *exclusively* or *predominantly* aimed at benefiting from tax savings or there were other business-related motivations. The Supreme Arbitration Court of Russia on 12.10.2006 adopted a Resolution N 53 "On evaluation of the validity of tax savings" which interprets as unjustified tax saving any mode of taxpayer's behavior different from the most reasonable behavior from commercial point of view and having tax saving as a main purpose.

The practice formed in the United Kingdom adds to this that tax planning can be seen as aggressive and hence potentially illegal "when it involves using financial instruments and arrangements not intended as, or anticipated by governments as a vehicle for tax

[3] Oats, Lynne, Angharad Miller, and Emer Mulligan. *Principles of International Taxation*. Bloomsbury Professional, 2017.
[4] Li, Jinyan, Arthur Cockfield, and J. Scott Wilkie. *International taxation in Canada: principles and practices*. LexisNexis Canada, 2018.
[5] Nagappan, Meyyappan. " *Intertax* 46, no.6 (2018): 520-540.
[6] Garcés, Manuel José. "Chile's approach to the t" The Indian approach to taxing virtual presence.axation of the digital economy". International Bar Association, February 28, 2019.
[7] Troitskiy, Vladimir. "New trends in international tax planning and international tax control". *The Scientific Opinion. Economic, juridical and sociological sciences*, no. 2 (2017): 24-34.
[8] "Starting a business", Internal Revenue Service, accessed February 21, 2019, https://www.irs.gov/businesses/small-businesses-self-employed/starting-a-business

advantage. For example, the use of overseas tax havens."[9]

Many countries now have an extensive system of laws and practices designed to preserve national tax base by preventing income from being shifted among related parties through the inappropriate pricing of related party transactions. They try to enforce the transfer pricing regime, ensuring goods and services transferred between related companies are done so transparently and are priced based on market conditions that permit profits to be reflected in the appropriate tax jurisdiction. That often means that any type of business splitting among various entities which governments don't like is considered a usage of tax shelter that increases the tax gap. Based on that, entrepreneurs can suddenly face the situation when there is a bureaucratically determined taxable "profit" under some governmentally developed theory of pricing. Moreover, by not paying of this artificial "price", the company, either domestic or foreign, could not only be civilly liable but criminally liable as well. Needless to say, that fair transfer pricing criteria may differ from one country to another and eventually generate collisions when two or more tax authorities will figure that particular business unit earned the biggest share of profit in their country.

The borderline is not yet drawn, however the legitimacy criteria of tax optimization are not where they used to be before, meaning "Everything is allowed unless it is directly prohibited by the law". The line has significantly shifted towards a much more conservative form of tax planning but new coordinates will be determined by further regulations and mainly by the enforcement practice.

## 3. Tax compliance as a key factor for modern tax planning

Whenever tax optimization struggles for its right to remain essential part of international tax planning, tax administration and compliance have gained core positions. Modern international tax compliance is undoubtedly a heavy burden for entrepreneurs involved in any type of international commerce. The 2018 Report by the US National Taxpayer Advocate[10] points that the most serious problem facing taxpayers – and the IRS – is complexity of Internal Revenue Code (the "tax code"). It takes "excessive time, hiring costly professional tax preparers and using costly computer software, obscures comprehension, facilitates tax avoidance, and undermines trust in the tax system, among many other problems"[11]. The tax compliance became itself the critical factor for tax planning: even big companies are to consider not only financial consequences of applying one or another tax architecture but costs and risks related to tax planning as well. Governments are quite aggressive in doing various tax audits, which affect not only transnational corporations but also regional businesses on very early stages of international expansion.

The described constitutes a new Non-Tariff Barrier (NTB) for international trade and investment. Popular NTB description as restriction that results from prohibitions, conditions, or specific market requirements that make importation or exportation of products difficult and/or costly[12] totally fits characteristics of modern compliance requirements and tax audit practices. Whenever NTBs traditionally are thought of as unjustified and/or improper application of Non-Tariff measures such as sanitary and phytosanitary measures and other technical barriers to trade applied by foreign government, tax compliance and audit measures are often barriers built by the company's national fiscal authorities. This behavior conceptually is based on two beliefs which are popular among modern political establishment and tax bureaucrats. First is considering any business unit a part of national welfare and thus ought to not only contribute to the growth of GDP and create jobs but also generate maximum tax for the government that would be further distributed among different social groups. The attempt to retain part of the profit by optimizing tax burden is associated with cheating and taking money from someone. Voices of governments and social activists in the US, Europe and the rest of the world keep counting how much tax revenues "they" are losing due to offshore tax abuses. Some researchers point at about 70 billion US dollars that United States is losing every year due to the shifting of corporate profits to tax havens[13], while the official sources (Parliament Sub-Committee on Investigations of the United States Senate) report 100 billion[14]. For European Union the hypostatized numbers mount to 75 billion US dollars a year[15] as revenue costs of tax havens. The credibility of these numbers is much under doubt. Mostly, these are very rough estimations lacking real methodology and primarily aimed to raise the question of some extent of

[9] Cable, Vincent. 2009. "This crisis must spur us to take on the tax avoiders". *The Guardian*, February 2, 2009.

[10] The US National Taxpayer Advocate is appointed by the US Secretary of the Treasury and reports to the Commissioner of Internal Revenue. However, the National Taxpayer Advocate presents an independent taxpayer perspective that does not necessarily reflect the position of the IRS, the Treasury Department, or the Office of Management and Budget.

[11] "Written Statement of Nina E. Olson before the Subcommittee on Taxation and IRS Oversight Committee on Finance, United States Senate. Subject: Hearing on Improving Tax Administration Today. 07/26/2018", National Taxpayer Advocate Congressional Testimony, accessed February 26, 2019, https://taxpayeradvocate.irs.gov/about/our-leadership/testimony

[12] "Understanding the WTO - Non-tariff barriers: red tape, etc.", World Trade Organization, accessed January 20, 2019, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm9_e.htm

[13] Zuchman, Gabriel. "How Corporations and the Wealthy Avoid Taxes (and How to Stop Them)". *The New York Times*, November 10, 2017.

[14] "Tax Haven Banks and US tax compliance ", Government Publishing Office [US], accessed February 15, 2019, https://www.govinfo.gov/content/pkg/CHRG-110shrg44127/html/CHRG-110shrg44127.htm

[15] "Why tax havens must go!", CATDM, accessed March 2, 2019, http://www.cadtm.org/spip.php?page=imprimer&id_article=13847

additional taxes that might be paid by corporations and individuals in the country, which are not paid or paid somewhere else affecting national interests. The interests of shareholders who invested capital and are carrying all risks are considered as having subsidiary nature. Higher tax burden is an obvious decelerator of business growth and demotivation of entrepreneur incentives. The extent to which entrepreneurs will continue to generate comparable revenues when forced to give bigger share of their earnings to a third party have never been estimated.

Second belief is that tax compliance rules and expenses do not have significant impact on international trade and investment. This statement could be hardly treated as something other than a speculation. According to the World Bank, a low cost of tax compliance and efficient procedures can make a significant difference for firms[16]. The so-called Munich group, a research center consisting of the Center for Economic Studies (CES), the Ifo Institute and the CESifo GmbH (Munich Society for the Promotion of Economic Research), is regularly publishing research with deep analysis on how corporate taxation and regulatory requirements affect the localization of financial sector. Their results show obvious negative effect of host country taxes on the probability of choosing a particular host location. They also demonstrate a strong influence of regulatory compliance environment. The stronger (more expensive, complicated, time consuming) are the compliance requirements the smaller is the chance of choosing particular jurisdiction by the businesses.

## 4. Banking compliance

Banks are not the same type of institutions they used to be throughout their history. Forced by OECD, IRS, national central banks and tax authorities they turned into effective agents of the regulators and tax collectors. Such term as bank secrecy becomes anachronism. Banks cannot be recognized as reliable or client-oriented similarly as one cannot call reliable or client-oriented the tax collector because they are not just providing services but withdraw client's earnings, though sometimes in a very polite way. Things were changing gradually but an active phase of this shift happened after the financial crisis of 2008. Many countries have seen a need to restrict banks' national and especially international activities. They went unprecedentedly far introducing restrictions and controls. More and more global banks complaint about excessive compliance costs associated with stricter regulations. Many financial institutions reconsider their international strategies as the costs of being global often exceed benefits thereof.

For example, the estimate costs for a bank to meet FATCA compliance requirements might average at 10$ per account per month[17]. For smaller banks expenses per account are higher as they have to distribute fixed costs on installing software among fewer clients. This became a barrier for many European banks to enter markets of some types of financial services. It turned into a worldwide trend that non-US banks are just denying to provide services to any individuals and corporation residing or by any mean related to the United States. Many financial institutions in Eastern Europe, especially in Baltic States, went further and totally ceased all bank settlements in US dollars except intra-bank operations.

The basic principles of banking regulations have shifted. For example, paragraph 3 Article 845 of Russian Civil Code states: "The bank shall have no right to determine and control the trends of using the client's monetary funds and introduce other restrictions on his right to dispose of cash at his discretion which are not provided by the law or the bank account agreement". Article 849 adds: "The bank shall be obliged to charge cash placed on the client's account within the day that follows the day of the receipt by the bank of the relevant payment document, unless the bank account agreement provides for a shorter period. The bank shall be obliged to pay out cash or transfer it from the depositor's account within the day that follows the day of the receipt by the bank of the relevant payment document, unless the law, the bank rules introduced in accordance with it or the bank account agreement provide for different time-limits". 10 years ago, Russian Central bank was actively penalizing banks for any delays in executing wire transfers or refusal to withdraw cash. The bank license could be suspended as a result of repetitive violations of that type. It is not that case anymore. Banks in Russia and all over OECD can virtually block anyone's accounts with minor suspicion of the account owner carrying malicious operation or formal refusal to present activity related documents. Financial institutions got the right and sometimes obligation to request almost unlimited amount of information and documents, including those containing trade secrets or personal data. Being "de facto" turned into another law enforcement institution, banks had to change core basics of their businesses.

Bank compliance became also a tool to stop wide use of offshores. Once again suppressed by OECD and IRS, banks just stopped opening accounts to offshore companies thus making even survived tax havens useless for international businesses. The old account holders were gradually forced to close their accounts or disclose ultimate beneficiaries.

[16] "Why do tax rates and tax administration matter?", Doing Business – World Bank Group, Accessed March 10, 2019, http://www.doingbusiness.org/en/data/exploretopics/paying-taxes/why-matters

[17] Wood, Robert W. "FATCA Carries Fat Price Tag". *Forbes*, November 30, 2011.

## 5. New jurisdictions and tax havens

While traditional jurisdictions are increasing their transparency levels and closing doors to foreign businesses, some new players come to the empty market. The jurisdictions with growing popularity could be divided into three groups.

I. Previously known as relatively low tax jurisdictions that try to adjust legislation in order to formally meet the OECD criteria to be removed from various grey and black lists. United Arab Emirates, Singapore, Hong Kong, Cyprus and some other countries and territories are examples of this class. Normally, they bring up costs of maintaining a company to foreigners by introducing requirements of presence in the country, meaning owning or renting real office (not a post box), hiring at least some local employees (normally 3 to 6) and reporting regularly to the local tax authorities. That allows these jurisdictions to claim that they are not tax havens but countries with friendly environment for "local companies" carrying international operations. Such jurisdictions are normally successful in case of having relatively developed national banking system. The transparency is reasonably high and requests disclosure of beneficiaries and at least formal explanation of income sources.

II. Jurisdictions that have never been considered as "offshores" but are proposing businesses formally moving to their territory a relatively low tax burden. Romania, Latvia, Estonia, Montenegro, Bulgaria, Paraguay are belonging to this category. All of these countries request regular tax reporting and accountability but under some conditions allow using either very low tax rate or even avoid paying some or all of the taxes.

For example, Romania imposed a special tax regime for micro-companies. Under the condition of having a maximum revenue of 1 million euros (EUR) at the end of the previous year, the income tax rates could be as low as 1% for micro-companies with one or more employees and 3% for micro-companies with no employees. Hence for companies carrying no operations inside the EU (meaning they are not subject to VAT taxation) the overall tax burden can be effectively limited to 1%[18]. Estonia is another example. All undistributed corporate profits in this country are tax-exempt. This exemption covers both active and passive types of income as well as capital gains from the sale of assets, including shares, securities, and real estate. This tax regime is available to Estonian resident companies and permanent establishments of non-resident companies that are registered in Estonia[19]. The transparency level and corporate data accessibility differs from jurisdiction to jurisdiction. Estonia has one of the most IT developed governments and its registers are open and easily accessible. Paraguay, on the contrary, doesn't have any open corporate or tax register.

III. The third group is presented by the only state that is the major economic power in the modern world. And this example is mostly not about low tax burden but about low transparency level. FATCA enables the government of the United States to obtain the most intimate of individual financial information, financial relationship, and future financial plans. This expansion of power is being exported out of the US via intergovernmental agreements to other countries, which then coordinate their exchange of information. These agreements are made through a simplified procedure and do not need approval of Congress. Even more effective mechanism for spreading FATCA is through direct enforcement of banks worldwide to search their records and to report to the IRS about any individuals having connection to the US.

Although the United States is fully devoted to the target of obtaining all possible tax information from all foreign sources, the US tax information collection machine is not working in a reciprocal way. It is against the US law to provide information about any taxpayer's affairs unless the US has signed a treaty that allows such information exchange. US is not part of OECD Automatic Exchange of Information (Common Reporting Standards) and has not so many bilateral treaties on financial or tax information exchange. This makes the situation when a non-US resident owns a US company or account is quite the opposite stance to the situation when a US resident opens an account in Europe or anywhere else. In real life, this almost fully shields the foreigners' US financial activities from the scrutiny of foreign tax authorities. The situation does not look like something temporary. In 2017 a bill named "The International Counter-Money Laundering Act" was turned down by the Congress. This bill would have given foreign authorities the right to ask US banks to release customer information based on "reasonable grounds". The US congress was firm to keep financial information secrecy even though FINCIN (Financial Crimes Enforcement Network – part of US Treasury department) reported before Congress hearings that almost $300 billion US dollars is laundered in US each year.

The corporate registers are available online in most states. However, only directors and officers are listed in the registers. Furthermore, there are easy ways to hide their names using legal nominee services or registering a factitious DBA (doing business as) name and placing it into the registers. Hence, any foreigner

[18] "Romania - Taxes on corporate income", Worldwide Tax Summaries, accessed March 1, 2019, http://taxsummaries.pwc.com/ID/Romania-Corporate-Taxes-on-corporate-income

[19] "Estonia - Taxes on corporate income", Worldwide Tax Summaries, accessed March 1, 2019, http://taxsummaries.pwc.com/ID/Estonia-Corporate-Taxes-on-corporate-income

keeping his funds either on his own name or on the name of a corporation in the US has really low chance to be disclosed to his national tax authorities. There are virtually no "know your customer" mandatory regulations in US requesting disclosure of actual owners of a limited company or corporation.

The US active participation in international anti-offshore campaign may be used in the future by other nations as a precedent to force the US authorities raise taxes and step to more transparent policy, but it doesn't look like something that can change the situation in the next few years.

In addition to extremely low transparency for foreign businesses' data, US tax legislation offers "inshore" low tax jurisdictions like Delaware, Vermont, Nevada, Alaska, Rhode Island or Kentucky that virtually turn United States into the dominant safe-haven in the world. Several of the named states have recently enacted legislation allowing the establishment of structures, which previously were an attribute of offshore notoriety. For example, Alaska and Delaware have passed asset protection trust law. Montana and Colorado have established onshore financial centers offering foreign investors exemption from estate tax as well as financial privacy and advanced asset protection.

If the US limited company is fully owned by the foreigners and operates foreign sourced transactions with other non-US entities there is no US tax implied. However, for the rest of the world such transaction will look as a transaction with US company and will not arouse any suspicions.

For individuals the US tax system also provides a myriad of tax avoiding opportunities. For example, the US has relatively high estate tax ranging from 18% to 40%. However, it could be fully avoided by foreigners. The criteria for applying estate tax is not based on residency, but on whether the alien is domiciled. Hence the non-US individual who may be resident in the US for the purposes of income taxation may not be considered to be domiciled in the US and consequently can avoid exposure to the US estate and gift tax by using any foreign corporation.

The US 30% withholding tax on dividends, interests and other fixed periodical income paid to foreign persons. But US tax legislation gives a special benefit to foreign investors. Foreign investment paying interest can be structured as "portfolio debt" which can legally pay interest free of any withholding tax. Such debt structured as debentures are allowed to be in bearer form, which gives the highest possible level of anonymity.

In case a foreigner is not doing real business or trade in the US and simply parks his capital in a US bank, insurance company or other type of financial institution in form of a deposit, the interest earned is qualified as foreign-sourced income and is not taxable in the United States. Besides, as such funds are deemed to be foreign property, they are not subject to estate tax as well.

Foreigners investing on stock exchange independently on the amount and frequency of operations are not subject to capital gain tax on securities transactions.

These benefits obviously do not cover all business needs and all possible situations but are an effective mechanism to attract international businesses. However, these advantages come at a cost. The US tax legislation is convoluted, the tax code is very complicated and precedents volume is enormous. The tax advisors are costly and need to be highly qualified to guide clients through an extremely complicated tax system. Moreover, there are significant discloser requirements set by IRS and sometimes by the state authorities. Hence, the US is an attractive jurisdiction for those businesses and individuals that can allow high level of tax professionalism, costly tax consulting and are ready to restructure their business architecture.

## 6. Customized jurisdiction solutions

Years ago, costs of company establishment and maintaining were key criteria for picking particular jurisdiction. Nowadays, both survived offshores and low tax jurisdictions are customized to accommodate particular types of businesses. If businesses are closely tied to the ground and physical presence are hardly objects of international tax planning through tax optimization, some new and old businesses which have little connection to particular territory can highly benefit from international corporate architecture.

For example, traditional intellectual intangibles obviously have tremendous value for the global business. They have no actual physical presence. There are hardly many good reasons for entrepreneurs to hold intellectual property in a high tax jurisdiction when by means of sophisticated tax planning the exposure to tax can be limited or avoided in a low or no tax country. Especially if such jurisdiction is participating in major international treaties on intellectual property and has a developed double taxation avoidance treaty network.

Another example is related to Internet businesses. Cyberspace is a new humongous business environment, which undermines traditional relationship between what is considered legally significant and physical presence. World wide web is gradually eroding the direct connection between geographical location and business activities, thus dramatically mitigating power of governments to control online businesses and the ability of physical location authorities to cover cyberspace by its regulations.

As states are still an important social institution even most of IT businesses need to have a harbor. Creating such harbors became a priority task for some traditionally "offshore" jurisdiction. Unable to continue their "no tax for everyone" regime they compete in creating more attractive climate and regulation for those who by the nature of their businesses are almost not depending on major regulators. Switzerland, Puerto Rico and Singapore are working hard to be pioneers in

accommodating various blockchain project, facilitate use of crypto currencies and introduce regulations for advanced business technologies like smart contracts. This might eventually turn into a world where major businesses would exist without being covered by any government regulations. However, this trend is only in its nascent stage and is beyond the scope of this article, thus, requires a separate research.

## Conclusions

Last decade brought tremendous changes to international tax planning as a service and as a business process. The legality of tax optimization as a form of retaining part of personal or corporate earnings by means of using foreign companies is widely questioned by governments and OECD. Banks, financial institutions and tax consulters have deviated from their traditional roles and converted to executers of governments' policies requesting full transparency, compliance, disclosure and total governmental control over any international monetary or asset transactions.

Traditional "no tax" jurisdictions are disappearing as a result of international tax and monetary authorities pressure on their government and on banks carrying international operations.

Simultaneously some new tax planning opportunities have appeared as a response to ubiquitous tightening of international tax regulation. Some of these new solutions brought growing popularity to the new "low tax jurisdictions" which were not qualified as offshores before. Estonia, Latvia, Hungary and Romania became comfortable European shelters for some businesses agreeable to some level of transparency and regular reporting and prepared to pay a very low tax calculated based on revenue. Same characteristics can be given to jurisdictions from other parts of the planet like Paraguay or Georgia. Few traditional "offshores" like UAE and Singapore are trying to preserve their place on this market by implying rules demanding some extent of physical presence in their country meaning having real office space and some paid employees in order to formally avoid being qualified as offshores. Surprisingly, one of the quickly growing safe harbors is the United States with its extremely low transparency level for foreign authorities due to not participating in Global Reporting Standard and tax regulations in some states allowing international businesses to effectively minimize their tax burden.

Another tax planning opportunity is related to customization of jurisdictions to be capable to accommodate particular types of businesses especially having low connection to particular territory. IT businesses and particularly businesses based on blockchain technologies are to be the easiest ones to accept formal link to any territory that will provide better environment and lowest tax. In the future, this trend may further develop in fleeing of many businesses out of any governmental control and regulations and this topic deserves separate research efforts.

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# INTERDISCIPLINARY JUDICIAL COOPERATION: MUTUAL RECOGNITION OF PROTECTION MEASURES IN EUROPEAN UNION

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**Abstract**

*Violence under multiple forms has become an increasingly worrying phenomenon in current society, leading to adoption of various legislative instruments, in order to effectively combat it.*

*According to particularities of each state, there is a wide variety of instruments adopted at national level, different either in name (interdiction orders, protection orders, restrictive orders, etc.), as well as juridical nature (civil or criminal). The same variety also appears at EU level, related to the type of legislation (mandatory or not; primary or secondary) and the area it covers (civil or criminal). The panel of legislative instruments is completed by a series of international conventions on preventing and combating violence.*

*In this large context, the purpose of the article is to analyze interdisciplinary issues related to judicial cooperation within European Union in civil and criminal matters, for the particular case of protection measures adopted by different authorities of Member States.*

*The principle is that exercise of the right of free circulation and establishment in European Union imposes that protection granted to an individual in a Member State should be maintained and continued in any other Member State to which that person travels or moves. In particular, this goal is achieved by recognition in a Member State of the effects of judgments providing protection measures handed down in another Member State.*

*The objectives of this study are to identify the relevant compulsory EU legal instruments in the field of civil and criminal areas, as well as a comparative perspective concerning the relation between previously identified EU law and national legislations and their sphere of application. Equally, the comparative approach will extend to establishing the main issues specific to exequatur procedure both at EU and national level.*

**Keywords:** *judicial cooperation, mutual recognition, protection measures, civil matters, criminal matters*

## 1. Introduction

The goal of the present study is to analyze interdisciplinary issues related to judicial cooperation within European Union in civil and criminal matters, for the particular case of protection measures adopted in different Member States.

The subject presents significant importance, as victims of (repetitive) violence have an increased need for protection against offenders, which lead to adoption of a large panel of various instruments at national, European Union and international level.

A comparative perspective over these legal instruments concludes that one way of safeguarding is to issue protection orders, a juridical instrument which appears in national legislations of all Member States of European Union.

There are, however, discrepancies among national protection order laws and quite various domestic approaches[1].

At the same time, it should be ensured that the legitimate exercise by citizens of European Union of their right to move and reside freely within the territory of Member States, in accordance with Article 3 Para 2 of the Treaty on European Union (TEU)[2] and Article 21 Treaty on the Functioning of the European Union (TFEU)[3], does not result in a loss of their protection.

It was therefore necessary to adopt at EU level binding legal instruments, in order to ensure mutual recognition in all Member States of protection measures adopted by different domestic authorities.

In this context, the study will identify the relevant mandatory EU legal instruments in the field of civil and criminal areas, their sphere of application, and also how they interact with national legislations.

Equally, the study will take into discussion the the main issues specific to exequatur procedure both at EU and national level.

Where having been expressed, juridical opinions will be pointed out, in close connection to discussion of relevant case-law.

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[1] The "POEMS" project, co-funded by the Daphne program of the European Union, focused on mapping the law on protection orders in 27 EU Member States. This project and its final report, as well as the related recommendations, are available along with the country fiches at the following link: http://poems-project.com/results/country-data, last accession on 01.03.2019, 13,54.

[2] Consolidated version published in the Official Journal C 326, 26 October 2012, pp. 13 - 46.

[3] Consolidated version published in the Official Journal C 326, 26 October 2012, pp. 47 - 200.

## 2. Content

### 2.1. The framework of judicial cooperation in civil and criminal matters

As European Union has the objective of developing and maintaining an area of freedom, security and justice, according to provisions within the Treaty of Amsterdam[4], the gradual establishment of this area implied measures to improve, simplify and expedite effective judicial cooperation between Member States in civil and commercial matters, as well as criminal matters.

By Council Decision no. 2001/1470/EC from 28 May 2001[5] there was established a European Judicial Network in civil and commercial matters, which began operating on 1 December 2002[6].

Similar to the area of civil and commercial matters, a European Judicial Network functions in criminal matters, created by Joint Action of 29 June 1998[7], and adopted by the Council on the basis of Article K.3 of the TEU.

At legislative level, there were different types of juridical instruments, all of them promoting the idea that the main tool for facilitating access to cross-border justice is the principle of mutual recognition[8] (based on mutual trust between Member States and direct judicial cooperation among national courts).

TFEU structures the themes belonging to the European area of freedom, security and justice in four domains, related to border control policies, asylum and immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation[9].

The legal basis of judicial cooperation in civil matters is Article 81 Para 1 of the TFEU.

Articles 82 to 86 of the same TFEU provide legal basis of judicial cooperation in criminal matters.

Also, Article 5 of the TEU has generally been used to justify the Union's competence to legislate at EU level. According to Article 5, the principles of subsidiarity and proportionality are applied when European Union uses its competence to legislate a specific matter.

### 2.2. EU legal instruments on mutual recogition of protection measures. National and international legal instruments

Going in-depth from the general framework, a new specific mechanism was conceived, composed of two EU legal instruments, one applying in civil matters, and the other in criminal area.

The main legal cooperation instrument in civil area is the regulation (part of secondary legislation, mandatory, directly applicable, capable of complete direct effect[10]).

Based on these characteristics, regulations are frequently compared to national laws, and part of juridical literature has referred to them as "European law"[11].

In particular for cooperation in protection measures, the relevant legal instrument is Regulation (EU) no. 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters of the European Parliament and of the Council[12] ("the Regulation").

In Romania, there were established measures necessary for application of the Regulation by Law no. 206/2016 for completing the Government Emergency Ordinance no. 119/2006 on certain measures necessary for the application of some Community regulations from the date of Romania's accession to the European Union, as well as for the modification and completion of the Law on Public Notaries and Notarial Activity no. 36/1995[13].

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[4] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed on 2nd October 1997, published in the Official Journal C 340, 1o November 1997, pp. 1 - 144. The Treaty of Amsterdam introduced a significant change of perspective in civil and commercial matters by virtue of Title IV, as the matter was brought under the so-called first pillar, and consequently from intergovernmental sphere to Community level.

[5] Published in the Official Journal L 174, 27 June 2001, pp. 25 - 31.

[6] Denmark, in accordance to Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, did not participate in the adoption of this decision, and therefore is not bound by it, nor subject to its application.

[7] Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network, published in the Official Journal, L 191, 7 July 1998, pp. 4 – 7.

[8] "Traditionally, *Cassis de Dijon* (CJ, Decision pronounced on 20.02.1979, C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* – our note) is considered to be the first case where the Court established the principle of mutual recognition. (...) Although the case law, such as Cassis de Dijon, created in practice the principle of mutual recognition, the term 'mutual recognition' has not been used in the Court's rulings until recently." (A. Sievälä, *Mutual recognition of protection measures in the European Union: Equal protection to all EU citizens*?, Master Thesis, 2016, University of Eastern Finland, p. 37, available on-line at the following link: http://epublications.uef.fi/pub/urn_nbn_fi_uef-20140819/urn_nbn_fi_uef-20140819.pdf, last accession 02.03.2019, 20,21).

[9] Prior to the Treaty of Lisbon, the last two domains belonged to the former third pillar of EU.

[10] Vertical ascendent direct effect (particulars invoke regulations against Member States), vertical descendent direct effect (Member States invoke regulations against particulars), and also horizontal direct effect (regulations may be invoked between/among particulars).

[11] H.-W. Arndt, *Europarecht*, VII[th] Edition, C.F. Muller Publishing House, Heidelberg, 2004, p. 82; A. Ghideanu (authors A. Ghideanu & others), *Cooperation between Member States for the purposes of solving the civil cases regarding the wrongful removal or retention of a child. European Seminar Manual*, SITECH Publishing House, Craiova, 2018, p. 75: "Regulations are somehow equivalent to „Acts of Parliament", in the sense that what they say is law and they do not need to be mediated into national law by means of implementing measures".

[12] Published in the Official Journal L 181, 29 June 2013, pp. 4 – 12. According to Recitals 40 and 41 of the Regulation, United Kingdom and Ireland have notified their wish to take part in the adoption and application of the Regulation; Denmark is not taking part in the adoption of the Regulation and is not bound by it or subject to its application.

[13] Published in the Official Gazzette of Romania no. 898/09.11.2016. In this context, it is important to point out that, even if regulations are directly applicable, national authorities are allowed to take the measures provided for by the regulations themselves or measures which prove

With respect to criminal matters, under the former third pillar (police and judicial cooperation in criminal matters mentioned before), the legal instrument for cooperation was the framework decision, as a form of intergovernmental cooperation[14].

Framework decisions were somehow similar to directives, as they required Member States to achieve particular results without dictating the means of achieving that result. By contrast to directives, framework decisions were not capable of direct effect[15], and failure to transpose a framework decision into domestic law could not lead to enforcement proceedings by the European Commission.

As the old "pillar structure" disappeared under the Treaty of Lisbon[16], the "abolition" of the former third pillar led to a change of legislative instruments in the field of criminal law, transgressing towards the instruments specific to the former first pillar (regulations, directives, decisions).

In particular for protection measures in criminal area, there was adopted Directive 2011/99/EU of the European Parliament and the Council of 13 December 2011 on the European protection order[17] ("the Directive")[18].

Directives are EU juridical instruments of secondary legislation, mandatory, not directly applicable, possessing restricted direct effect[19].

In transposition of the above mentioned Directive, Romanian legislator adopted Law no. 151/2016 on the European protection order, as well as for amending and completing some normative acts[20], applying only to measures adopted in criminal field (Article 1 b).

On the other hand, Law no. 217/2003 on the prevention and combating of domestic violence[21] deals protection measures in civil area, as already established by Romanian Constitutional Court in decision no. 264/27.04.2017[22].

As elements of comparative domestic law, it is interesting to note that, in Spanish legislation, there are legiferated "restriction orders" which belong to the sphere of criminal law[23]; in Bulgaria, for example, the legislator has incorporated the implementing rules of the Directive into the law on family violence[24].

At international level, the most significant instrument is the Council of Europe Convention on preventing and combating violence against women and domestic violence[25] (known as "Istanbul Convention"),

necessary given the shortcomings of the regulations (T. Ștefan, B. Andreșan-Grigoriu, *Drept comunitar*, C.H. Beck Publishing House, Bucharest, 2007, p. 213).

[14] A. Ghideanu (authors A. Ghideanu & others), *op. cit.*, p. 76: "A framework decision was a kind of legislative act of the European Union used exclusively within the EU's competences in police and judicial co-operation in criminal justice matters".

[15] ECJ (Grand Chamber), Decision adopted on 05.11.2012, C-42/11, case *João Pedro Lopes Da Silva Jorge* (proceedings concerning the execution of a European arrest warrant): "(53) (...) although framework decisions may not, as laid down in Article 34(2)(b) EU, entail direct effect, their binding character nevertheless places on national authorities, and particularly national courts, an obligation to interpret national law in conformity. (54) When national courts apply domestic law they are therefore bound to interpret it, so far as possible, in the light of the wording and the purpose of the framework decision concerned in order to achieve the result sought by it."

[16] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, published in the Official Journal C 306, 17 December 2007, pp. 1 – 202.

[17] Published in the Official Journal L 338, 21 December 2011, pp. 2 – 18. According to Recitals 40 - 42 of the Directive, United Kingdom has notified the wish to take part in the adoption and application of the Directive; Denmark and Ireland are not taking part in the adoption of the Directive and are not bound by it or subject to its application.

[18] The *rationale temporis* in adopting two distinct EU legal instruments was explained as follows (A. Sievälä, *op. cit.*, p. 30): "The Directive on the European protection order, which was accepted in December 2011, created a mechanism for mutual recognition of protection measures in criminal matters. However (…) this was not enough. (…) Since the Directive only enabled mutual recognition of protection measures which have been adopted based on a crime or the possibility of a crime, those systems which give the possibility to issue a protection measure protecting from other than criminal acts were left outside of the scope. (…) The Regulation on mutual recognition of protection measures in civil matters filled this gap, at least a part of it. The Regulation was adopted 18 months later than the Directive, in June 2013."

[19] Only vertical ascendent direct effect (particulars can invoke directives against Member States), in consideration of non-transposition/wrong transposition of directives by Member States.

[20] Published in the Official Gazzette of Romania no. 545/20.07.2016.

[21] Published in the Official Gazzette of Romania no. 367/29.05.2003, republished in the Official Gazzette of Romania no. 365/30.05.2012 and no. 205/24.03.2014.

[22] Published in the Official Gazzette of Romania no. 468/22.06.2017. As stated in pt. 15 of this decision: "The rationale for introducing the law on the protection order is (…) the creation of an effective *civil legal instrument* for preventing and combating domestic violence, similar to those used in other EU legislation, as there is only criminal law protection in domestic law against domestic violence and it is exercised under very restrictive conditions." (our underline)

[23] Tribunal no. 1 for causes of violence against women, Arganda del Rey, Spain, case no. 28014004 – 2018/0009796, sentence no. 1272 pronounced on 04.12.2018, not published, made reference to Article 57 of Spanish Criminal Code, related to Article 544 bis of Spanish Procedural Criminal Code.

[24] D.-M. Șandru, I. Alexe, P. Dobrică, *Studiu legislativ și sociologic privind măsurile de protecție în materie civilă*, Editura Universitară, Bucharest, 2017, p. 56. A. Sievälä, *op. cit*, p. 16: "A study in 2011 found at the time there were 27 different protection order schemes in practice within the European Union – meaning that each of the then existing 27 Member States had their own system. The protection measure systems of the Member States can roughly be divided into two groups. In some countries protection orders or similar measures can be issued in civil matters, whereas in other countries they can only be adopted in criminal matters." (pp. 18 - 19).

[25] The Istanbul Convention was opened for signature on 11 May 2011, in Istanbul, Turkey and came into force on 1 August 2014. For an on-line text, see the following link: https://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/090000168008482e, last accession on 02.03.2019, 12,24.

which has been ratified by European Union[26], but not all Member States[27].

The Istanbul Convention deals only with violence against women and domestic violence and recommends that: "Parties shall take the necessary legislative or other measures to ensure that appropriate *restraining* or *protection orders* are available to victims of all forms of violence covered by the scope of this Convention"[28]. (our underline)

It is important to note that (similar to EU legislation) the Convention does not impose a certain legal nature of the measures adopted at national level by means of restriction/protection orders (civil, criminal, etc.) establishing only that the orders should be available irrespective of, or in addition to other legal proceedings[29].

### 2.3. Relation between EU legal instruments on mutual recognition of protection measures and national law of Member States

#### 2.3.1. Direct/non-direct application

Direct applicability means that EU law does not require transposition measures adopted internally by Member States.

As laid down in Article 288 Para 2 of TFEU: "A regulation shall have general application. It shall be binding in its entirety and *directly applicable* in all Member States". (our underline)

Direct applicability of regulations has been unanimously accepted in juridical literature[30] and case-law of the Court of Justice in Luxemburg from the very beginning[31].

By contrast, in accordance to Article 288 alin. Para 3 of TFEU: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall *leave to the national authorities the choice of form and methods*". (our underline)

In consequence, directives are not direct applicable and need adoption of national transposition measures („a procedure similar to adoption of Government decisions in order to ensure application of laws and ordinances"[32]).

It should be highlighted in this context that the role of regulations and directives is different, as regulations are designed to ensure *uniformity* by their direct application, whereas directives aim to *harmonize* domestic legislations (indicating the directory lines and the result to be achieved, but at the same time leaving states a discretion regarding the implementing measures to be adopted[33]).

Criminal area has always been a delicate matter for each Member State, and therefore the option of the EU legislator to adopt a directive in this field is justified[34].

On the other hand, a clear reason for adoption of a directive (instead of a regulation) can be found in Article 82 Para 2 of the TFEU, according to which mutual recognition of judgements and judicial decisions in the area of judicial cooperation in criminal matters are to be dealt with by means of directives.

By contrast to criminal area and according to Recital 4 of the Regulation applicable in civil matters: "In order to attain the objective of free movement of protection measures, it is necessary and appropriate that the rules governing the recognition and, where applicable, enforcement of protection measures *be governed by a legal instrument of the Union which is binding and directly applicable*". (our underline)

#### 2.3.2. Direct/non-direct effect

Direct effect has been defined as the attribute of EU law to create rights in the patrimony of natural and legal persons, which they can invoke directly before national courts, against other natural or legal persons or public authorities and the state.

Unlike direct applicability, direct effect of regulations can not be deduced from Article 288 TFEU, and was tehrefore consacrated by the case law of the Luxembourg Court of Justice[35].

The same case-law established that regulations have complete direct effect (both vertical and

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[26] On 13 June 2017, European Commissioner Věra Jourová (Gender Equality) signed the Istanbul Convention on behalf of the European Union.

[27] România has signed the Istanbul Convention on June 2014 and ratified it by Law no. 30/2016 on the ratification of the Council of Europe Convention on the Prevention and the fight against violence against women and domestic violence, adopted at Istanbul on May 11, 2011, published in the Official Gazzette of Romania no. 224/25.03.2016. The Convention entered into force for Romania on September 2016. For an analysis of the Istanbul Convention, see A. Portaru, *Convenția de la Istanbul: analiză și implicații*, available on-line at the following link: https://www.juridice.ro/459023/conventia-de-la-istanbul.html, last accession on 02.03.2019, 12,09.

[28] Article 53 Para 1 of the Istanbul Convention.

[29] Article 53 Para 2 of the Istanbul Convention.

[30] French doctrine – G. Isaac, M. Blanquet, *Droit général de l'Union Européenne,* IX$^{th}$ Edition, Dalloz Publishing House, 2006, p. 204; English doctrine – P. Craig, G. de Búrca, *EU Law, Text, Cases And Materials*, IV$^{th}$ Edition, Oxford University Press, 2007, p. 84; Romanian juridical literature – A. Fuerea, *Drept comunitar european. Partea generală,* All Beck Publishing House, Bucharest, 2003, p. 156.

[31] CJ, Decision adopted on 07.02.1973, C-39/72, case *Commission v. Italy*; CJ, Decision adopted on 10.10.1973, C-34/73, case *Fratelli Variola S.p.A. v. Amministrazione italiana delle Finanze*.

[32] A. Fuerea, *Drept comunitar european. Partea Generală, op.cit.,* p. 113.

[33] Directives respect thus the particularities of each national legal system. Nevertheless, national transposition measures must be legally binding (CJ, Decision adopted on 25.05.1982, C-96/81, case *Commission v. Kingdom of the Netherlands*).

[34] According to Recitals 7 and 8 of the Directive: "In order to attain these objectives, *this Directive should set out rules* (...). This Directive *takes account of the different legal traditions of the Member States* (...)". (our underline)

[35] CJ, Decision adopted on 14.12.1971, C-43/71, case Politi S.A.S. v. Ministry of Finance of Italy; CJ, Decision adopted on 17.09.2002, C-253/00, case Antonio Muñoz y Cia SA și Superior Fruiticola SA v. Frumar Ltd și Redbridge Produce Marketing Ltd.

horizontal), conclusion to which juridical literature fully agreed[36].

Foundation of direct effect of directives is also exclusively jurisprudential, based on the idea of state fault for non-transposition or wrong transposition[37].

As a consequence, directives cannot have but vertical ascendent direct effect (only particulars can invoke directives against Member States)[38].

**2.3.3. EU case-law**

The study of EU case-law in civil matters has not led to identification of requests for preliminary rulings on interpretation or validity of the Regulation[39], based on Article 267 of the TFEU[40].

In criminal matters, there has been identified a single request, denied by the Luxemburg Court for reasons of clear lack of competence[41].

In this context, we consider important to point out that the preliminary ruling procedure has been qualified as an instrument of cooperation between national courts and the Court in Luxemburg[42], which might have been useful in case of EU legal instruments regulating recognition of protection measures, for reasons to be presented further on.

**2.4. Sphere of application - delimitation between civil and criminal matters**

Decision to legiferate civil and criminal matters concerning protection measures in two different EU binding legal instrument, doubled by the multitude of national laws providing protection measures either in civil or criminal area, will create difficulties for national courts in deciding to apply the Regulation or the Directive.

Undertaking a comparative approach between the Regulation and the Directive, we consider that delimitation between "civil" and "criminal" matters is not clear enough.

Juridical literature[43] supports our opinion, proposing, e.g., that delimitation might depend on the degree of danger in the conduct that led to adoption of the measure establishing the protection order.

According to both the Regulation and the Directive, the civil, administrative or criminal nature of the authority ordering a protection measure should not be determinative for the purpose of assessing the civil/criminal character of a protection measure[44].

In addition, the Regulation stipulates that: "The notion of civil matters should be interpreted autonomously, in accordance with the principles of Union law"[45].

As there have not yet been preliminary rulings on interpretation of the Regulation or the Directive concerning protection measures, we consider appropriate to shortly present the EU case-law dealing with the concept of autonomy of the notion "civil and commercial matters" in case of other regulations, covering different matters in civil area.

Establishing the sphere of application of the concept of "civil and commercial matters" in a case concerning application of Regulation no. 2201/2003[46], the Court explained[47] that it "must be regarded as an *independent concept to be interpreted by referring, first, to the objectives and scheme* of the Brussels

[36] Towards the conclusion of complete direct effect of EU regulations - A. Groza, R. Bischin, Regulamentul comunitar - o analiză din perspectiva principiilor aplicării dreptului comunitar, Romanian Journal of Community Law no. 4/2009, pp. 64 - 65, taking over from C. Toader, Constituționalizarea dreptului comunitar. Rolul Curții de Justiție a Comunităților Europene, Romanian Journal of Community Law no. 2/2008, p. 19; T. Ștefan, B. Andreșan - Grigoriu, op. cit., p. 214; O. Ținca, Drept Comunitar General, 3rd Edition, Lumina Lex Publishing House, Bucharest, 2005, p. 305; J. P. Jacqué, Droit Institutionnel de l'Union Européenne, 5th Edition, Dalloz Publishing House, 2009, p. 592; C. Blumann, L. Dubouis, Droit Institutionnel de l'Union Européenne, 3rd Edition, LexisNexis Litec Publishing House, Paris, 2007, p. 453.

[37] G. Isaac, M. Blanquet, op. cit., p. 277: "direct effect of directives (...) appear in a particular «pathological» juridical context, namely when they have not been transposed in due time or have been incorectly transposed".

[38] If transposition measures have been taken by Member States in time and corectly, effects of directives apply to particulars based on national measures and there is no need for particulars to protect their rights by means of the theory of direct effect (CJ, Decision adopted on 15.07.1982, C-270/81, case Felicitas Rickmers - Linie KG & Co. c. Finanzamt für Verkehrsteuem).

[39] For similar conclusions, D.-M. Șandru, I. Alexe, P. Dobrică, op. cit., p. 48.

[40] Article 267 of the TFEU stipulates: "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay".

[41] ECJ, Ordinance adopted on 16.12.2016, C-484/16, case *Semeraro*.

[42] CJ, Decision adopted on 22.11.2005, C-144/04, case *Mangold*.

[43] M. Bogdan, Some reflections on the scope of application of the EU Regulation no 606/2013 on mutual recognition of protection measures in civil matters, Yearbook of Private International Law, vol. 16/2014-2015, pp. 406 and following.

[44] Recitals 10 of the Regulation and the Directive.

[45] Recital 10 of the Regulation. For discussions concerning the area of application of the Regulation, Guillaume Payan, *Le Règlement européen n˚ 606/2013 du 12 juin 2013, relatif à la reconnaissance mutuelle des mesures de protection en matière civile: entrée en application d'un Règlement passé quasiment inaperçu*, Lexbase Hebdo édition privée n˚ 603 du 5 mars 2015, N° Lexbase: N6208BUH, pp. 1 - 2, shortly presented in D.-M. Șandru, I. Alexe, P. Dobrică, *op. cit.*, p. 32.

[46] Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, published in the Official Journal L 338/1, 23 December 2003, pp. 1 - 29.

[47] ECJ, Decision adopted on 27.11.2007, C-435/06, case *Korkein hallinto-oikeus (Finland)*.

Convention *and, second, to the general principles which stem from the corpus of the national legal systems* (…) Since the term 'civil matters' is to be *interpreted with regard to the objectives* of Regulation (…) the uniform application of Regulation No 2201/2003 in the Member States, which requires that the scope of that regulation be defined by Community law and not by national law, is capable of ensuring that the objectives pursued by that regulation" (our underline).

In a more recent ruling related to Regulation no. 44/2001[48], the Luxemburg Court stated[49]: "It follows from settled case-law of the Court that that scope is defined essentially by the *elements which characterise the nature of the legal relationships between the parties* to the dispute *or the subject-matter* thereof (see, in particular, Case C-406/09 *Realchemie Nederland* [2011] ECR I-9773, paragraph 39, and *Sapir and Others*, paragraph 32)".

Stressing once again the importance of theleological interpretation, the Court underlined the necessity to take into consideration the *scope* of the EU (and not domestic) legal instruments, doubled by *general principles which stem from the corpus of the national legal systems* and a concrete analyse of *elements which characterise the nature of the legal relationships between the parties or the subject-matter*.

Applying these directory lines in order to establish the delimitation between civil and criminal matters in protection measures, it can easily be seen that the first criteria is not relevant, as the objectives of the Regulation, respectively the Directive are formulated in almost identical terms[50].

On the other hand, applying the second criteria which refers to national legal systems and concrete elements of the case, leads to a delimitation according to domestic law.

In practice[51] there have already appeared cases where the character of the protection measure was determined according to national law of the Member State of origin/issuing Member State, and this orientation of case-law seems to find support in juridical literature[52].

Indeed, it seems sensible to draw the line between the Regulation and the Directive by following a simple reasoning: if the protection measure was adopted to protect a person from an act which is criminalised in the issuing Member State, the Directive should apply; all the other situations should fall under the application of the Regulation.

Moreover, this line of reasoning avoids eventual situations when protection measures adopted in Member States should not fall under the application either of the Regulation, or the Directive (e.g., administrative character of the measure under national law).

Nevertheless, it should not be forgotten that in the beginning the Court made reference to EU law when determining the scope (and therefore sphere of application) of EU legal instruments, wchich is also reasonable in order to ensure uniformity.

References for preliminary rulings should be very useful in this context, also taking into consideration that the speedines of recognition procedure is esential in the area of protection measures (or, the first and very important element which defines functional civil or criminal competence of the national court seized with the exequatur procedure is the legal instrument to be applied: the Regulation or the Directive).

### 2.5. Exequatur procedure

#### 2.5.1. Decisions subject to mutual recognition (court decisions/extrajudicial decisions)

As a general rule, Article 81 Para 1 of TFEU stipulates that "the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of *judgments* and of *decisions in extrajudicial cases*". (our underline)

According to Article 3 Para 1 of the Regulation, "protection measure" means "*any decision, whatever it may be called*, ordered by the issuing authority of the Member State of origin (…)". (our underline)

In addition, Recital 13 of the Regulation provides that: "In order to take account of the various types of authorities which order protection measures in civil matters in the Member States (…) *this Regulation should apply to decisions of both judicial authorities and administrative authorities* provided that the latter offer guarantees with regard, in particular, to their impartiality and to the right of the parties to judicial review. In no event should police authorities be considered as issuing authorities within the meaning of this Regulation". (our underline)

Corroborating the provisions aforementioned, it results that the principle of mutual recognition of

[48] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, published in the Official Journal L 12, 16 January 2001, pp. 1 - 23.

[49] ECJ, Decision adopted on 12.09.2013, C-49/12, case *Sunico and others*.

[50] The Regulation provides in Recital 6 that it "should apply to protection measures ordered with a view to protecting a person where there exist serious grounds for considering that that person's life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk, for example so as to prevent any form of gender-based violence or violence in close relationships such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion".

Similarly, the Directive applies to protection measures which aim specifically to protect a person against a criminal act of another person which may, in any way, endanger that person's life or physical, psychological and sexual integrity (recital 9 of the Directive).

[51] Prahova Tribunal, case no. 41/105/2019, criminal sentence no. 16 pronounced on 18.01.2019, not published; Prahova Tribunal, case no. 7579/105/2017, criminal sentence no. 546 pronounced on 14.11.2017, not published.

[52] A. Sievälä, *op. cit.*, p. 21: "The limitation to decisions in criminal matters means that the Directive applies only to protection measures which have been given to protect a person against crimes. Therefore, if actions such as stalking are *not criminalised in the criminal law of the Member State*, the Directive does not apply." (our underline)

protection measures in civil matters covers both judicial, and extrajudicial decisions.

The situation is different in criminal matters, starting from the very legal basis for cooperation in this area.

Article 82 Para 1 of TFEU stipulates that "Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of *judgments* and *judicial decisions*". (our underline)

Subsequently, the Directive provides no exception from this rule.

It is therefore clear that only judicial decisions can make the object of recognition in criminal area.

**2.5.2. Mandatory (or not) character of the exequatur procedure**

According to Article 4 Para 1 of the Regulation: "A protection measure ordered in a Member State shall be recognised in the other Member States without any special procedure being required and shall be enforceable without a declaration of enforceability being required".

Subsequently, Para 2 of the same Article enumerates the acts necessary to be presented when a protected person wishes to invoke in the Member State addressed a protection measure ordered in the Member State of origin.

Based on the provisions mentioned above, juridical literature[53] expressed opinion that the exequatur procedure is necessary under the Regulation.

In our opinion, the exequatur procedure is not necessary, as it results from a logical interpretation of Article 4 Para 1 of the Regulation, which stipulates that recognition is granted "*without any special procedure being required*".

In addition, theleological interpretation of Recital 4 of the Regulation leads to the same conclusion: "Mutual trust in the administration of justice in the Union and the aim of ensuring quicker and less costly circulation of protection measures within the Union justify the principle according to which *protection measures ordered in one Member State are recognised in all other Member States without any special procedure being required* ". (our underline).

Nevertheless, if a person asks for recognition of a judgement, this application should be analized (and not rejected *de plano*, related to arguments presented above) according to rules provided in Articles 4 – 14 of the Regulation (this was the solution adopted by national case-law in case of other regulations)[54].

On the contrary, in criminal matters the exequatur procedure is mandatory, acording to Article 9 Para 1 of the Directive: "Upon receipt of a European protection order transmitted in accordance with Article 8, the competent authority of the executing State *shall, without undue delay, recognise* that order (…)." (our underline)

**2.5.3. Changing the character of the protection measure through the exequatur procedure**

When Member States recognise protection measures adopted in other Member States, the procedure always reffers to protection measures granted on different grounds by different domestic authorities.

As national protection measure systems are very different, a natural question raises: the character of the protection measure as it derives from the national legislation under which it was approved can be changed by the process of recognition (e.g., a measure belonging to the criminal area in the issuing Member State can be recognized in the form of a civil measure in the addressed Member State)?

As clearly stated in Recitals 14 and 20 of the Regulation, the type and civil nature of the protection measure may not be affected by adjustment of factual elements[55].

In the same line of reasoning, Article 10 Para 1 (c) of the Directive states that the competent authority of the executing State may refuse to recognise the European protection order if it relates to an act that does not constitute a criminal offence under the law of the executing State (the principle of double criminality as a ground for non-recognition).

By corroborating the provisions aforementioned in a literal interpretation, we conclude that the legal nature of the protection measure (civil or criminal) cannot be changed by process of recognition[56].

Systematic and theleological interpretation lead to the same conclusion, as both EU and national legal instruments legiferate separately civil and criminal protection measures.

**2.5.4. Differencies concerning the exequatur procedure in civil and criminal matters**

The framework construed by the Regulation and the Directive related to recognition in one Member State of protection measures adopted in another Member State is similar.

In both cases, the EU legislator starts from the same premises (existence of a protection measure adopted in one Member State) and afterwards figures a mechanism of recognition implying two states (the

[53] D.-M. Șandru, I. Alexe, P. Dobrică, *op. cit.*, p. 62.

[54] Similar provisions in Regulations nos 44/2001 and 2201/2003 resulted in Romanian case-law in occasional denial of the exequatur procedure, justified on lack of interest for the applicant, as recognition operates *de jure*. Nevertheless, the case-law generally admitted the *possibility* to follow the exequatur procedure in consideration of practical difficulties encountered by applicants with different national authorities when having requested recognition *de jure*, without presenting an exequatur judgement.

[55] "Based on the principle of mutual recognition, protection measures ordered in civil matters in the Member State of origin should be recognised in the Member State addressed as protection measures in civil matters in accordance with this Regulation" (Recital 14 of the Regulation); "(...) the type and civil nature of the protection measure may not be affected by such adjustment" (Recital 20 of the Regulation).

[56] A. Sievälä, *op. cit.*, p. 54: "(…) the form in which a protection measure is transferred from one Member State to another is defined by the nature of the matter in that State (…)".

Member State where measure was adopted and the Member State where it is to be recognised)[57].

Also, both the Directive and the Regulation emphasise as a general rule that this procedure does not require the Member States to change their national systems for ordering protection measures.

In general, it is accepted that the framework in civil and criminal matters is similar "since all the different types of protection measures found within the area of the Union are a part of the same entirety and since the idea has been to adopt a coherent system of mutual recognition of protection measures. By creating two fundamentally different systems depending on the nature the protection measure has in the national system the Union would have created a more complicated system which would have put the citizens and the Member States of the Union in different positions"[58].

Apart from the same general framework, there are nevertheless important differencies in substance and procedure, the most significant of which shall be presented below.

**Substancial differencies**

The first and most important different element between civil and criminal areas related to recognition of protection measures is *adjustment of factual elements* in recognition of civil measures, respectively *approximation of laws* in criminal measures.

According to Article 11 and Recital 20 of the Regulation, the addressed Member State has the right to adjust the factual elements of the protection measure where such adjustment is necessary in order for the recognition of the protection measure to be effective in practical terms.

As provided by Recital 20 of the Regulation, factual actual elements include the address, the general location or the minimum distance the person causing the risk must keep from the protected person, the address or the general location.

Therefore, the adjustment is to be done according to the national law of the addressed Member State, but limited to the elements provided by the Regulation.

As for procedural aspects, Article 11 pts 2 and 5 of the Regulation states that the procedure for the adjustment of the protection measure shall be governed by the law of the Member State addressed, exempt for the suspensive effect of the appeal, if stated by domestic law.

The protected person, as well as the person causing danger must be informed about these adjustments, and they have the right to appeal against them.

On the other hand, according to Recital 20 of the Directive: "Since, in the Member States, different kinds of authorities (civil, criminal or administrative) are competent to adopt and enforce protection measures, *it is appropriate to provide a high degree of flexibility in the cooperation mechanism between the Member States under this Directive*. Therefore, *the competent authority in the executing State is not required in all cases to take the same protection measure as those which were adopted in the issuing State*, and has a degree of discretion to adopt any measure which it deems adequate and appropriate under its national law in a similar case in order to provide continued protection". (our underline)

Nevertheless, as pointed out before, this cannot lead to a change of the civil/criminal original character of the protection measure, but only to adoption of the closest measure belonging to the same sphere.

Secondly, there are significant differencies related to grounds for non-recognition under Regulation, respectively the Directive, which can result in different degrees of effectiveness of these EU legal instruments.

The Regulation (Article 13) allows refusal of recognition only in two cases: if the recognition was "manifestly contrary to public policy in the Member State addressed" or "irreconcilable with a judgment given or recognised in the Member State addressed".

The grounds for non-recognition under the Directive are much broader (Article 10 Para 1 provides nine grounds, the majority of them related to the national law of the executing State, thus reducing a protected person's possibility to get protection in some Member States).

Also, there are questions related to respect of principle of equality, deriving from a situation when a person who has been granted protection in one Member State exercises the right of free movement and continuation of the protection in the other Member State depends on national legislation of the latter.

**Procedural differencies**

According to the principle of procedural autonomy of Member States, procedural aspects fall within the margins of appreciation of national legislators.

As a consequence, an exequatur procedure for recognition in Romania of juridical effects of protection measures adopted in civil matters in another Member State is to be solved by pronouncing a judgement, according to rules indicated in Articles 1093 – 1101 of Romanian Procedural Civil Code[59].

Applying the same principle in criminal area, an exequatur procedure is to be solved by pronouncing a judgement, according the rules indicated in Article 13 of national Law. no. 151/2016 on the European protection order, as well as for amending and completing some normative acts.

[57] As stated in the Regulation, the "Member State of origin" means the Member State in which the protection measure is ordered, and "Member State addressed" means the Member State in which the recognition is sought (Article 3 Paras 5 and 6 of the Regulation). According to the Directive, the "issuing state" is the Member State which has adopted the protection measure, and the "executing state", is the Member State to which a European protection order has been forwarded for recognition (Article 2 Paras 5 and 6 of the Directive).

[58] A. Sievälä, *op. cit.*, p. 40.

[59] Law no. 134/2010, published in the Official Gazette of Romania no. 606/23.08.2012.

By contrast to the Regulation[60], the Directive also establishes in Article 7 and Annex I a special form for issuing a European protection order, clearly identifying the information to be filled-in (this standard form has also been indicated as Annex 1 to Law. no. 151/2016).

We consider that, for reasons of uniformity and speediness, a similar standardized form should be conceived as an Annex to the Regulation.

## 3. Conclusions

There is a significant amount of variation in national legislations of Member States related to protection measure systems. The level of protection measures (civil or criminal), and also the criteria under which protection may be granted vary from one Member State to another.

At EU level, there is a legitimate right for citizens of European Union to move and reside freely within the territory of all Member States.

In this context, the aim of the EU legislator was to ensure continuous protection of victims within the common area of justice, freedom and security, and at the same time to make sure that persons in need of protection may exercise their right to free movement without losing the protection[61].

In order to reach this goal, it construed a mechanism based on mutual recognition of protection measures adopted in one Member State in all other Member States[62], by adopting a Regulation for civil matters and a Directive for criminal matters.

The principle of mutual recognition is based on mutual trust and direct judicial cooperation among national courts. It follows as a general direction that Member States are to recognise the validity of decisions pronounced in other Member States and give them the same juridical value and effects as if they were national decisions.

Apart from the general framework, important aspects are still in question, and there are also significant elements specific to each EU legal instrument, either in substance or procedure.

It is of great importance that a clear limit concerning the sphere of application of the Regulation, respectively the Directive is not established in the corpus of these legal instruments (functional competence of domestic courts seized with exequatur of protection measures and application of either the Regulation or the Directive depend on this).

As a consequence, juridical literature and the case-law argued that the legal nature of a protection measure is to be appreciated in accordance to national laws, and this legal nature cannot be changed through the exequatur procedure.

There are also specific elements attached to the substance of each EU instrument, some of them deriving from their different juridical nature (Regulation, respectively Directive).

The first and most important different element relates to adjustment of factual elements in civil measures (restrictively indicated by the Regulation), respectively approximation of laws in criminal measures (on which Member States have a margin of appreciation). As stated, regulations have the function of ensuring uniformity (allow less at the appreciation of Member States), and Diretives are used to harmonise (there is always a margin of appreciation for Member States).

Secondly, the grounds for non-recognition under the Directive applicable in criminal matters are much broader than those allowed by the Regulation for civil cases. Since the possibility to refuse recognition in criminal area is significantly broader, the effectiveness of the Directive in ensuring the cross-border protection may be smaller than the effectiveness of the Regulation.

Also, the possibility to refuse recognition on grounds related to national law which has been left to Member States in criminal matters (e.g., refusal to recognize measures based on acts which are not crimes according to the legislation of the executing State) clearly has implications on effectiveness.

If grounds for non-recognition provided by the Directive would have been reduced to those stipulated by the Regulation, the practical impact of the whole mechanism of mutual recognition of protection measures would have been stronger.

There are also formal/procedural differencies, which might affect uniformity and speediness in cross-border recognition of protection measures.

To this respect, a similar standardized form as the one indicated in Article 7 and Annex I to the Directive should be conceived as an Annex to the Regulation.

Standard forms unify the process of issuing and recognising protection measures in Member States and and smooth mutual recognition of protection measures within the European Union.

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[60] The Regulation does not include a ready-made form to be filled in in case of protection measures in civil area (according to Article 19 of the Regultion, this kind of a form will be established by the Commission). At present, Article 5 of the Regulation reffers only to a certificate, indicated by Article 2 as one of the documents necessary to be provided when a protected person wishes to invoke in the Member State addressed a protection measure ordered in the Member State of origin.

[61] Thus, a person in need of protection will not have to apply for a new protection measure in the new Member State of residence when exercising the right to free movement.

[62] A. Sievälä, *op. cit.*, p. 38: "The Directive on the European protection order and the Regulation on mutual recognition of protection measures in civil matters extend the principle of mutual recognition to cover protection measures. The ground for this is the same as it has been with the principle of mutual recognition all along, both in the case law and the legislation of the Union: to ensure the functioning of the free market. In addition to this, the special nature of the position of crime victims and other persons in need of protection has also been used in reasoning the creation of the new mechanism for mutual recognition of protection measures. This fits well with the growing importance of fundamental rights in the EU".

At national level, harmonising the criteria for adopting a protection measure within domestic legislations of Member States would help[63].

Finally, the whole mechanism on mutual recognition of protection measures is rather new and not sufficiently applied in practice, and therefore professional training of magistrates in this area should be useful[64].

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[63] This is a situation which, at least at the moment, cannot be changed in criminal area. One the one hand, each Member State has its own criminal system; on the other hand, EU and Member States have shared competence in the area of freedom, security and justice related to enacting EU legislation within this field.

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# ADMINISTRATIVE AND PATRIMONIAL LIABILITY OF MILITARY CIVIL SERVANTS

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**Abstract**

*In exercising the functional attributions, military civil servants are liable for the damages caused by the actions taken, according to the law. The patrimonial liability engages in the determination of the guilt and the causal links between the actual act and the effects produced. This type of administrative accountability has in the center the material liability of the military and normative acts in which we find both the means of establishing the guilty and the way of recovering the damages in conjunction with the remedies.*

**Keywords:** *administrative responsibility, patrimonial responsibility, military civil servant, liability, administrative guilt, damages, remedies*

## 1. Introduction

This Article aims to analyze the concept of administrative and patrimonial liability of military personnel in the case of state's responsibility for the damage caused by administrative acts.

Given that the military civil servants compared to civil servants are part of the whole, we consider it appropriate to analyze their administrative and patrimonial liability, especially regarding their material liability for damage resulting from the management of financial resources or with pecuniary character. We treat this subject as a distinct situation which, although approached by the doctrine of labor law, falls to accompany the administrative and patrimonial liability of military personnel not only for reasons of disciplinary unity but also for the coherence of the analysis of the institutions under discussion.

A particular case where the military personnel bears the administrative and material liability is the case when they are held accountable for deeds related to the damage resulting from the formation, administration and management of the financial and material resources, caused by the fault of the military personnel and in connection with the fulfillment of the military service or of the job duties.

Material liability of military personnel towards the public institution intervenes both for the actual damage and for the unfulfilled benefit, a legal notion similar to the material liability in the labor law, but with which it is not confused, since the recovery of the damage is carried in accordance with a special procedure provided by Ordinance no. 121 of 1998 on material liability of military personnel.

## 2. Military civil servants – special status civil servants

The hypothesis from which we start our approach is based on the fact that the military personnel are civil servants, according to all the rigors of the legal rules, which makes them bear the administrative and patrimonial liability as other civil servants, accepting the discipline and conduct rules specific to them.

According to the provisions of Article 16 paragraph (3) of the Constitution of Romania stipulating that public positions and dignities may be civil or military, the statute of military personnel does not fall under the provisions of the Labor Code.

We support the idea of the late Professor Antonie Iorgovan, according to which the military personnel are a category of civil servants with a special statute that are distinguished from the civil servants mainly by the valences related[1] to the discipline that guides their professional conduct. According to Article 2 of Order no. M64 of June 10th, 2013 approving the Military Discipline Regulation, published **in the Official Gazette No. 399bis of July 3rd, 2013, the military discipline represents the strict compliance of legal provisions, of the** rules of order and conduct mandatory for the maintenance of the functional status, the fulfillment of the specific missions and the smooth running of the activities by all categories of military personnel, being considered as one of the determining factors of the operational capacity. For military discipline there is a need of conscious acceptance of the rules of conduct and of a reward and sanction system, expressly regulated.

As a proposal of *lex ferenda*, to eliminate the errors of interpretation, we consider it necessary the appointment of the military personnel in Article 5 paragraph (1) of the Law no. 188/199 on the Statute of

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[1] A. Iorgovan, Tratat de drept administrativ, IVth Edition, vol. I, ALL Beck Publishing House, Bucharest, 2005, p. 592.

Civil Servants, among those public services benefiting from special statutes. In situations that do not concern military discipline and the rigors specific to this category of civil servants, the above mentioned Statute is the common law applicable to them. The statute of military civil servants, namely Law 80 of July 11th, 1995 contains provisions applicable to them, regardless of the central public authority or the autonomous authority where they work[2]: the Ministry of National Defence, the Ministry of Internal Affairs, the Romanian Intelligence Service, the Foreign Intelligence Service, the Special Telecommunications Service, the Protection and Guard Service.

The fact that military personnel are a special category of civil servants is regulated both by the Constitutional Court by Decision no. 34 of February 9th, 2016, section 26[3] and by the High Court of Cassation and Justice by Decision ICCJ-RIL no. 10 of April 16th, 2018, section 49[4].

In order to delimit the military personnel among civil servants and to eliminate mistakes or erroneous interpretations of the presumption that they are in legal employment relationship (under the Law 53/2004 on the Labor Code[5]), in our approach we started from using the notion of "military civil servants". Let us not forget that in addition to the fact that military civil servants are serving the nation[6], compared with other civil servants they are obliged by oath[7] to live for the nation in whose service they operate.

This hypothesis is based on both the constitutional provisions[8] of Article 16 and their role in society, keeping in mind that "the military personnel have to observe the most important social values, if not the essential ones for the existence and proper functioning of a society, in the current political context of Euro-Atlantic country, being engaged in a compendium of activities, including:

- Collective defence as the main common goal of Romania and the North Atlantic Organization (N.A.T.O.)[9].
- European security and defence, according to the Common Security and Defence Policy of the European Union[10];
- National security and defence of Romania and its interests in the field of internal and external information[11];
- The defence of public order, of citizens' fundamental rights and freedoms, of public and private property[12];
- Fire prevention and extinction[13];
- The protection of Romanian and foreign dignitaries working in Romania[14].

Military civil servants vested with the exercise of public authority are found both within the central administrative authorities and within the autonomous administrative authorities, such as: the Ministry of National Defence (MapN), the Ministry of Internal Affairs - (MAI), the Romanian Intelligence Service (S.R.I.), the Foreign Intelligence Service (SIE), the Special Telecommunications Service (STS), the Protection and Guard Service (S.P.P.), having among the general duties: ensuring the defence needs of

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[2] According to Article 3 of Law 80 of 1995 on the Statute of military personnel, they can be in the following situation: without military position but they meet the conditions provided by the law for military service in reserve and *if necessary, as military men in activity; in retirement, when, according to the law, they can no longer be called for military service.*

[3] Section 26. *Further, analyzing for the same purpose other legal texts, the Court finds that, according to Article 85 paragraphs (1) and (2) of Law no. 188/1999 on the Statute of Civil Servants, which represents the general framework for civil servants (the military personnel being a special category of civil servants): "(1) The repairing of the damage to the public authority or institution in the situations referred to in Article 84 a) and b) is ordered by issuing a decision or a imputation order by the head of the public authority or institution, within 30 days of the finding of the damage or, as the case may be, by undertaking a payment commitment, and in the situation stipulated in section (c) of the same article, on the basis of the final and irrevocable judgment. (2) The civil servant concerned may file an appeal against the decision or the imputation order before the administrative court". It follows from the combined interpretation of the abovementioned legal provisions that the imputation order is an administrative act, since the litigant can address the administrative court against the contested act.*

[4] 49. *Since neither Law no. 80/1995 nor other normative acts do not specify the court with jurisdiction in work conflicts of military personnel, the cases are constantly solved by the administrative courts. At the present stage of the legislation, the solution was judged to be judicious because, according to the Constitution of Romania (Article 16 paragraph (3)) both public positions and public dignities are, as appropriate, civil and military. So, in essence, the military personnel (whose statute is governed by Law 80/1995) are all civil servants. Thus, it is natural that, having regard to Article 1 of the Law no. 188/1999, jurisdiction should belong to administrative courts, according to Article 109 of the same law. It has been concluded that the military personnel (in service) are a variety of the civil servants, a variety which has imposed on them the adoption of a special statute (Law 80/1995), a statute which, where appropriate, complements the statute of civil servants (Law 188/1999), general regulation in the matter* [*Article 1 paragraph (1) of the aforementioned law].*

[5] Law 24/2004 with subsequent amendments and completions.

[6] Article 2, paragraph 2 of Law no. 80 of July 11th, 1995 on the statute of military personnel, with subsequent amendments and completions.

[7] Decree-Law no. 119 of 14 April 1990 regarding the contents of the military law published in the Official Gazette no.21 of February 8th, 1990.

[8] Constitution of Romania, republished.

[9] Article 5 of the North Atlantic Treaty, signed in Washington DC on April 4th, 1949.

[10] European Union Military Committee (EUMC) set up by Council Decision 2001/79/PESC of 22 January 2001.

[11] Article 1 of Law no.1 of January 6th, 1998 on the organization and operation of the Foreign Intelligence Service, published in the Official Gazette no. 511 of October 18th, 2000, with subsequent amendments and completions. Article 1 of Law no. 14 of February 24th, 1992 on the organization and operation of the Romanian Intelligence Service, published in the Official Gazette no. 33 of March 3rd, 1992.

[12] Article 1 of Law no.550 of November 29th, 2004 on the organization and operation of Romanian Gendarmerie, with subsequent amendments and completions, published in the Official Gazette no. 1175 of December 13th, 2004.

[13] Article 1 of Law no.121 of October 16th, 1996 on the organization and operation of the Military Firefighters Corps, with subsequent amendments and completions.

[14] Article 1 of Law no.191 of October 19th, 1998, on the organization and operation of the Protection and Guard Service, with subsequent amendments and completions.

Romania, preventing and counteracting actions that constitute, according to the law, threats to the national security; preventing and fighting terrorism; management of the special telecommunication domain for the public authorities in Romania; the defence of public order, the defence of life, bodily integrity and freedom of the person, public and private property, the legitimate interests of the citizens, the community and the state; ensuring the protection of Romanian and foreign dignitaries and of their families during their stay in Romania, etc.

Particular attention and increasing interest are observed on the responsibility of the military resulting from the inherent risks of a social organization. The focus is particularly on ensuring that the risks inherent imposed by the general interest are not manifested, among those risks we mention those arising from exceptional situations in terms of devastating effects on society in general and on the individual in particular (damage to persons who fall victim to acts of terrorism, war, warfare, insurgency, riots; compensation for persons who have fallen victim to crimes whose author is unknown; victims of natural disasters or air, naval, terrestrial traffic accidents, etc.).

We could add numerous situations of devastating effects resulting from military actions and operations:

- public exhibitions of military equipment of military forces;
- handling dangerous weapons from a constructive and operational point of view for both handlers and third parties;
- the movement of the technique in the area of responsibility, during tactical maneuvers or during logistic support;
- accidents resulting from military training;
- explosives resulting from work with explosives during various pyrotechnical drills;
- defusing suspicious packages on public space;
- performing bomb squad works in the interest of various communities, etc.
- performing secret missions, etc.

## 3. Definition, features and principles of administrative and patrimonial liability

The Constitution of Romania of 1991, revised and republished in 2003 has various articles subject to a right of compensation for the damages caused by the public authorities by administrative acts, by their delay in handling the citizen's petition or by remaining silent with regards to the latter.

Analyzing the constitutional provisions, we found various articles describing such a fundamental right: Article 44 The right of private property, Article 52 The right of a person aggrieved by a public authority, Article 73 Classes of laws. From their analysis and interpretation, it turns out that we have one of the following actions[15]:

1. An action brought exclusively against public authorities;
2. An action brought exclusively against the actual civil servant;
3. An action brought exclusively against both the public authority and the civil servant.

These actions are regulated by Law no. 554 of December 2nd, 2004 on administrative litigations, with subsequent amendments and completions, where in Article 52 paragraph 1, by way of an extinctive interpretation, the expression administrative acts includes also the administrative contracts drawn up by virtue of its public law legal capacity (procurement contracts[16], service contracts, etc.).

The administration's responsibility is recognized as manifesting itself under three forms: responsibility for fault, responsibility for risk and responsibility for job error[17].

Among the definitions of the administrative and patrimonial liability, we remember the opinion of professor Anton Trăilescu, according to which: "administrative and patrimonial liability is that form of legal liability consisting in requiring the state or, as the case may be, territorial and administrative divisions to compensate for the damage caused to individuals by an unlawful administrative act or by the unjustified refusal of the public administration to solve a petition for a right recognized by the law or for another legitimate interest"[18].

The constitutional principles upon which is based the liability of public authorities and their civil servants (of state) for the damage caused, are listed in a research paper, as follows[19]:

a) Patrimonial liability belonging exclusively to the state as a result of the damage caused by judicial errors (with the possibility of seeking legal remedy or redress against the civil servants *who have exercised their office in bad faith or with serious negligence*).

The constitutional base of this principle is described in Article 52 paragraph 3 of the Constitution, developed by Article 96 of Law 303/2004 on the Statute of Judges and Prosecutors, stipulating in paragraph 2 "the joint liability of the state and judges and prosecutors for the exercise of their office in bad faith or with serious negligence.

A particular situation is that of the military prosecutors and judges working in the military courts,

[15] Antonie Iorgovan, Tratat de drept administrativ, Vol. II, 4th Edition, All Beck Publishing House, Bucharest, 2005, p.459

[16] Doina Cucu, Procedures for the procurement of public property rights. The legal nature of public works contracts, CKS 2018, University Nicolae Titulescu of Bucharest;

[17] Elenna Emilia Ștefan, Răspunderea Juridică, privire specială asupra rîspunderii în Dreptul Administrativ, Peo Universtitaria Publishing House, Bucharest, 2013.

[18] Anton Trăilescu, Drept administrativ. Tratat elementar, All beck Publishing House, Bucharest, 2002, p.367.

[19] Antonie Iorgovan, Tratat de drept administrativ, Vol. II, 4th Edition, All Beck Publishing House, Bucharest, 2005, p.461

with jurisdiction in criminal cases involving military civil servants, having extended material jurisdiction since the introduction of the New Criminal Procedure Code compared to the old regulation that was strictly limited to job offenses committed by them. Although there have been many discussions about the necessity of military courts, we continue to support them, as a result of the rigor and discipline specific to any form of military organization, conduct and deontology that must be observed throughout the military trial based on the presumption of innocence. It might be said that these courts have a dual coordination: from the administrative point of view, they are managed by the Ministry of National Defence through the Military Courts Division, and from the point of view of the separation of powers, they are part of the judiciary.

b) Patrimonial liability of public authorities as a result of the damage caused *both by administrative acts causing damage and as a result of not solving within the legal term a petition made under the law (there is the possibility that the civil servant guilty of violating the law be brought in the proceedings);*

The administrative act was defined in a research paper of the interwar period as *a manifestation of will by a competent administrative body, creating a general or individual legal situation governed by the rules of public law, in which we find the idea of domination and command*[20].

Current definitions describing with precision and concision the contents of the administrative act are given by the famous professor Antonie Iorgovan and by the distinguished lady Ph.D. professor Verginia Verdinaș, a disciple of the late "spiritual father of the Constitution", retelling the last author: *the administrative act is the main legal form of the public administration activity consisting of an express and unilateral manifestation of will subject to a public power regime and of the legality control of courts, issued by the administrative authorities or private persons authorized by them, under which collateral*[21] *obligations and rights arise, are amended or are paid off.*

Administrative acts causing damage are those administrative acts issued that affect a person's patrimonial or non-patrimonial interests (including moral damages that hurt the honor, prestige and reputation of a person). Consequently, we are in a situation in which a person has suffered a material or moral loss caused by the issuance of the administrative act in question, which implies the accountability of the state, respectively of the guilty public authorities and civil servants.

Also, the administrative and patrimonial liability is involved both for failure to answer a petition within the time limits and for the failure of the administration to answer or to respond. The statement is supported by Article 51 of the Constitution regarding the citizen's right of petition and by the provisions of Government Ordinance no. 27/2002 on the regulation of the activity of solving petitions.

c) Joint patrimonial liability of public authorities and civil servants for damage caused to the public domain as a result of a faulty *functioning* of public services.

The public domain, that community of goods forming the object of public property – domain assets, is given by its owner and the different legal regime, these features being the object of property ownership. The manner of procuring public property rights is regulated by Article 863 of the new Civil Code, which lists the possible forms[22], as follows: *expropriation on grounds of public utility, donation or legacy, onerous convention, the transfer of an asset from the private domain to the public domain, other manner provided by the law*.

The damage caused to the public domain entails the administrative and patrimonial liability of the state if a person's legitimate right or interest is damaged, ensuring fair compensation within the limits set by the law.

We consider that the faulty functioning or the poor functioning as it is termed in a pejorative manner or the unsatisfactory functioning of public services can be assessed objectively only in the light of the effects of the administration of public affairs and their judgment in terms of efficiency and effectiveness as well as with regards to the satisfaction of the beneficiaries. In other words, we are interested in the perspective of the administration's performance and the relationship of the public administration with those whose public affairs are being administered[23]. The right to good governance is already enshrined as a fundamental right[24], defined in the doctrine as *the right of every person to have his or her affairs handled impartially, fairly and within a reasonable time by the Community institutions and bodies*[25].

Among the situations of faulty functioning of "military public service" we find: breach of the obligation to motivate the administrative acts issued, both those concerning its own employees and those concerning other individuals, in other words, the lack of motivation of the administrative acts, the lack of transparency in the taking of individual measures by not hearing the person concerned, the failure to grant or allow a person the access to his or her own file taking into account the intervention required by the law regarding the observance of the legitimate interests related to confidentiality, secret of service, state secret,

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[20] P. Negulescu, Drept Administrativ, vol. I, IV Edition, E.Marvan Publishing House, Bucharest, 1934, p. 304;

[21] Verginia Verdinaș, Drept administrativ, X Edition, revised and updated, Universul Juridic Publishing House, Bucharest, 2017, p. 328;

[22] Adelin Zăgărin, Expropriation on grounds of public utility, Revue Europeenne du Droit Social, Vol. XLI, ISSUE 4, year 2018, p 94, Bibliotheca Publishing House, Târgoviște, 2018.

[23] Mureșan Florina, ″ Corelația bună administrare-bună guvernare în contextul integrării României în Uniunea Europeană″,ADJURIS – International Academic Publisher, mai 2018.

[24] Article 41 of the Charter of Fundamental Rights of the European Union, entitled The right to good administration

[25] Verginia Vedinaș, Deontologia vieții publice, Universul Juridic Publishing House, 2007, p. 224.

professional and/or trade secret. Failure to observe such conditions by the central public authorities, respectively the autonomous administrative authorities where military civil servants work may entail suspension or annulment of the administrative act by the court[26].

d) Exclusive patrimonial liability of public administration authorities for limits of public service.

## Conclusions:

Administrative and patrimonial liability of military personnel is subject to Law no. 554/2004 on administrative litigations, completed by the other rules of administrative law and the civil procedure provisions, where Article 28 provides that the law mentioned is completed with the civil procedure provisions, provided that they are not incompatible with the procedure set by the law, the specificity of the authority relationship between the public authorities, the legitimate rights or interests of the aggrieved parties.

In the administrative law treaty of Professor Antonie Iorgovan in 2005, Vol. II, it is stated that the compensation for damage is conditioned by the annulment or the establishment of the unlawful nature of the administrative act in question, respectively the establishment of the failure to answer a petition within the time limits or the unjustified refusal to answer. Both aspects presented are associated with a violation of a legitimate interest, so the actions for damages and annulment are filed at the same time.

According to the law of administrative litigations, the aggrieved person may file a petition for summons of the military civil servant guilty for failing to answer a petition within the time limits, for unjustified refusal, for issuing an unlawful administrative act. According to Article 16 of the reference law, the latter can make a claim against his hierarchical, if he received a written disposition to issue or not to issue the act in question.

The law of administrative litigations describes the preliminary procedure on Article 7, as a preliminary administrative appeal before filing an action for annulment in conjunction with an action for damage before the administrative court. Further it describes the time limits for filing the preliminary complaint, differentiated according to the administrative act under discussion: for individual administrative acts, the time limit for filing a preliminary complaint is 30 days of the time the aggrieved person became aware of the contents of the act, accepting the exception that, for good reasons, the complaint may be filed within a period of up to six months; for normative administrative acts the complaint can be filed at any time and for administrative contracts the time limit is 6 months. It must be stated that those time limits are limitation periods and, after the preliminary procedure, at the judicial stage, the grounds invoked in the request for annulment of the act are not limited to those invoked in the preliminary complaint lodged with the issuing or hierarchically superior authority.

For military public authorities organized on the principle of hierarchy, the request is lodged with the entity hierarchically superior to that issuing the damaging act, as an example, if the act was issued by the Inspectorate of Gendarmerie within the Ministry of Internal Affairs, the preliminary complaint may be addressed directly to the minister. Note that, according to Article 7 paragraph 5, the preliminary stage is mandatory, except for actions initiated by the prefect, the ombudsman, the Public Ministry, the National Civil Servants Agency related to claims by persons aggrieved by orders or parts thereof, as well as cases against administrative acts that cannot be revoked because they entered the civil circulation and produced legal effects, cases concerning the unlawfulness and cases of unjustified refusal to answer a petition regarding a legitimate right or interest, respectively failure to answer the applicant within the legal time limit.

We consider as lex ferenda the introduction of provisions obliging military public authorities to submit annual reports or to highlight in their annual activity reports the stage of responding petitions, their number, the way of settlement and closing, etc. given the importance of this fundamental right constitutionally enshrined.

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# THE ACTIVITY OF TRANSPOSING DIRECTIVE 2014/94/EU OF THE EUROPEAN PARLIAMENT AND COUNCIL OF 22 OCTOBER 2014 ON THE DEPLOYMENT OF ALTERNATIVE FUELS INFRASTRUCTURE. THE POST-TRANSPOSING ATTRIBUTIONS OF THE ROMANIAN ENERGY REGULATORY AUTHORITY

**Ionela-Alina ZORZOANĂ***

**Abstract**

*This article proposes an analysis of the activity of transposing the Directives, an obligation of the Member States of the European Union provided by the Treaty on the Functioning of the European Union. The transposing obligation entails that the Member State to which a Directive is addressed has the option to choose the form and means and the important issue is that the obtained result should be the one set up by the concerned Directive. Following up the study, we shall analyze the sanctions that can be implemented by the European Commission in case of failure of transposing or partially transposing a Directive. We further proposed ourselves to analyze the case of Directive no. 2014/94/EU of the European Parliament and Council from 22 October 2014 on the deployment of alternative fuels infrastructure. The analysis shall refer to the scope of issuing the Community deed, but especially to the challenges recorded during the process of transposing Directive 2014/94/EU in Romania and the triggering of the infringement procedure against Romania. The article shall also compare the stage of transposing the Directive in other Member States. Last, but not least, we shall also make an analysis of the attributions of the Romanian Energy Regulatory Authority in domestic law.*

**Keywords:** *obligation of transposing the directives, sanctions in case of failure to transpose/partial transposing, scope of the issuance of Directive 94/2014/EU, alternative fuels, transposing in Romania, infringement procedure, notification of the Court of Justice of the European Union, Romanian Energy Regulatory Authority, collaboration, distribution of electricity, natural gases.*

## 1. Introduction

In the first part, this study proposes an overview of "*directive*" - concept, especially in regard to the obligation of the Member States of the European Union to transpose the Community act. The first part of the study also addresses the sanctions that may be taken against a Member State of the European Union in case of partial transposition or non-transposition of a European directive.

The second part of the study is dedicated to the particular case of the Directive no. 2014/94/EU of the European Parliament and of the Council of 22 October 2014 on the deployment of alternative fuels infrastructure through the difficult course of transposing this Community act in Romania. We have chosen this Community act as it is topical, namely the European-wide project to remove petroleum-based fuels and the transit to alternative fuels.

The study analyzes the stages of Directive no. 2014/94/EU from the point of view of the European institutions issuing the Community act.

An essential issue of the study is a comparative analysis of the transposition of the Directive by other Member States of the European Union. Romania and Malta are the last two countries to have fully transposed the Directive, under the threat of sanctions that could be applied by the Court of Justice of the European Union, as the final stage of the infringement procedure.

The study also analyzes the attributions of the Romanian Energy Regulatory Authority following the transposition process of the Directive, in the light of the status of this regulatory authority.

Last but not least, the study aimed to draw attention upon the "restrictions", especially such of financial nature regarding on one hand, the necessary investments to be made in infrastructure following the transposition of the Directive in Romania and, on the other hand, the reluctance of the population to purchase alternative fuel vehicles.

## 2. Content

### 2.1. General considerations on the concept of the directive

#### 2.1.1. Directive – binding act for Member States of the European Union

Each action undertaken by the EU is based on treaties - legally binding agreements signed by all EU countries setting out EU objectives, rules of operation of European institutions, decision-making procedures and relations between the European Union and its Member States.

Treaties are the starting point for EU law and are known in the European Union as "primary law".

The legislative corpus deriving from the principles and objectives of the Treaties is known as

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"secondary legislation". This includes regulations, directives, decisions, recommendations and opinions.

Directives require from Member States to achieve a certain result, without imposing the means by which they can do this. Member States must adopt measures incorporating directives into the national law ("transposition") in order to achieve the objectives set by them. National authorities must notify the European Commission about such measures.

According to Article 288 of the Treaty on the Functioning of the European Union (TFEU)[1], the Directive is binding on each recipient Member State in regard to the outcome to be achieved, leaving the competence to national authorities concerning the form and means to achieve the result. Thus, it can be said that "*the directive imposes results and leaves to the recipients the competence in regard to the form and means to achieve the targeted results, within the established deadlines*."[2]

In essence, the directive theoretically requires the intervention of the national authorities to produce legal effects in the domestic law of each recipient Member State. Deriving out of the Community decision-making process, the correctly published or notified directive creates an obligation on the receiving Member State to take the necessary measures for its effective application in the national legal order. The obligation derives directly from the requirement imposed by art. 288 TFEU.

It follows that the "normal" situation corresponds to the adoption by the competent national authorities of an act transposing the Community Directive.

**2.1.2. Obligation to transpose directives**

The transposition of the Directive is the operation by which the Member State receiving a Community Directive takes the necessary measures to implement such. The state has the choice of "form" (in terms of the legislative or regulatory technique of each state) and "means" (legal institutions likely to achieve the stated objective) and it is essential that such lead to the achievement of the result. The State may adopt laws or regulations, as may be required to repeal or amend internal provisions incompatible with the provisions of the Directive.

For a directive to enter into force at national level, EU countries must adopt a law to transpose such. This national measure must achieve the objectives set by the Directive. National authorities must communicate such measures to the European Commission.

The transposition must occur within the deadline set at the time of adopting the Directive (generally within two years).

**2.1.3. Sanctions that can be taken in case of non-transposition/partial transposition of directives**

In accordance with art. 17 para. (1) from the Treaty on European Union, the European Commission has the scope to ensure the application of the Treaties by the States that have ratified them, the measures adopted by the institutions for that purpose, and also oversees the application of EU law under the control of the Court of Justice of the European Union.

If the concerned Member State fails to communicate measures fully transposing the provisions of the directives or fails to take action to remove the suspicion that EU legislation has been infringed, the Commission may initiate a formal infringement procedure. The procedure follows a series of stages provided for in the EU Treaties, each of which ends with an official decision[3].

The "*infringement*" procedure is triggered by the European Commission against states that do not respect their community obligations.

The triggering thereof may be caused in three cases:

a) Omission of notification of national normative acts transposing and implementing directives - Member States have the obligation to notify transposing legislation and implementing legislation;
b) Non-compliance of national legislation with Community/EU requirements - this means that domestic legislation has to be in full compliance with Union requirements;
c) Inappropriate application of Community/EU normative acts - Member States are also required to ensure the application of Community provisions.

This procedure involves several steps: from the notification about the failure to comply with EU directives, the submittal before the Court of Justice of the European Union (CJEU) and until a fine (lump sum or periodic penalty payment) is imposed upon the Member State.

Therefore, we shall briefly outline the stages of the procedure to explain the current situation of Romania (with reference to the specific case subject to analysis, transposition of Directive 2014/94/EU), what exactly the three infringement procedures relate to and, we shall also briefly present the situation which the state may reach, if the non-compliance with directives continues (CJEU notification by the European Commission).

In the first stage of commencing the procedure, the Commission draws up a "letter of formal notice" which it sends to the concerned State and in which are itemized the infringements of Community law. The letter means the formal opening of the infringement procedure.

The second step is the possibility for the Member State to defend itself. This stage is called "*Member State Observations*" and aims to protect the interests of that State. However, the State cannot rely on any current provision, practice or circumstance in domestic

[1] Ex-Article 249 (3) of the Treaty establishing the European Community (the Directive is binding on each Member State of destination with regard to the outcome to be achieved, leaving the national authorities competent in form and means).
[2] Augustin Fuerea, Handbook of the European Union, 6th reviewed and supplemented edition, Universul Juridic, Bucharest 2016, page 237;
[3] https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_ro;

law to justify the failure to comply with the Community law.

The next step is the "*Reasoned Opinion*", i.e. the last warning by the Commission prior to the referral to the CJEU, a warning issued in the absence of the observations of Member State or if they are considered unsatisfactory.

The "Member State reply" followed therefore to the reasoned opinion, meaning the measures taken by the State to comply with the Commission's opinion. The deadline for compliance is set by the latter, and if the State does not make the necessary changes, the Commission shall refer the case to the CJEU in order to start the contentious procedure.

If the Court resolves the case in favour of the Commission[4], the state is bound to align the domestic national law to the European one. If State still fails to comply thereafter, then the Court is required to pay a lump sum or periodic penalty payment until the obligations laid down in the first judgment have been complied with. Penalties are proposed by the European Commission, but the decision on their amount pertains to the CJEU. It follows that, in the specific case of Member States which have not implemented the directives within the period agreed by the Council of the European Union and the European Parliament, the Commission may ask the Court to penalize the Member State in financial view, when it first adopts the decision.

This possibility, introduced by the Treaty of Lisbon, is provided in Article 260 (3) TFEU. If, despite the first judgment, the Member State fails to take the necessary measures, the Commission may initiate a new infringement procedure pursuant to Article 260 TFEU by sending a single written warning before notifying the Court again.

If it does indeed refer the matter to the Court again, the Commission may propose to it to impose financial penalties on the Member State, depending on the duration and gravity of the infringement and the size of the Member State. There are two elements:

- a lump sum, determined on basis of the time elapsing since the ruling of the first decision;
- and a daily fine, calculated as of the date of the second decision, until the Member State ceases the infringement.

### 2.2. Directive no. 2014/94/EU of the European Parliament and of the Council of 22 October 2014 on the deployment of alternative fuels infrastructure

#### 2.2.1. Scope of the occurrence of Directive no. 2014/94/EU

The European Commission has announced at the level of 2013 an ambitious package of measures to create alternative fuel stations across Europe with common design and usage standards.

The package was based on analyses of each type of fuel:

- **Electricity**: the situation of electricity charging points varies considerably across the EU. Leaders in this area are Germany, France, the Netherlands, Spain and the United Kingdom. The Commission's legislative proposal provides for the imposition in each Member State of a minimum number of recharge points equipped with a common socket outlet. The objective was to have a sufficient number of loading points so that car manufacturers could launch a mass production at reasonable prices. The concept of "common socket outlet" at EU level has been established as an essential element for the widespread adoption of this fuel.
- **Hydrogen**: Germany, Italy and Denmark already have a significant number of hydrogen refuelling stations, although some are not accessible to the public. Common standards are still required for certain components, such as fuel hoses. Under the proposed measures, existing power stations will be connected to form a network with common standards, ensuring the mobility of hydrogen vehicles. This applies to the 14 Member States that currently have a hydrogen network.
- **Biofuels**: already represent almost 5% of the market. They are used combined with traditional fuels and do not require any specific infrastructure. A major challenge will be to ensure their sustainability.

– **Liquefied (LNG) and compressed (CNG) natural gas:** LNG is used for water transport, both sea and river. LNG infrastructure for the supply of vessels is at a very early stage, with only Sweden having bunkering (fuel supply to a ship) with small-scale LNG for seagoing vessels, with plans to build such facilities in several other Member States. The European Commission has proposed that, by 2020 and 2025, LNG refuelling stations should be installed in all 139 maritime and river ports that are part of the trans-European transport network. It is not about large gas terminals, but fixed or mobile refuelling stations. All major EU ports are targeted. LNG: Liquefied natural gas is also used by trucks, but there are only 38 filling stations in the EU. The Commission has proposed that by 2020 refuelling stations should be installed every 400 km on the roads that are part of the trans-European transport network.

– CNG: Compressed natural gas is mainly used by cars. Currently, one million vehicles use this fuel, which represents 0.5% of the fleet; the sector aims to increase this figure by 2020. The proposal of the Commission will ensure that publicly available refuelling points with common standards at intervals of no more than 150 km are available throughout Europe.

- **LPG**: Liquefied Petroleum Gas. No action for LPG is foreseen, with core infrastructure already in place.

[4] By the CJUE Decision from 13 February 2014 in Case C 530/11, the United Kingdom of Great Britain and Northern Ireland was convicted for the non-transposing of a directive in an action of assessing the failure to fulfil obligations under Article 258 TFEU Committee

The European Strategy for Alternative Fuels and Appropriate Infrastructure has been materialized into the following documents:

1. European Commission Communication "Europe 2020: A European Strategy for a Smart, Green and Inclusive Growth Favourable to Inclusion"[5] having as scopes:
   - improving competitiveness
   - improving energy security
   - more efficient use of resources and energy.
2. **Commission White Paper for the period 2011-2020**[6] with the aim of reducing oil dependence of transport by:
   - a multitude of policy initiatives, including the drafting of a sustainable alternative fuels strategy, as well as an adequate infrastructure
   - a reduction by 60% until 2050 versus the values from 1990 for greenhouse gas emissions from transport
3. **Communication from the Commission from 2013** entitled "Clean energy for transport: a European strategy on alternative fuels":

The main alternative fuels that have the potential for long-term substitution of oil:

- electricity
- hydrogen
- biofuels
- natural gas and liquefied petroleum gas (LPG)

There is a possibility to use such simultaneously and combined, for example through dual fuel technology systems.

In the *Official Journal of the European Union*, series L 307[7], was published DIRECTIVE 2014/94/EU OF THE EUROPEAN PARLIAMENT AND COUNCIL on the deployment of alternative fuels infrastructure.

The purpose of the adoption of the Directive was to establish a common framework of measures for the installation of alternative fuels infrastructure in the Union in order to minimize oil dependency and reduce the impact of transport on the environment. The directive also set minimum requirements for the creation of alternative fuel infrastructure, including refuelling points for electric vehicles and natural gas refuelling points (LNG and CNG) and hydrogen, to be implemented through national policy frameworks of Member States, as well as common technical specifications for such recharging and refuelling points, as well as user information requirements. The Directive entered into force on the twentieth day following its publication in the Official Journal of the European Union (28 October 2014), i.e. until 18 November 2016.

Thus, the emergence of the Directive has made it mandatory for each Member State to adopt by 18 November 2016 a national market policy framework for the development of alternative fuels in the transport sector and the installation of the relevant infrastructure with the ultimate goal:

- Supply of electricity for transport
- Hydrogen supply for road transport especially for networks
- Providing natural gas for transport
- Informing users

The installation of alternative fuels infrastructure within urban agglomerations has the following levels to achieve:

1. Electricity for transports:
   - a suitable number of publicly accessible recharging points shall be installed by 31 December 2020 to ensure that electric vehicles can circulate at least in urban/suburban agglomerations and other densely populated areas and, where appropriate, within networks established by the Member States
   - the number of recharging points is determined by taking into account, *inter alia*, the estimated number of electric vehicles by the end of 2020
   - recharging points for electric vehicles installed or renewed as of 18 November 2017 comply at least with the technical specifications set out in the Appendix to the Directive and with the specific safety requirements applicable at national level.
2. Natural gas for transports:
   - a suitable number of publicly accessible GNC refuelling points is installed by 31 December 2020 to ensure that CNG operated vehicles can drive in urban/suburban agglomerations and other densely populated areas
   - Developing standards, including detailed technical specifications, for refuelling points for LNG and CNG vehicles
   - CNC refuelling points for vehicles installed or renewed as of 18 November 2017 comply with the technical specifications set out in the Appendix to the Directive.
   - an appropriate number of LNG refuelling points is installed in inland ports by 31 December 2030 to allow LNG-operated ships to circulate throughout the TEN-T central network (the Trans-European Transport Network).

**2.2.2. Difficulties encountered in transposing the Directive in Romania. Adoption of Law no. 34/2017 insufficient for the European Commission; Transmitting Reasoned Opinion; Referral to the European Court of Justice; Comparative analysis to other EU Member States**

In order to transpose the Directive in Romania, a working group was established, the activity of which started in April 2015 with the aim of having a transposition act by the end of 2015.

However, almost two years after the Directive was issued and numerous warnings from the European Commission in the Official Journal of Romania, Part I,

[5] https://eur-lex.europa.eu/legal-content/RO/TXT/ ?uri=celex%3A52010DC2020, Bruxelles, 3.3.2010;
[6] https://www.untrr.ro/oldcontent/content2/WP-Roadmap-to-a Single-European-Transport-Area-2011_ro.pdf
[7] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=OJ:L:2014:307:TOC

no. 214/29.03.2017 was published Law no. 34/2017 on the deployment of alternative fuels infrastructure.

The Law regulates measures destined to install the alternative fuel infrastructure, in order to reduce to a minimum the oil dependence and mitigate the impact of transport on the environment.

To achieve this goal, the Law set minimum requirements for the creation of the alternative fuel infrastructure, including refuelling points for electric vehicles and refuelling points for compressed natural gas, liquefied natural gas and hydrogen, to be implemented through national policy frameworks and common technical specifications for such recharging and refuelling points, as well as user information requirements.

The Law had a deadline of 60 days as of the date of its publication in the Official Journal of Romania, Part I, and the Ministry of Energy, as the competent regulatory authority, informed the European Commission in this view.

On a first analysis of the text of the normative act, it was easy to see that it was a true copy of the Directive's provisions without application norms and without presenting to the Commission a strategy to be followed in order to fulfil the purpose of Directive 2014/94 /EU.

This issue was also raised by the Commission, which initiated the infringement action against Romania for the complete non-transposition of the Directive, according to the purpose established by the Community act.

Thus, although on March 30, 2017, the measure transposing the Directive was notified to the Commission, and the Conformity Table was remitted on 12 April 2017, the European institution initiated the infringement procedure in a non-contentious phase by sending a Letter of late payment.

Therefore, on 13 July 2017, the Commission summoned Romania, along with 6 other Member States, to fully transpose the rules on the deployment of the alternative fuel infrastructure.

The Commission sent a reasoned opinion to Greece, Ireland, Malta, Romania, Slovenia and the UK, asking them to notify their national policy framework based on the EU rules on the deployment of alternative fuels infrastructure (Directive 2E).

The national policy framework is the main tool foreseen by the Directive to ensure the creation of sufficient infrastructures for alternative fuels, including recharging points for electric vehicles and gas and hydrogen refuelling points, and to avoid fragmentation of the internal market. Accelerating the deployment of alternative fuel infrastructure is indeed essential in order to give all Europeans green and competitive mobility, as set out by the Commission in the "Europe on the move" package adopted in May 2017. These seven Member States had at their disposal two months to fulfil their obligations under the Directive; otherwise, the Commission could decide to refer the case to the EU Court of Justice. Furthermore, the Commission also decided to send a letter of formal notice to Sweden, which notified a national policy framework not comprising the minimum elements required by the Directive[8].

On 4 October 2017, the European Commission informed that Bulgaria, Denmark, Estonia, France, Lithuania, Malta, Poland, Romania and Sweden have to fully transpose EU rules on the installation of alternative fuels infrastructure, according to a communiqué of the EC[9].

The main objective of the Directive, to be transposed by 18 November 2016, was to establish a common framework for the large-scale deployment of alternative fuels infrastructure in Europe. The nine Member States had two months to notify the Commission of the concerned measures, otherwise the Commission may decide to refer the case to the EU Court of Justice.

On 25 January 2018, the European Commission decided to refer Malta and Romania to the EU Court of Justice for failing to fulfil the obligation of notifying about the national policy frameworks under Directive 2014/94/EU on the deployment of alternative fuel infrastructure[10], whereas the other 7 states manages to evade the threat of being sanctioned by the CJEU.

Initially, Member States (including Romania and Malta) were requested to notify the Commission about the national policy frameworks by 18 November 2016. Until the date of the referral to the CJEU, Malta and Romania have not answered to this request, although they received from the Commission a letter of formal notice and a reasoned opinion on 15 February and 13 July 2017 respectively.

Accelerating the deployment of infrastructure for alternative fuels is essential to give all Europeans green and competitive mobility, as announced by the Commission in the "Clean Mobility Package" adopted in November 2017[11].

**2.2.3. Competences of the Romanian Energy Regulatory Authority after the transposition of the Directive**

By the entry into force of Law no. 160/2012[12] for the approval of Emergency Ordinance of the Government no. 33/2007 on the organization and functioning of the Romanian Energy Regulatory Authority, its statute has been substantially reconfigured, ANRE becoming an administrative authority with legal status, under parliamentary control, which is not part of the executive power and has no right of legislative initiative.

[8] http://europa.eu/rapid/press-release_MEMO-17-1935_ro.htm
[9] http://europa.eu/rapid/press-release_MEMO-17-3494_ro.htm
[10] http://europa.eu/rapid/press-release_IP-18-358_RO.htm
[11] https://ec.europa.eu/transport/modes/road/news/2017-11-08-driving-clean-mobility_en
[12] Published in the Official Journal of Romania, Part I, no. 685/3 October 2012

As a peremptory argument in this respect are also the provisions of Article 35 from the Directive of the European Parliament and of the Council concerning common rules for the internal market in electricity and repealing Directive 54/2003/EC, art. 39 of Directive 73/2009/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas and repealing Directive 55/2003/EC, which consecrates the thesis according to which "*Member States shall guarantee the independence of the regulatory authorities and ensure that they impartially and transparently exercise their powers. For such purpose, the Member State shall ensure that, when carrying out their regulatory tasks under this Directive and the relevant legislation, the regulatory authorities: are legally distinct and functionally independent from any other public or private entity".*

By virtue of the legal provisions regarding the relations with third parties, mentioned in art. 11 paragraph (1) of the aforementioned normative act, regarding the responsibilities of ANRE for "*collaboration with the ministries*", without the Authority acting or being permitted to act as initiator or co-initiator of the draft law on the transposition of the Directive 2014/94/EC, the indirect contribution of the regulatory body consisted of the following issues:

- According to current regulations **in the field of electricity**, operators of recharging points are free to purchase electricity from any electricity supplier in the European Union if it is interested in concluding contracts for the supply of electricity with operators of loading points on the territory of Romania and it either holds a license for the supply activity granted by ANRE, or it has acted or acts in order to be confirmed by ANRE the right to supply electricity in Romania under a license or an equivalent right granted by the state from the European Union where it has its registered office, according to art. 10 paragraph (5) of the Regulation for Licensing and Authorizations in the Electric Power Sector, approved by ANRE President Order no. 12 / 2015[13];

– The relation of electricity distribution/transmission operators to economic operators that install and/or operate publicly available recharging points fall within the type of relations covered by the regulations regarding the access to the public electricity networks and the provision of the service distribution of electricity. The principles laid down in Art. 25 and art. 44 paragraph (2) of Law no. 123/2012 on Electricity and Natural Gas, as subsequently amended and supplemented[14], were expressed in the following regulations relevant for this analysis:

– Regulation on connection of users to public electricity networks, approved by ANRE President Order no. 59/2013, with subsequent amendments and supplementations[15];

– The general conditions attached to the license for the provision of the electricity distribution service by the economic operators concessionaries of the power distribution service and the General Conditions related to the license for the provision of the electricity distribution service by operators who are not concessionaries of the distribution service electricity, both of which are approved by ANRE President Order no. 73 / 2014[16];

- In the field of natural gas, any economic operator may acquire natural gas from a license holder for carrying out natural gas supply activity, Romanian or foreign legal entity. Thus, relevant for the transposition of Directive 2014/94/EC, in accordance with the provisions of Article 7 letter a) of the Regulation on the granting of licenses for the establishment and licensing of natural gas, as subsequently amended and supplemented, approved by the Order of the ANRE President no. 34/2013[17], ANRE issues licenses for natural gas, biogas/biomethane, liquefied natural gas (LNG), compressed natural gas for vehicles (CNGV) and, according to art. 7 pt. (V) of the same regulation, ANRE issues licenses for the operation of the LNG terminal operation. It is also worth mentioning that, according to the provisions of art. 6 lit. (f) and (g) of the Regulation, it is necessary to have establishment permits for LNG and CNGV facilities.

– According to the general principles, the connection of LNG and CNGV facilities to the natural gas transmission system, to the upstream pipelines or to the distribution systems shall be carried out in a regulated regime in accordance with the provisions of Law no. 123/2012, respectively of Government Decision no. 1043/2004 approving the Regulation on Access to the National Gas Transmission System and the Regulation on access to upstream pipelines, as subsequently amended and supplemented[18];

– Regarding the general regulatory framework for LNG and CNGV, it is established by the LNG Technical Code, approved by ANRE President Order no. 109/2013 and the Technical Code for compressed natural gas for vehicles, approved by the ANRE President's Decision no .;

– Regarding hydrogen, ANRE does not have attributions for this TP.

[13] Published in the Official Journal of Romania, part I, no. 180/17 March 2015
[14] Published in the Official Journal of Romania Part I, no. 485/16 July 2012;
[15] Published in the Official Journal of Romania Part I, no. 517/19 August 2013;
[16] Published in the Official Journal of Romania Part I, no. 599/12 August 2014;
[17] Published in the Official Journal of Romania Part I, no. 427/15 July 2013;
[18] Published in the Official Journal of Romania, part I, no. 692/2 August 2004; currently repealed by Government Decision no. 326 of 10 May 2018 on the abrogation of Government Decision no. 1043/2004 on the approval of the Regulation on Access to the National Gas Transmission System, the Regulation on access to natural gas distribution systems and the Regulation on access to upstream pipelines, published in the Official Journal of Romania, part I no. 412 from 15 May 2018.

From the analysis of these issues, it can be noticed that the Regulatory Authority has no legislative initiative, but only technical and regulatory support after the transposition of Directive 2014/94 / EC.

## 3. Conclusions

The EU has clearly outlined a European vision and strategy for alternative fuels and appropriate infrastructure.

With regard to the alternative fuels infrastructure was adopted Directive 2014/94/EU. The transposition deadline of the Directive was 18 November 2016, but Romania reached the stage of referral to the Court of Justice of the European Union for not fully transposing the Community act.

Although initially the Romanian authorities believed that a Transposition Law was sufficient enough to comply with the provisions of the Directive, the European institutions took a different view, initiating the infringement procedure, which came to the notice of the CJEU.

Faced with this reality, the Romanian authorities have stepped up cooperation to speed up the development of a *Strategy on the National Policy Framework for the Development of the Alternative Fuels Market.*

Thus have been outlined the following steps:

- Establishing the current market situation in relation to (a) alternative fuel vehicles and (b) installed infrastructure;
- Inventory of incidental national legislation and relevant strategic and programmatic documents;
- Establishing criteria for analyzing future market development;
- Analysis of future market development;
- Establishing the targets set by the Directive;
- Establishing the necessary measures to achieve the targets set by the Directive;
- Consultation of relevant players, including producers' associations, industry etc.

Almost one year and a half after the deadline for transposition, including after the CJEU has been notified of the violation of Art. 258 TFEU, on 7 June 2018, the Court ordered the case to be closed, with the Romanian authorities succeeding in convincing the Commission that they have developed a strategy on a credible and feasible national policy framework[19], in accordance with the scope targeted by Directive 2014/94/CE. The aim of the Strategy is to reduce greenhouse gas emissions in transport by promoting alternative fuel infrastructure, including refuelling points for electric vehicles and natural gas refuelling points (LNG and CNG) and hydrogen, and promoting vehicles clean and energy-efficient road transport.

Although Romania escaped the threat of a CJEU decision, the question remains whether Romania's infrastructure is ready to implement the Strategy, which at least at the theoretical level seems ambitious. Obviously the answer is negative, unfortunately, but what is to be done? When investments is needed, who will do such? The state or private sector? Is the state able to stimulate private sector investments in creating the infrastructure necessary to implement the Strategy outlined following the transposition of Directive no. 2014/94/EC?

Furthermore, the question arises, which is perhaps the most difficult one, whether at a mentality level we are able to take the step towards modernization and accept the evolution?

"Clean" fuels, as they are called in the current language, have three main impediments: the high cost of vehicles, low consumer acceptance, and the lack of recharging and refuelling stations. It's a vicious circle. No refuelling stations are being built because there are not enough vehicles. Vehicles do not sell at competitive prices, because there is no sufficient demand. Consumers do not buy vehicles, because they have high prices and there are no stations.

By modifying national regulations to encourage the involvement and investment of the private sector, Romania, as other Member States, should be able to implement these changes without necessarily involving public spending by developing projects to benefit of aid from the EU.

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# PLAGIARISM AND SCHOOL WITH ITS "SINS"

**Ioana Victoria BĂLAN (MAFTEI)***

**Abstract**

*The paper aims to highlight those aspects of education that hinder the development of autonomous and creative personality (focusing on students) and that favour"germ" plagiarism.*

*In addition, the present paper offers suggestions for good practices by which to improve and/or to combat those types of behaviour that could lead to the spread of plagiarism.*

**Keywords:** *plagiarism, education, competences, creativity, ideas, critical thinking, originality, motivation, technologies.*

## 1. When and how do we commit plagiarism?

In accordance withart. 4 from Law no. 206/2004on good conduct in scientific research, technological development and innovation[1], plagiarism represents*"exposure in written work or oral communication of texts, phrases, ideas, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works, including in electronic form, of other authors, without mentioning this and without referring to the original sources."*

In accordance with art. 35 of Law no. 8/1996 republished[2], "without the consent of the author and without paying any remuneration, the following uses of a work previously made known to the public are permitted, provided such are compliant to good habits, do not contradict the normal exploitation of the work and do not prejudice the author or holders of usage rights (b) the use of short quotes from a work for analysis, commentary or criticism purposes or as an example, insofar their use justifies the extent of the quote".

The right of third parties to use a work without the author's consent is limited and this limitation of the patrimonial right of the author in doctrine is called the "**right of quotation".**

I found a perfect illustration of the right of quotation in the following opinion formulated by A.C. Renouard: "*to forbid writers to quote their predecessors, to refuse for the progress of science and public discussion the use of any passage in a work in the private domain is undoubtedly an exaggeration. It must be said that an author who quotes another person or makes him the one he relies upon or disapproves of, indicating that he did not want to assume the capacity of an author of another's work is, of course exempted from any defaulting conduct. But anything can be abused of.*"[3]

In accordance with Law no. 8/1996, "in all cases (...) the source and the name of the author should be mentioned, unless this proves impossible".

In order to belegal, the quotation should observe"*the quantitative and qualitative correlation between the quoted text and the own contribution of the author who used the quote to accomplish his work*"and the reproduction of the quoted passages should be"identifiable in the work in which it is incorporated, and it is traditional to warn by settingthe quotation between quotation marks and indicating the author's source and name, for example by a footnote, "the purpose being justified by" *critical, polemical, pedagogical, scientific or guiding nature of the work in which the quotations are embedded*."[4]

The ultimate condition for reproduction to be licit is that it should not prejudice the quoted author. Prejudice occurs"whenever, as a result of incorrect quotation (...), it becomes unnecessary to read his work, the right to inviolability of the work is impaired or the quote turns into an act of disloyal competition."[5]

In attempting to define plagiarism, to a certain extent as a supplement of the law, or rather to place it in a certain space and to find certain coordinates, the specialized literature used an abundance of epithets and stylistic constructions such as "theft", "wound","abuse in evaluation", "a phenomenon that suffers from the increase of social sobriety", "phenomenon that took grotesque forms","phenomenon of feudalization","phenomenon that reached incredible odds","phenomenon attributed in*school life*the label of *quasi-rule*","subject of tabloids".[6]

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[1] Official Journal no. 505 from 4 June 2004

[2] Official Journal no. 489 from 14 June 2018

[3] F.Pollaud-Dulian, Le droit d'auteur, Economica, Paris, 2005, p. 508, quotation indication. Viorel Roș, Intellectual Property Law, C.H. Beck Publishing House, Bucharest, 2016, p. 369-370

[4] Viorel Roș, Intellectual Property Law, C.H. Beck Publishing House, Bucharest, 2016, p. 373-374

[5] Ibidem p. 375

[6] Dorin Isoc, Guide of Acting against Plagiarism, Ecou Publishing House, Cluj-Napoca, 2012, p. 10-13

Should this be the reason why "plagiarism" has caused rivers of ink to flow? So that it could be the "the subject matter of tabloids"? Because it meets our need for quarrel, blood and circus? This is sad. I did not intend to make an analysis of the reasons that prompted others to write about plagiarism - which I personally do not consider a phenomenon. However I proposed myself to explain my motivation in approaching this issue and to find out the possible causes that determine the"litigants"to plagiarize.

*"In all approaches involving principles, causes, or elements, understanding and knowing result from being aware thereof, as we believe that we know each one after finding out the prime causes and the prime principles and we <have reached> the elements".*[7]

Further to explaining the possible causes, I dare propose also possible fighting measures.

I admit that there is a rich case-law of those who have massively plagiarized, impertinently stealing entire chapters, of those who have recorded an authortwo or three times in the bibliographical list, changingeither his surname or the forename in the "quotation indication"(!), of those who massacred valuable works and the work of valuable creators, of those who, in the desire to satisfy their egos, to accumulate notoriety or obtain additional symbolic statutes, and who, afterwards , in the meagreness of their minds and character, also declared themselves aggrieved by the criticism. I condemn acts of plagiarism and firmly support their annihilation and sanction.

What I would like however to signal is that plagiarism accusations, which are in many cases ungrounded, with no legal basis, manipulate and discourage those, who are at the beginning of the research activity. The tools they dispose of and by which they can survive these pressures are the model in the person of the coordinating teacher, the intrinsic motivation, the ethical principles and mandatorily hard work.

Yes. I also agree with the wound that plagiarism causes through the PhD (as the abundance of epithets listed above refers to this category). In fact, I also have a set of "*values*" attributed to plagiarism, and with which I can enrich the list: "*loopholesin self-evaluation*""*superficiality*,""*sufficiency*,""*opportunism*." I also agree that the presentation as an original of a plagiarized material implies serious deontological deficiencies, defective relating to the phenomenon of knowledge, its axiology and ethics. "*Guilty*" situations result in disregard, discredit and defacing of the higher education institution.

In my opinion, the institution of the PhDmeans or should mean maturity. The paidean approach of the PhD candidate supposes a "plus", supposes growth, accumulation, interrelation and interdependence, all the results of search and reflection. The PhD thesis should imply an epistemological dynamics based on personalized resettlement, an enriched reconfiguration, on a reform of certain issuesrelated to the knowledge base. And all these under the imperative sign of originality.

However, by generalizing the PhD plagiarism in the press (in all press categories), calling it an onerous, perverted phenomenon, validated by a "political", unethical, circumstantial and conjectural tool, circumscribed to the sphere of banality, I consider that great injustice is done to those who aspire to this title by real efforts, toil, honesty, authenticity, and perhaps, sometimes, sacrifice. I mean the category of those who have the property of each written comma, have their own perspective, original approach and dialectics, authentic creation, discipline, principles and creed, those who have a well-articulated cognitive, emotional, volitional and attitude psychological profile, ordered, organized , determined and ambitious ones.

*"Ambition should not be moderated, but it should be given an honest, wise, and great purpose".*[8]

For this latter category of PhD candidates, I have a piece of advice, rather an encouragement: all minuses assigned to the obtaining of the PhD title should give them more faith in showing their value. Trying to reverse polarity, turning these shortcomings into motivational tools.

I appreciate the fighting spirit and I do not have a biased attitude towards plagiarists, but to decide what is plagiarized, to distinguish nuances, to estimate the theft in percentages, to blame responsibility on the measurement, to decide how much is plagiarized and how much "plagiarism elemements", to identify the cut or mosaic, this should not be left to pseudo-specialists. Because, insofar civic spirit is appreciated, in the created vortex, it is hard to distinguish between *born* and *made*ones.

The authentic PhD candidateis subject to the perspicuous tug of the *vulgus* with only the blame for aspiring to a title. And for such purpose he/she is making an effort. An assumed one. He/she is assessed by public opinion, by the perception of society in the manipulated part, partly in error, partly justified. This PhD candidate is called "dottore" and receives eventually, in the happiest case, a stethoscope as a birthday gift from a joker.

What he/she has not assumed, and what is eroding, is that when he.she enters the PhD program, he/she becomes the presumed author of counterfeiting in the opinion of society. And I'm not referring here to "*á la manierede*works (homage or parody to one's style)"[9], but to our tendency to parody everything and all, to trivialize, to treat unfairly.) In such a case, the honest aspirant to the title, but the presumed falsifier, so much the more and especially in our times has to supply evidence of authenticity. And if there is something to separate here, the persons authorized to

[7] Aristotel, Physics - translation by Alexander Baumgarten, Univers Enciclopedic Gold, p. 39
[8] Alexis de Tocqueville, About Democracy in America, Humanitas Publishing House, 2017, p. 743
[9] Umberto Eco, On the Tracks of Giants, RAO, 2018, p. 276

do so will do this. *"(...)to judge a PhD thesis requires you to master the field of the thesis well, and to know more than the one who wrote it, i.e. to have the professional authority (including the moral one) to judge the writings of another person in an impartial manner and according to objective criteria*".[10]

Quoting Hennig –*The Apology of Plagiarism* - I concluded that the two antagonistic parties, plagiarists and plagiomen, both reactive, should think well before throwing the stone: *"After all, how much science can a poor man bear in one's lifetime? And how much erudition do his fellow men bear to trace and denounce him as an impostor? For whom accepts these considerations, the plagiarism charge becomes a stone that cannot be lifted."*[11]

Petre Ţuţea said that"*original is only God*". I would have liked to read a continuation of this saying dedicated to those who, for various reasons, choose to start crusades, make ado, set the index, plagiomen who in the name of ethics have been in their turn plagiarists (history proved this!) and in the name of morals (perhaps even the Christian one), they beat heavy spikes in the flesh of the so-called impostures.

Those who are real creators are entitled to talk about plagiarism. How many?

Take a step forward those of you, who think you created "Any", "Anyone", "Anything", "Anywhere", "Anytime".

Take a step back and first judge your creation, putting it after that of the Creator.

Then judge the creations of others!

## 2. SCHOOL AND "ITS SINS"

*"Educate children and it won't be necessary to punish people!"*

Pitagora

Education is the answer to the community's question and its formulation is closely connected to its needs. And, logically, as society evolves and realities are constantly changing, education is subject to the same route. The only constant remaining is the need for training. Through education we achieve culture, integration and networking. We are changing approach tools, methods, and techniques according to the new goals. The new purpose in the context of the present reality is the formation of a complex type of personality: creative, autonomous and mandatorily active-participative.

What does "actual reality" bring, and in what way does it demand that the above-mentioned requirements are in place to justify the purpose?

First of all it brings, in a general way, a "guilty disorder". One of the musings of Blaise Pascal positions and, at concurrently brilliantly explains the "status" of disorder in people's lives: "The most unreasonable things become the most reasonable due to people's disorder."[12]

And when we refer to "disorder," we actually mean undesirable behaviours resulting from an altered thinking. Throughout history, enlightened minds have "calibrated" the "disorder" on several levels: moral, political, legal, beginning with Moses' Tablets, the Sermon on the Mount, precepts of Roman law, Aristotelian logic of sophism vs. correct reasoning, the Magna Carta or the Universal Declaration of Human Rights. The current disordered experienced by all of us suffers from a sublime mixture of values, a profound mutation in their dynamics, a plague exfoliating the decision-making power, making it more difficult to delimit the plus from the minus, the truth from falsehood, the good from the bad, a difficulty in discerning among the multitude of challenges, beautifully packedimposture and histrionics, rough manipulation and dissonant horizons. All this, by the echo that it generates, makes it more difficult to choose and to assume responsibility.

This is, from my point of view, the current radiography of the Romanian society to which I would add Daniel David's claim: "*I believe that the Romanians' psycho-cultural profile is dominated by mistrust in people, which makes us less tolerant and cooperative with others for the common benefit (our cooperation is especially one for survival, not for success). Lack of cooperation does not enable us to use our intellectual and creative potential, which generates performance below its level. This leads both to the exaggeration of the positive - any achievement is amplified as a sign that, although not seen, the potential is there - on a background of increased emotionality and the exaggeration of the negative - by the frustration that we cannot unlock our potential, on a background of competitiveness not doubled by discipline/self-discipline, increased cynicism and scepticism. Perhaps this psycho-cultural profile was born based on chronic insecurity/uncertainty throughout history*".[13]

I chose to present this perspective because, in the generous context of the theme of "education", it offers a nuanced understanding of the dynamics of individual's adaptation (beneficiary of education) and of the functioning of society. At the same time, the logical thread of the analysis supposes also the identification of the failures resulting from it.

Amidst this reality lies the school, also subjected to changes, reforms, reconfigurations, recalibration and the whim of the decision-making structures.

Unfortunately, the rapid succession of reforms in education, approaches in which the New no longer lives with the Old, contradictory provisions, some hasty decisions, taken without the assessment of the

[10] Viorel Roş, Plagiarism, Plagiomania and Deontology, RRDPI no. 3/2016

[11] Gabriel H. Decuble- Preface to *The Apology of Plagiarism*, J.L.Hennig, Art Publishing House, 2009

[12] A. Pleşu, G. Liiceanu, Dialogue opening the Festival "The World We Live in", 23-27 February 2019

[13] Daniel David, Psychology of the Romanian People- psychological profile of the Romanians in a cognitive-experimental monograph, Polirom, Iaşi, 2015, p. 319

consequences, without a contextualized vision, discontinuity in the application of the measures caused by the succession of different governmental teams, the New for the sake of updating, without waiting for the result of the "innovation"by the previous team and the failure to correlate between the personal needs and the community ones, gradually led to a precarious state of Romanian education, characterized by poor scores in standardized tests, abandonment, de-motivation, inconsistency and unsubstantiality.

The reform in education has brought and subjects to attention, on one side, issues related to curricular, methodological and procedural documents and on the other side, the process concerns both the system in its entirety and individually.

The educational process supposes the interaction among several interdependent entities: the teacher, on the one hand, and the pupil (together with the family) on the other, as beneficiaries of education.

The analysis further identifies the shortcomings assigned to each category and which, once identified, could be corrected.

*"If we need to help a science", said Emmanuel Kant long ago in"The Critique of Pure Reason", then all difficulties and even those that are hidden on nits party have to be disclosed; each of them resorts to a remedy that cannot be found without increasing for the science either the extent or the accuracy, sothat the very obstacles become incentives to increase the solidity of science".*[14]

The teacher is or should be a model. A model of competence, authority, autonomy, empathy, flexibility, trust, reciprocity, dialogue partner, creativity, motivation, kindness, gentleness and a master in harmoniously managing all of them. The list is long because its mission is a noble one, but the ones I chose to develop herein refer to competence and motivation.

*"He who wants to educate must be educated himself (...) The first place is occupied by parents, ordinary people (...), who remain themselves children for all their lives, to the extent of one half or in their entirety. After all, is anyone expected that all these parents have "personality"? In exchange, we expectof coursemore from the educator, the specially trained specialists, who were anyway taught psychology, whether in a proper or poor way (...) about young people dedicating their lives to the teaching profession are supposed to be themselves educated (...). The way we raise the issue of education is generally unilateral, exclusively considering the child to be educated and, rendering instead no attention to the adult educator himself/herself (...). It is desirable to say about him/her that he/she is skilled and masters his/her domain and not that he/she doubts himself/herself and his/her competence.*

*The specialist is convicted to competence, without the right to appeal."*[15]

In the context of rapid change, competence cannot be maintained without the desire of continuous improvement. This important component puts him/her in the position of a director of the instructive-educational process and is a barrier to self-sufficiency and belief in the infallibility of his/her knowledge. The model he/she provides is transmitted by cultivating in his/her students the desire to know, to seek, to initiate, to incite to discovery. These are small steps in the formation of autonomous, trained and responsible individuals. His/her competence model forms competences, both for the present and for the future. In the anticipatory approach, the teacher prepares his/her disciples for adaptation, for security, in the context of future changes, leading them away from the danger of inadequacy and inefficiency. The competent teacher contributes to the formation of the spirit, the modelling of the character and hygiene of conduct.

However, in my opinion, the highest goal of the teacher is to teach students the lesson of competition with oneself, of overachieving, of self-fulfilment.

An unmotivated teacher will not know how to motivate his/her students. His/her reasons, whether concerning insufficient salary, the aggressive intrusion of parents – a fact that sometimes perturbs the school climate - frequent and unsuitable changes, sometimes the obligation to draft "paperwork" (too many and sometimes too little justified) should not deprive the pupils of motivation. I theoretically say "should not". Practically, this happens independently of the teacher's will. An unmotivated teacher is an inefficient teacher; he/she produces a state of lack of motivation for the entire collective. The student's lack of motivation in learning has several forms of manifestation. The frequent one is the shorting of the search process, the copy-paste shortcut, manifestations that inhibit the creative potential. "*This should not omit the fact that the system as such should offer a coherent and tailored motivation strategy to teachers. In order for the self-motivation process to work, a minimum of motivation offered by the education system in its aggregate is necessary*". Besides the elements"*which the management of the education system should elaborate in relation to the human resource, the teacher should not forget that the person who sends him/her to school daily, which helps him/her perform and be happy and satisfied in the life he/she is leading is precisely his/her person. If a teacher does not like what he/she does, then, no matter what the education system would do for its members, the entire process is damaged*."[16]

Not long ago, I read a study drafted by the scientists from NASA, applied on a sample of 1,600 children aged 4 to 5.

[14] Emmanuel Kant, The Critique of Pure Reason, quotation indication Marin C. Călin, Theory and Meta-theory of educative action, Aramis Publishing House, 2003, p. 7

[15] Carl Gustav Jung, Power of the Soul, Anthology, Part III, Individual and Social Psychopedagogy, Bucharest, 1994, p. 13-14

[16] Ion Ovidiu Pânișoară, The Successful Teacher, Polirom, Iași, 2009, p. 21-23

Following the replication of these tests over a million times - which eliminates any suspicion in the veracity of the results - it was concluded that "we are born geniuses, but the education system is hindering us".[17]

The test aimed to analyze the ability of the subjects to come up with innovative ideas on certain proposed topics, in other words, it tested the level of creativity and imagination. The amazing results showed that 98% of the children received a genius score. Repeating the study on children aged 10 years, they noticed that only 30% of children genius scores obtained; in case of 15-year-olds, the percentage was 12%, and in the case of adults only 2%.

Gavin Nascimento, author of the study, says that we are born with the ability to be geniuses of creativity, but while in the first years of life we predominantly use the right brain hemisphere (the one responsible for divergent thinking and creativity), we exchange in time this process with convergent thinking (the left hemisphere of the brain).

Divergent thinking is the one used to find solutions to generate predictions, probabilities and a high number of possibilities, while convergent thinking is the one - which in the opinion of researcher George Land, who designed the test on the request of NASA - "suppresses imagination. We have discovered that education shows children how to use both types of thinking. So, when someone comes and asks you to give him a new idea, as these ideas cross your mind, you repress them: that's a bad idea, that's what I tried and did not work, it will not work and so on."

"*When we look at what happens in the brain, we notice that neurons struggle with each other and diminish the focusing ability of the brain, as we constantly judge, criticize, analyze, censure. When we think driven by fear, we use a smaller part of the brain*."adds Land.

Unfortunately, the "truth" from school is well defined, students receive processed materials, which they only have to memorize. School and family should provide opportunities for children to develop divergent thinking. "*Letchildren disagree with us, encouraging them to find more than one way to solve a problem*"says Christine Carter.[18]

Student management in the learning activity, performed with much tact, under the sign of developing creativity, on the one hand, careful to avoid subjective assessments, indirect references, random, informal observations and generally avoiding a brutal or sentential attitude, can turn the student into an active subject of his own formation, and not just as a desideratum, as a fundamental principle of pedagogy, beautifully formulated in the book, but as an active and autonomous manner in its own development.

"*Some men see things as they are and say, why; I dream things that never were and say, why not?*"(George Bernard Shaw)

And indeed, "*why not*?", as long as"*creativity is just connectingthings*"(Steve Jobs).Connections give rise to other connections, and knowledge involves a long tethered string of synapses.

"*Wonder connected with a principle of rational curiosity is the source of all knowledge and discover*".(Samuel Horsley).

I was talking above about the high percentage of creativity at children aged 3-5 years. Have you ever noticed such a child, how amazed, but how patiently he looks for minutes on end the movement of a row of ants coming out of the anthill?

And then, it's natural to wonder what's going on with his curiosity, his desire for knowledge? Where, on the route is the process being short-circuited, how is his universe ruined, why is the endowment wasted and why does he get to set himself limits and look for shortcuts instead of sharpening his skills of finding answers? I found a survey these days on a social network asking for the answer to the next question:"*What do you think should be changed in the education system – the curriculum/textbooks or teaching style?"*I later understood that the answers were expressed in somewhat balanced proportions.

I also believe that textbooks / curriculum and teaching style should be "regenerated".

What is the teaching style? It is a set of methods and procedures used by the teacher in the teaching process he/she performs. The definition is not comprehensive. It is obvious that the success of a lesson depends on many elements: first of all how the design was made, its quality, the way in which goals, objectives, contents, skills were formulated, which the teacher proposes himself/herself to form, the used didactic materials, the judicious planning - the temporal resource - the moments of the lesson in the design of the activity of the concerned didactic strategy and the assessment methods. But for this analysis, I chose to develop the issue of adapting the methods to a lesson, and because the pace of change involves reconfiguration, I will not refer to all traditional methods playing a valuable role in the economy of a lesson, and I am far from the thought of criticizing such. What I want to emphasize, however, is related to the need to intertwine them with other alternative methods, such as, for example, critical thinking methods.

Critical thinking methods develop a structured aggregate of functional competencies and ensure the transition from "*what do we learn*?" to "*how do we learn*" in the general picture of "lifelong learning".

"*Criticism"* from the content of the notion refers to the awakening of consciousness, the participation in the building of one's own personality, the active involvement of the pupil in a flexible didactic approach, representing from this perspective a way of promoting another learning method.

*"...R.W.C.T. methods -reading and writing for the development of critical thinking-are not a study subject,*

[17] Gavin Nascimento, We Are Born Creative Geniuses But The Education System Dumbs Us Down, Surprising Results of a NASA Study
[18] Quotation indication Ion Ovidiu Pânişoară, Who Anihilates the Child's Creativity

*a teaching discipline, but a positive approach, an active process of constructive interrogation that forces the student to think in an authentic way about "what does this knowledge mean to me?","How and where can I use this knowledge?","What happens if I apply this knowledge?"*[19]

*"The levels at which critical thinking develops the student's abilities are: personal/public, heteronymous/autonomous, intuitive/logical, unidirectional/multidisciplinary"*[20]

Asignificant issue to be emphasized is, on the one hand, as I have claimed before, the need to combine these methods with the classic ones, but especially their proper choice, taking into account the specificity of the chosen topic, the individual characteristics and the peculiarities of each age, with the contextual transactions in which they are used.

The critical thinking methods most often used in didactic activity are the following:"Brainstorming","Bundling Method","Tour of the Gallery","Double Journal","The Quintet","I Know-I Want to Know-I learn","Venn-Euler Diagram".I chose for exemplification purposes three of them:

- Brainstorming

Teacher's question: "What message does the following quotation send to you?"

"What is the writer? A creator of moral monuments made with the spirit and hand." -George Călinescu

Ideas are orally expressed by the students and written on the blackboard:

Inspiration; challenge; guide; memories; vision; imagination; creativity; fulfilment; courage; strength; adventure; love of peers; emotions; effort; development; knowledge; wisdom, expression, model (4$^{th}$grade, Middle School Titu Maiorescu, Bucharest)

- Quintet

Draft a quintet on the topic"Mother", in which:

- the first verse is made up of a word that would express a name;
- the second, two words to express characteristics;
- the third, three words expressing actions ending in "ing" (verbs in the gerund);

Fourth, a four-word sentence expressing feelings on the topic;

- the fifth, a word that encompasses the essence of the first verse.

*Mama,*
*Beautiful, gentle,*
*Loving, labouring, understanding,*
*She'san entire universe,*
*Treasure* (V.S.- 4$^{th}$grade, Middle School Titu Maiorescu)

- Thinking Hats

Application based on the text"*Silver Skates*"by Mary Elizabeth Mapes-Dodge[21]

The White Hat - informs:

Who were Hans and Gretel?

*The Red Hat* - say what you feel:

Tell me how you feel about Hans wanting to buy skates or a coat for Gretel, and she insists that Hans should buy skates for himself.

*The Black Hat* - negative issues:

With what elements (situations) presented in the text do you not agree?

*The Yellow Hat* - positive issues:

What qualities did Hilda have?

*The Green Hat* – generate new ideas

Continue the story with a end imagined by you.

*The Violet Hat* –clarifies:

Why do you think the text is titled "Silver Skates"?

Other activities that can be carried out in schools to develop creativity can be:

*"Create a logo to represent you"or"Write a script for a play based on a funny experience you've been through", "Write a story in exactly (a certain number of clearly specified words) that one of your grandparents told you"(saga).*

These creations can participate in competitions and can be awarded. Benefits can be multiple: develop constructive competition, give examples, share with colleagues and, last but not least, develop creativity.

Children learn by imitating adult behaviour. That is why the advice of specialists is "to take time for our own creativity".

Creativity in school can be educated and developed through many types of activities in all education subjects. One of the tools to stimulate creativity is self-assessment.

Self-assessment is another process that forms confident and independent students, helps them actively think in different ways in which one can solve a problem, focusing on the process, not on the goals. Self- assessment develops skills to appreciate the own progresses. When the criteria and purposes are clearly specified, he focuses on more than to look for mistakes, collaborates, offers feedback, and develops objectivity.

The meta-cognitive thinking "prise de conscience" - whose founder was Piaget - represents the active and autonomous manner of its own formation. It enables the control of cognitive processes, organizational capacity, sequence of stages, planning and estimation of expected outcome.

A proposal to modify the manner in which the stages are handled within a lesson refers to the frequent introduction of self-assessment moments. The result will be notable in the register of intrinsic motivation, self-esteem and perseverance.

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[19] Florica Chereja, Development of Critical Thinking in Primary Teaching, Humanitas Educational Publishing House 2004, p.9

[20] C. Temple,J.L.Steele,S.M.Kurtis, Lecture and Writing Guide for the Development of Critical Thinking,vol.I,1998, quotation indication.[20]Florica Chereja, Development of Critical Thinking in Primary Teaching, Humanitas Educational Publishing House 2004, p.9

[21] Grigore A.,Ipate-Toma C., Ionica N-S.,Crivac G.-M.,Negrițoiu C.-D.,Angel A, Tiroiu E.-O. Handbook for the Romanian Language and Literature, 4$^{th}$ grade, sem. I,Ed.Ars Libri, 2016, p.70.

And if we judge self-assessment (along with assessment) as a subsystem of the social system, we have achieved an objective of helping the individual to position himself correctly in different types of interactions that shall render him a future placement (on the labour market) unaffected by the inconsistency of thestatus. The objectivity with which he has learned to assess himself will save him in the future from failing in unrealistic or illusory expectations, will responsibly identify his own minuses and will have the ability to issue value judgments for either improvement or design of a goal.

I could not conclude the analysis of the "human resource in education" without reminding the role of the parents, the family, or more precisely, how their involvement can influence, disturb and even alter the finality of the educational act designed by educators for the benefit of educators.

Current psychological studies show that pupils, especially young children, suffer from a lack of affectivity, which is due to the absence of parents for much of their child's life. This "hunger" of affection, in the plan of manifestations, unfolds on a wide field. Children become reactive, some sad, some fearful, self-contained or uncooperative. There is obviously no performance under these circumstances. As a consequence, the parent misunderstanding the cause of the inefficient management by the child of its own emotions and needs exerts even greater pressure on the child. The child will make efforts to fulfil his expectations. He will consume his resource inefficiently by trying to cope with pressure, and from here to imbalance is just one small step.

The parent must correctly understand the notion of involvement. Look at it with realism, offer options, show confidence. Proper involvement in the child's life may be a motivational factor, but when imposed standards are unrealistic, the effect may be devastating. Coercion and punishment disrupt performance. This kind of parenting causes the occurrence of blockages and severe behavioural disorders.

Harmonious development involves valorization, supporting, encouraging awareness that every good thing is done for your own development, putting this asset into practice, encouraging passions, warm, compliant climate and joy.

I do not think that this can be directly imputed to the school. I would not even have what. What school can do is to signal to parents the change of child's behaviour and school results in order to achieve a parent's congruence and collaboration as a partner in the joint effort to form a desirable personality.

Another issue of parents' inappropriate involvement refers to the pressure they exert on the teacher by asking for "quantity". As a result, they work much and not always efficient in class: sheets, collections, ancillary staff, additional training for various school competitions, etc., based on the idea that much should be good too. And many teachers, in order to avoid conflicts with parents, give up at this pressure, forgetting that they have attended a school where they learned the methodology of teaching all education subjects, forgetting that they are specialists who learnt psychology and pedagogy, mitigating quality in this way. How can I otherwise see a situation where the child did not understand how a mathematical problem is properly judged, but has to work at least ten plus two sheets plus four pages from a collection? How has it occurred that this child does not know how to judge a problem? The answer is simple. The method of solving a problem in mathematics involves the following mandatory steps, and nothing justifies omitting any of them.

Thus, in order to solve a problem, it is necessary to observe the following steps - the learning by the student of the predication of the problem. For the purpose that the student learns the predication, it is necessary to read the problem, then to explain unknown words or expressions. If there are students who fail to understand or represent the context described in the problem, discussions are held on the content and/or appeals to intuitive means that should lead to an understanding of the text are made. Then the problem data is written, its schematization, and the problem is repeated. This step is mandatory because it provides the teacher with feedback on the assimilation of the predication. Only now follows the examination or judgment of the problem, the drafting of the resolution plan and the actual solution. I things do not stop here.Additional activities in writing follow and materialize in the numerical expression to adequately solve the problem, looking for all solutions to the problem, if the problem admits more, composing problems of the same type, and finally trying to "complicate" the problem, i.e. find also other possible questions or extensions for it, possibly by changing or inserting new data. This stage is the one that contributes to the development of divergent thinking, to the cultivation of creativity. That's how the book provides that a problem is correctly solved. I wonder, however, how many reach the solving of problems in this last stage. Because in this methodically correct manner, only one or two problems are solved in one hour.And because the student has only one problem solved in an hour, the teacher risks being judged as incompetent in comparison to other teachers and eventually indicted. And then, in order not to complicate himself, the teacher compresses as much as he can, being aware that he renounces to quality in favour of quantity. But that's what is requested ...

Another highly discussed issue is the need to rethink the curriculum and the quality of school textbooks, the latter partially non-compliant to the psycho-pedagogical requirements, some of which are "guilty" of precarious scientific content (!) How do they arrive on the desks? Have decision-makers learnt about the utterly unfounded grievances concerning the quality of textbooks? Do they have anything to say about the team that made possible the printing of such (study!)materials? We speak of expertise, responses to

all statements and reactions that have been largely objective. I can only wish these questions were not just rhetorical.

The option of digital textbooks, especially in the current context of digitization, should be welcomed. It's just that the curricular support that arrived in schools is far from what teachers have been expecting. The projection referred to interactive content, which requires students to process them, or additional information to supplement those that were representing the nucleus of the lesson's core knowledge, a prolongation of the basic support, an extension. However, what we currently call digital handbook is an identical copy of the basic support (classic manual), but in electronic form. I personally do not see their usefulness, or perhaps only to the extent that I explain a possible tendency to convert the classical formative trajectories, meaning that the culture of the didactic approach based on the traditional support - the printed textbook - disappears altogether. And this could be possible, because we live in the era claiming communication only on basis of technique. This phenomenon has naturally also its advantages and disadvantages, but the most profound disadvantage that I identify is depersonalization - handwriting conveys a personalized message - and the suppression of the emotional side of communication will result in a spiritless, dilutedcommunication, which at some point will also lead to the cancellation of the teacher's job, as long as writing is no longer learned in schools and the Internet abounds in tutorials of all kinds.

Education should be viewed within the broad context of bio-psychosocial transformations in a given spatial-temporal coordinate system. Although the realities of Romania are different, I think it would help if we learn from the good practices that more clever people than us offer.I chose for exemplification purposes Finland and not necessarily because it provides a steady model of the extremely good results of the PISA Student Program, where it occupies the leading position in Europe, but for many other reasons I will present below.[22]

Education in Finland is the most important vector and a true reporting axis for all the other segments of the administration. Finland does not have a "secret ingredient" about which everybody speaks, but it has well-established educational and social strategies and policies.

Thus, one important issue to remember is that the Finnish government subsidizes the research-based master's degree - a prerequisite for a teaching position. In 2012, the Helsinki University received 2300 applications for the 120 places in the training program of the primary didactic staff. At such a competition, followed by the condition of a 5 to 7.5 year-probation (only then they are allowed to run their own class), it is easy to understand why Finland grants teachers a high level of autonomy in classrooms. They have a great deal of freedom in the management of the curriculum applied to their own class.

Another educational strategy emphasizes both equality between schools and students. The state offers resources to help weaker pupils to recover. All teachers are prepared to homogenize collectives.

Finnish teachers have personalized methods for assessing students' performances. The paradox is that, although they do not have standardized tests (they do not see their utility because their human aspect must take precedence in their philosophy), their pupils get the best results at international tests.

Finnish children start school at the age of seven (although informally they start it earlier), and children's "well-being" is cultivated in all school activities and outside it. They have fewer lessons and more time for "play and joy".

In Finland there are very few private schools and even schooling fees are forbidden. The vast majority of children attend public schools.93% of students are graduates of secondary school or of a vocational school, and the State will still pay for schooling to one of the 8 national universities. The percentage of those continuing higher education -66%, is one of the largest in the European Union.

## Conclusions

Inthis analysis, I have punctually addressed certain issues embodied in applications in different education subjects, but we addressed the shortcomings in a general way, related to curriculum, textbooks, teaching style. Though treated in a general way, I think they form an aggregateleading to a decrease in implicit and university school performance, including plagiarism, the theme that is the subject of this paper.

I tried an analysis of the Romanian school in its entirety but, as I think it was noticed, my concern lies more with the primary education area due to the following reasons: it is the school cycle where the first bricks are placed, the age of the most important acquisitions, both cognitive and behavioural-attitudinal: learning writing, reading, adding, assuming and applying. Their formative and valorization role will accompany the child in all future steps to impose and capitalize the self.

I am convinced that the quality of the foundation depends on the solidity of the edifice.

Education shapes the future and the future that we dream of depends on the qualityof the current teaching projection.

The question I asked myself when I proposed this approach was the following: "In the multitude of deficiencies that the Romanian school suffers of, what can we do to balance it?" Of course what I found as"cracks", refer only to a part of what should be improved. I do not claim that I accomplished a complete radiography of the education system or that I

[22] http://www.toptenz.net/10-reasons-finland-worlds-best-school-system.php

have found the best "healing" solutions. Besides, I did not intend to look for all the negative aspects that the school of the present times is guilty of. I just wanted to identify those that favour the appearance of the germ of plagiarism. And I think I succeeded. Only that the shortcomings I am talking about do not refer to the school with its walls (impersonal form). Although it refers to the institution, the shortcomings are attributed directly to people, namely behaviours and attitudes, which take different forms. And then, where is the "sublime" in education, where is the art in education? Hegel said that "education is the art of making man ethical." Probably also those who should practice this art lack the ingredient that would call them artists - that ingredient called "creativity." And perhaps they lack even "ethics."

But there would be too much to say. Or maybe too tough. Perhaps there is no lack of ethics, but adaptation to the contextual framework. Thus, on the contrary, in the notion of shortcomings, the majority of teachers in Romania (admit that its is a small flock that has not a black sheep) has the same merits as those of the high-performance education systems, and one more merit: to adapt, in an attempt to make it possible to perform on quite a rough terrain, with a large number of students in classes, with loaded school curricula, inadequate textbooks, decisions that suffer from unpredictability and amateurism, incompetence and carelessness, lack of appreciation, and to recognize the authority of the psycho-pedagogue.

The Romanian teacher forms competences, enriching its model of professional competence with abilities that those from the education systems with tradition in Europe do not have: with resistance to pressure, aligning the technical coordinates with the action-ones, maximizing the few resources to reach the projected finalities, i.e. the ability to crack the whip...

I wonder what the Romanian education system would look like if this huge potential from the chair, materialized in creativity, resistance to stress, adaptability, resilience, empathy, vision and perspective, would be also duplicated by supportand especially, if they understand that it is imperiously necessary that these constants are perpetual.

When I get the answer to this question, I will ask the next one: "Is enough attention paid (and I am not referring to the attention of the press, but to the school) to plagiarism?" But only then, considering that one is a consequence of the other, mandatorily in that order. And then I would dare to formulate opinions in which to include the word "ethics".

Without accents and percentages!

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# DEONTOLOGY AND ETHICS –SOME DETAILS ON THE VIOLATIONS OF RULES IN SCIENTIFIC RESEARCH ACTIVITY AND THEIR SANCTIONING

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**Abstract**

*This study concentrates on ethics and deontology rules which apply in the scientific research activity and has the aim to outline the main violations encountered in practice and their correlative sanctions. The topic is treated both from a philosophical perspective and from a legal point of view, linking ethical theories with real situations. This analysis illustrates our vision regarding the terminology of academic ethics and also presents the main legal, international and national instruments in this respect. Research findings are presented taking into account the more complex framework of collective morality and highlight the causes for which people are tempted to circumvent imposed requirements.*

**Keywords:** *morals, ethics, deontology, scientific research, violations and sanctions*

## 1. Introduction

The themes of this study focuses on certain aspects of ethics in general, containing detail mentions with regard to the rules of ethics and deontology as pertaining to the scientific research activity. More specifically, for this theme, we will take into account the possible infringements of the rules invoked, together with their correlative penalties.

The importance of this work comes directly from the main purpose of the intervention, that is, to create a very relevant informational data medium, analyzing elements of a - continuously evolving and of interest - subsection of academic ethics. At the same time, it is a scope, the shaping of an overview of the various evolutions pertaining to ethics in the broadest sense, through the analysis of segments among the numerous theme correlative notions, as well as highlighting changes we can deem fundamental in the field. Giving examples regarding the practical use of the information presented is intended to be completed by the presentation of real situations, through the lens of ethical theories.

The means through which we want to achieve the said scope is that of researching the provisions of international laws pertaining to this field, as well as those of the relevant national legislation, together with the analysis of publications which take into account the philosophical dimension of such concepts. Examining the afore mentioned will lead to an assertion of the main ideas in the area, and of personal theoretical conclusions, all of the said designed in a style that should be accessible to all those interested in this field and not only to the specialists in legal sciences.

By this synthetic analysis, having as a major scope the rules of ethics and deontology in the scientific research endeavors, it is desired to complete the list of available information from the specialized papers at this time. Even if the doctrine cannot be considered insufficient in this respect, it is essential that it be added new research, which meet the challenge of being in agreement, from several perspectives, with this dynamic area.

### 1.1. Conceptual clarification

Pythagoras claimed that for you, the man, the first law should be that you respect... yourself. Keeping with the same reasoning, we would add that each person is the first judge of their ethics, but "the morals of each individual is rational when analyzed by comparison with the morals of society."[1]. The usage of two concepts, "ethical" and "moral", the first of Greek origin, *-ethos*, the second having its roots in the Latin *mores*, often overlaps in the common contemporary language. One explanation could be that the basic meaning of the initial terms is the same, namely that of "habit".

According to Cecilia Tohăneanu[2], in philosophy, many of the authors[3], deem the two terms to have different meaning which, although in close connection, are far from identical. Through the lens of morality, good and evil appear sketched as absolute standards. Just as absolute is deemed the duty of distinguishing between approving what is considered good and blaming, slandering, separating ourselves, as through a wall, (by) what is evil. If this applies to morals, ethics is different at least through the fact that it "approaches good and evil taking into account the imperative of reciprocity between people, the need to facilitate their common life. Thus, the difference between ethics and morals is the social dimension."[4]. Therefore, for this

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[1] Éric Weil, as invoked by Verginia Vedinaș, Deontologia vieții publice (Deontology of Public Life), Universul Juridic, București, 2007, p. 242.

[2] Cecilia Tohăneanu , Noțiuni de filosofie morală (Notions of Moral Philosophy), Editura PRO Universitaria, București, 2013, p. 11.

[3] They include George Cheny, Jean-Marc Coicaud, Daniel Warner.

[4] Cecilia Tohăneanu, op. cit, p. 12.

dimension we pick as a central term coexistence, while we can look at solidarity, empathy and tolerance as *sine qua non* values of contemporary ethics.

Without attempting to exhaust the meaning of this notion, we should add that the doctrine distinguishes between philosophical ethics and "regular" one, which refers to "a collection of standards in regards to which a group of community of people decide to regulate their behaviour - in order to separate what is legitimate or acceptable in pursuing their goals by that which is not"[5]. On the other hand, in general, philosophical ethics deals with the study of a set of principles, it is a theory about "people's life as people"[6]. While staying within the same scope and continuing with a similar type of classification - general (not exhaustive) - we would like to add that, in turn, philosophical ethics includes two big categories, namely theoretical ethics or "moral philosophy"[7] and meta-ethics. The later aims to research exactly the notions used for this subject, analyzing the veracity of justifications for the formulated theories.

Moral philosophy draws guiding lines, with the potential of finding applicability in the collective behaviour, regardless of the particular one. Where does my right or liberty begins and where does it end (if it does)? This question started effervescent debates among today's children - the most often we hear "My right ends where yours begins" or "I can enjoy my right as much as I wish, but without disturbing others. They have their rights, too, maybe the same as mine, maybe some others" - and such debates create all the conditions to remind us that two decades ago, the same kind of statements were the leitmotifs of such discussions. "How should people act or behave, what should they do and what they shouldn't?"[8] is the question theoretical ethics, a normative subject, tries to answer.

Meanwhile, we answer this question daily, due to the fact that many of the dozens of decisions we make imply decisions based upon ethics or morality (most of the times, without even realizing it). In this case, we can legitimately assert that the existence of the principles of this subject matter was embedded in the collective consciousness, the example of the children being just one of the many situations with the potential to be invoked in support of this idea. The naturalness with which such situations are approached (or not) is reflected both in the private behavior and the collective one, thus we can say, without doubt, that "Morality is so present in our lives that so often we no longer see it... Just in difficult or dilemma inducing situations do we become conscious of the ethical weight or decision making[9]. It may seem that morality involves many requirements, sometimes seemingly or actually contradictory, and we, rational human beings, find ourselves face to face with the difficulty of choice: what actions are allowed, what actions we shouldn't undertake, and, especially, what are our guiding principles. In essence, this is how the big moral theories were born, true ethical systems containing rules which manage to determine what is correct from a moral standpoint.

At this point of our analysis, we want to note that "they very rarely differ from the recommendations given for the daily, mundane cases (all these theories, for basic situations, tell us we should do pretty much the same thing)". Regarding differences, we like to add that they appear "more likely... in the justification and theoretical grounds for normative requirements." Being aware that we are not dwelling in the most appropriate context for analyzing such theories in detail, we believe, however, appropriate to mention the most important ones: deontology - or the theory of the duty of Immanuel Kant, utilitarianism - or "theory of the largest delights"[10] of John Stuart Mill, and, of course, the ethics of virtue - having a founding father in Aristotle.

Continuing our brief classification, we will skip the specificity of descriptive ethics (without wishing to minimize its meaning), in order to approach applied ethics, as it presents elements closer to the focus of this paper. Petre Singer[11] is one of the main proponents of this subject and he maintains that the value of rules ranking as principles is confirmed by their direct applicability in various contexts of human activity. Otherwise, aside the fact that it can be considered a script of form without substance, the very theoretical nobility is diluted –"…an ethical judgment with no practical value has a theoretical deficiency, too"[12]. Applied ethics is a field of ethics which becomes

[5] Antony Flew, Dicționar de filosofie și logică (Dictionary of Philosophy and Logic) -translated by Drăgan Stoianovici, Editura Humanitas, București, 1996, p. 119.

[6] Ibid.

[7] Cecilia Tohăneanu, op. cit, p. 18.

[8] Cecilia Tohăneanu, op. cit., p. 17.

[9] Emanuel Socaciu, *Fundamente ale eticii academice (Fundamentals of Academic Ethics)*, in the paper: Liviu Papadima (Coordinator), Andrei Avram, Cătălin Berlic, Bogdan Murgescu, Mirela-Luminița Murgescu, Marian Popescu, Cosima Rughiniș, Dumitru Sandu, Emanuel Socaciu, Emilia Șercan, Bogdan Ștefănescu, Simina Elena Tănăsescu, Sanda Voinea *Deontologie academică*, *Curriculum–cadru* (Academic Deontology, Framework Curriculum), Universitatea din București, p.11, (https://deontologieacademica.unibuc.ro/wpcontent/uploads/ 2018/10/ Deontologie-Academica-Curriculum-cadru.pdf).

[10] Cecilia Tohăneanu, op. cit., p. 97.

[11] He is also the author of several scenarios, the popularity of which is beyond the ethics scope of study. From the analysis of such practical cases, one can understand the principle that we have the moral obligation to prevent a bad thing from happening, when it is in our power to do it, without having to make great sacrifices. For details and examples, please consult Emilian Mihailov, Mihaela Constantinescu, *Ce sunt teoriile etice și de ce ne sunt utile?* (What Are Ethical Theories and which is Their Use?) in the paper: Emanuel Socaciu, Constantin Vică, Emilian Mihailov, Toni Gibea, Valentin Mureșan, Mihaela Constantinescu, *Etică și integritate academică*, (Ethics and Academic Integrity) Editura Universității din București, 2018, p. 33.

[12] Peter Singer, *Practical Ethics* (personal, unauthorized translation), Cambridge University Press, Cambridge, 1993, pag. 2.

stronger and stronger nowadays and refers to the application of ethical principles in certain domains of activity, being made up of rules adapted to the specificity of the respective (professional) activity. As an example, we mention the following subdivisions or directions of applied ethics: medical ethics, political ethics, environment ethics, animal rights ethics, ethical aspects regarding technology and digital issues, administrative ethics, legal ethics, academic ethics. A practice gaining popularity is the codification of specific rules for each domain through instruments with a "particular" title, which don't have a general applicability but intended recipients, like, for example, a certain professional group.

## 2. Content

### 2.1. Academic Ethics. Essential elements.

Next we will cover a segment of academic ethics, namely the rules of ethics and deontology in the scientific research activity. Even if certain elements of the aforementioned seem not to be in direct connection with our topic, we believe they constitute a greatly summed up presentation of the notions with which we shall work, that could not be eliminated, for the sake of consistency. Moreover, "the common morality" and the important historical theories of ethics are useful for contextualizing and understanding situations specific to academic ethics. Reader PhD Emanuel Socaciu[13] states that "It would be strange should we discover that the ethical duties we have as professors, researchers or students are constantly contradicting our more general duties we have as human beings" - an opinion we support ans regarding which we would like to add that the relationship between the two can be seen as one from the whole to the part but that, exactly this interaction represents, at the same time, the reason for which we might find ourselves in a dilemma - something harder to identify in practice, but plausible.

Customizing, academic institutions or organizations are susceptible of being one of the "spaces" where acts which contradict morality take place, because the people who work under the coordination of or for the said institution find themselves, as we all do, in the situation of having "… morally debatable options, because we don't find in ourselves the means to resist temptation"[14]. Thus, they are also subjected to "akrasia"[15]. Moreover, the above are valid because the subject matter of academic ethics is the result of the convergence of multiple aspects, including some regulatory ones, having to do with research ethics, professional ethics, but also the management of ethics and integrity in academic organizations.

To the extent in which we will continue to illustrate the main breaches of ethics and deontology rules in the scientific research activity, as well as the ways to punish such breaches, we deem it important to start from establishing which are the possible causes making a person commit these breaches. One of the situations for which we could find relatively convenient solutions (but which is surely not the main cause for immoral or illicit actions) would be that in which people breach the rules because they do not know them, they do not know their obligations – "The morality deficit is not, most of the times, generated by a lack of knowledge"[16]. In such a hypothesis, accessing the information or conceiving and implementing an educational program in this regard could be a salutary, immediately applicable solution. Still, studies show that most of the breaches are committed knowingly, the lack of motivation to do things right from the moral standpoint being the missing element - and thus the link to akrasia. However, we believe in the importance of being informed and debating, in the fact that the aforementioned give birth to the premises which can create the intrinsic will to have an appropriate behaviour.

Before restricting the scope of our approach to the juridical dimension of ethics and deontology in the scientific research activity, we would add a few conceptual considerations connected with the "interferences" between morals/ethics and law, meant to support us in the following analysis.

According to Kant, in relation to its "decisive impulses"[17], the law can be of two types - juridical (which institutes obligations) and, respectively, ethical ("the idea of duty resulted from the law is, at the same time, the impulse to action"[18]). Therefore, the philosopher underlines that legality refers exclusively to compliance with the law (morals), while "morality means the determination of will by the moral law, to act based upon the respect for the moral law, no matter the consequences the human action will bring"[19]. Duty appears as a common element between law and morals, but both have ample specificity[20]. In connection to them we will limit ourselves to mentioning two aspects. First

[13] Emanuel Socaciu, *Introduction* to the paper: Emanuel Socaciu, Constantin Vică, Emilian Mihailov, Toni Gibea, Valentin Mureșan, Mihaela Constantinescu, op. cit., p.12.

[14] Emanuel Socaciu *Introduction,* p. 11.

[15] Ibid. *Akrasia (Weakness of the will) is the term used by Aristotle to describe the characteristic of human beings which produces their typical deficit of morality.*

[16] Ibid.

[17] Verginia Vedinaș, op. cit., p. 54.

[18] Immanuel Kant, Scrieri moral-politice, Introducere în metafizica moravurilor (Moral and political writings, Introduction to the metaphysics of morals), Biblioteca de filosofie, Clasicii filozofiei universale, Editura Științifică, București, 1991, p. 77 – invoked by Verginia Vedinaș, op. cit., p. 54.

[19] Verginia Vedinaș, op. cit., pp. 54-55.

[20] For details, see Verginia Vedinaș, op. cit., pp. 55-60.

of all, the laws represent the encoding of rules meant to keep the social peace and equilibrium and don't have universal applicability, as it should happen in case of moral rules. Probably, in an ideal society, the laws would pass the moral test and between the two concepts there would be an almost complete overlap, but in our situation, here is the first major difference: only the obligations having a juridical nature can be imposed by using coercion, too.

But what is the place of deontology (*deontos* means what is appropriate, *logos* - science) in this scheme? Because it refers, in essence, to the rules pertaining to the exercise of a profession, we find deontology at the border between law and morals, or, more likely, in the convergence area of the two. It shows characteristics of both concepts – for example, a set of rules which regulate a type of professional behaviour. Part of those rules are established through legislation or contracts; the other category deals with rules which cannot be imposed by coercive force, the person's conduct being possibly sanctioned at most by the public opinion (moral rules)[21]. We cannot neglect the fact that there is a tendency to codify multiple deontological norms, for example, in a Code of Ethics, which can suggest, leaving differences aside, the thin demarcation line between "legal" rules and moral ones.

The successful achievement of professional ethics stipulations could be translated by the fact that the "reciprocal expectations[22]" of a professional community and those of the community in general could be fulfilled, the general success being interdependent upon the fulfillment of obligations by both "parties". An obvious trend is present also regarding academic ethics, respectively the ever growing preoccupation[23] for it, which, although referring also to elements which were subject of debate "from the dawn of modernity… the field experienced a significant self reliance in the last 20-25 years, especially as a need to give an articulate theoretical answer to requests coming from bodies funding research and education, and from the public opinion, too"[24]. For the academia, given its nature, we think it is absolutely normal that society has expectations, hopes, higher wishes regarding ethics, and doesn't limit itself exclusively to the aspects stated by legal norms.

Narrowing the area of our discussion to the ethics of scientific research, we wish to underline that the elements related to it show a variety of forms, which should answer to an entire palette of equally challenging issues, which manifest starting from choosing a theme through bringing results into the public space and obtaining an eventual profit. The doctrine shows the analysis of two meanings of this concept; the first refers to scientific ethics seen as an "area of theoretic reflection, in which moral dilemmas which can appear in the research activity appear, or… normative proposals for the approach of such dilemmas"[25]. Obviously, the dilemmas are very varied, each field of research having its own specific issues, "classic" in this regard, but there can be new issues with the development of each particular case.

A second meaning of the notion we bring into discussion takes into account an institutional system, through which the regulations in force pertaining to the matter are put into practice. Among others, it contains the bodies which grant an opinion on ethics for a research project, but also those which supervise compliance with regulations, or work to their development, in order to harmonize it with the new social developments[26].

### 2.2. The legal dimension of ethics and deontology in scientific research.

#### 2.2.1. Historical perspective, international rules

The great number and diversity of issues which can appear in this matter, as well as the specificity of each particular research field - aspects we already mentioned - are factors which make the application of good practices and customs popular, but which, at the present time, the legal stipulations can no longer be ignored, and they institute a pretty comprehensive framework. The rules of ethics and deontology in scientific research which are applicable in our country, too, are stated, mainly, at the following levels: international, European Union, national or of the various institutions involved in the process of education and research. An essential role in respect to the understanding and interpretation of such provisions is played by jurisprudence.

These rules were absolutely necessary, given the subjectivity with which each individual appreciates what is allowed or not from the academic ethical and deontological point of view. Thus, "benchmarks for human behaviours… rules through norms coming with sanction which can be applied generally, undifferentiated based upon the spatial or temporal context, and impersonal, undifferentiated based upon the respective actors or the researched subject"[27] are imposed. We would also like to add that the rules in question have as a scope both research itself and the exploitation of the research results.

Below there are, selectively, some of the international regulations relevant in the field. The

[21] According to ideas presented by Verginia Vedinaș, op. cit., pp.112-124.

[22] Emanuel Socaciu, *Fundamente ale eticii academice (Basics of Academic Ethics)*, p. 9.

[23] As an example we mention one of the very renowned publications on this subject, *Journal Academic Ethics*, edited at Springer. This can be consulted at the address: https://scholar.google.ro/scholar?q=journal+of+academic+ethics&hl=en&as_sdt=0&as_vis=1&oi=scholart, accesata la data de 31.01.2018.

[24] Emanuel Socaciu, *Fundamente ale eticii academice (Basics of Academic Ethics)*, p. 9.

[25] Emanuel Socaciu, Fundamente ale eticii academice (Basics of Academic Ethics), p. 10.

[26] According to the above mentioned, we agree with the opinion of PhD Associate Professor Emanuel Socaciu.

[27] Simina Elena Tănăsescu, *Standarde şi reglementări* (Standards and Regulations), in the paper: Liviu Papadima (Coordinator), op. cit., p. 37.

Declaration of Helsinki[28], which has as its principal regulatory object medical research on human subjects, establishes a series of guidelines in this respect. By way of example, we mention: in research involving human subjects, their welfare shall prevail over any scientific or social interest; experimental procedures should be detailed in a protocol which must be submitted for the approval of the Revision Committee for Ethics; the participants in the study must agree, having been informed; informed consent must be documented; consent must be obtained under such conditions as to reduce to a minimum any inappropriate influence; the subjects participating in the study have the right to protect their own integrity. Another tool for the international coding of rules regarding conduct in medical scientific research is the Oviedo Covention, which regulates elements regarding bioethics and human dignity[29].

The rules governing today's scientific research in the medical field (involving human subjects) were designed as the international community's response to immoral medical experiments performed over time worldwide and culminated with those occurring during the Nazi regime[30]. According to the Scientific Research Ethics Committee of the University of Bucharest, after Second World War, appalling abuses committed by some Nazi doctors were discovered. These subjected the prisoners to inhumane scientific experiments, because of which, most often, death occurred (Acad. M. Dinu Antonescu, president of the National Bioethics Commission for Medicines and Medical Devices provides the following examples in an interview: Dr. Joseph Mengele - experiments on twins at Auschwitz; Dr. Sigmund Rascher -freezing experiments at Dachau and Auschwitz; Dr. Erwin Ding Schuler -immunization experiments at Sachsenhausen, Dachau, Natzweiler, Buchenwald). All these occurred without informing the "patients" and, obviously, without their consent. Classified as crimes against humanity, the acts were tried at the Nuremberg Tribunal and have resulted in "adopting a first code of good moral conduct in scientific research, inspired by this historical episode's mistakes: the Nüremberg Code"[31]. Please note that the new elements introduced by this Code were: "informed consent; risk-benefit analysis (development of a theory of risk in ethics); recognition of subject's right to withdraw of the experiment at any time, without being penalized"[32].

Because drawing up a complete list of international legal norms regarding ethics and deontology in scientific research would demand a separate study, having it as it's main object, we will limit ourselves to name juridical instruments which are interesting through the fact that, although this is not their main scope, they contain stipulations regarding scientific research correlative to the field they regulate. We consider the following: The Treaty on the Non-proliferation of Nuclear Weapons[33] ; The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction (opened for signature at London, Moscow and Washington on April 10, 1972)[34] ; the international conventions on chemical or biological weapons.

We cannot end the segment dedicated to international regulations without reference to the Universal Declaration of Human Rights - adopted and proclaimed on 10 December 1948 by the UN General Assembly, by resolution 217- which was designed to become "a common standard of achievement for all the peoples of the world, thus gaining the vocation to become a true fundamental law of humanity[35]. The preamble of the declaration begins with the following words: "Whereas recognition of the inherent dignity of all members of the human family and of their equal and inalienable rights is the foundation of freedom, justice and peace in the world...", which gives an essential meaning to the value of dignity, which is reiterated in the first sentence of Article 1: "All human beings are born free and equal in dignity and rights." Even if we can not support that this Statement refers explicitly to academic ethics, it has a special importance, because it is an indisputable source for the theme of ethics in general. We are arguing this idea because liberty, justice and peace in the world have as a basis, aside equal and inalienable rights for all persons (thus, also

[28] Adopted at the 18th General Assembly of the World Health Organization, 1964; over time, it has undergone multiple revisions, in order to be consistent with scientific and social evolutions.

[29] See the Official Gazette no. 103 of February 28, 2001, Decree no. 51 of February 20, 2001, promulgating the law on the ratification of the European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to Applications of Biology and Medicine, the Convention on Human Rights and Biomedicine, signed in Oviedo on April 4, 1997, and the Additional Protocol to the European Convention for the Protection of Human Rights and Human Dignity regarding the Application of Biology and Medicine, on the prohibition of cloning human beings, signed in Paris on January 12, 1998.

[30] For a detailed analysis of the deontology of research on human subjects, do consult the study of professionalDeontology of Research on Human Subjects, available at this address: http://www.academia.edu/12727370/DEONTOLOGIA_CERCET%C4%82RII_PE_SUBIEC%C5%A2I_UMANI, accesed on 1.02.2019.

[31] The Scientifi Research Ethics Commission of Bucharest University's website, http://cometc.unibuc.ro/scurt-istoric.html, accessed on 1.02.2019.

[32] Ibid.

[33] According to the website of the Ministry of Foreign Affairs (https://www.mae.ro/node/2015, accessed on 02.01.2019), it was opened for signature on July 1, 1968, and entered into force on March 5, 1970. This includes currently 189 signatories. Initially, it was established that the treaty duration be 25 years from entry into force. At the Review Conference examining the enforcement of the Treaty's provisions of 1995, it was extended indefinitely. North Korea announced unilaterally, in 2003, its withdrawal from the Treaty, and Israel, India and Pakistan are not parties.

[34] Entered into force on March 26, 1975.

[35] Gabriel Iosif Chiuzbaian, the Declarația Universală a Drepturilor Omului –izvor de drept (The Universal Declaration of Human Rights - source of law), in the magazine "Drepturile Omului" No 4/1994, pp. 6-8, cited by Verginia Vedinaș, op. cit., p. 74.

in front of moral norms), the recognition of their inherent dignity. Dignity is, also, a special value from the perspective of moral philosophy, Kant himself being the suporter of the idea that the one who is moral would not be necessarily happy, but will obtain something much more important, namely the dignity of being happy.

Mentions about dignity, considered to be a "general human value"[36], also appear in those constitutional stipulations which can be considered as sources for ethics. The first indication of this is found in the very first article of the fundamental law, specifically the third paragraph, which lists the supreme values guaranteed by the state: "…human dignity, the citizens' rights and freedoms, the free development of the human personality, justice and political pluralism"[37].

Another relevant stipulation is article 30, which enshrines, in the first paragraph, the freedom of expression, considered an essential value for any democratic society: "Freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public are inviolable."[38]. Of course, this is not an absolute freedom, it is subject to legal restrictions, in order to protect other essential values for society, next to which the freedom of expression must coexist. As exactly the same article governs, one of these values is dignity - "Freedom of expression shall not be prejudicial to the dignity, honour, privacy of a person, and to the right to one's own image."[39].

Among the myriad constitutional provisions relevant for the ethics field, we would like to add article 57, because we deem it relevant for the scope of the present study. It establishes two essential legal principles for the regime of rights and liberties, respectively good faith in exercising them and the respect for other persons' rights. The obligation to respect these principles is incumbent on both Romanian citizens and foreigners and stateless persons. The concept of bona fides is a traditional principle of civil law, but it was and will be a key concept of morality[40].

The fundamental law is again that which, through article 148, second paragraph, consecrates the priority of European Union law over opposite stipulations in the internal legislation. Among the priority laws should be considered, besides the European Union's primary legislation, the derivative one (but only the mandatory acts - the regulation; directive and decision, for recipients); also, in certain cases, the norms coming from external commitments, jurisprudence, general principles of law. Without detailing the technical and juridical issues such a priority implies, or the numerous situations in which this constitutional article finds applicability, we deem relevant in the present context to underline that there are various regulations at the level of the European union which have, among others, as their scope the ethics in the scientific research. We give as an example Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the ownership of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use[41].

Related to scientific research at European Union level we add, as a curiosity, that there is a guide for this subject matter, which suggests focusing exclusively on the non-military, civilian research activities. It is interesting to follow this guide, which we consider will have an evolution in the direction of opening also towards "military research", for the purpose of collective defense, given the international contemporary context, but also current challenges, like the threat posed by terrorism, which the European construct must face.

**2.2.2. Internal regulations - possible violations and sanctions**

Nationally, there are a number of regulatory documents governing, from different perspectives, academic ethics and integrity. We will give a short selection of those we consider relevant for the matter of ethics and deontology rules in the activity of scientific research, underlining the most common violations appearing in practice, as well as their correlative sanctions. A specialized journal expresses the idea that "using scientific research methods implies, ipso facto, compliance with deontological and ethical rules which form integrity regarding research"[42]- an opinion we support -, agreeing, also, that "it cannot be a valid method of scientific research that which does not respect the deontological and ethical rules". Examples are given of : plagiarism, falsifying scientific data, eliminating some results invalidating the hypothesis which is supposed to be demonstrated by the act of research.

The framework for research and development activities is established through the Government Ordinance no. 57/2002 regarding scientific research and technological development and contains: "scientific research (which includes fundamental and applied research), experimental development and

[36] Vasile Morar, Moralități elementare (Elementary morality), Editura Paideia, București, 2001, p. 16.
[37] The Romanian Constitution, as amended and supplemented by the Law on the Revision of the Constitution no. 429/2003.
[38] Ibid.
[39] Ibid.
[40] For more details, see Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, Constituția României Revizuită, comentarii și explicații, (Romanian Constitution Revised, Comments and Explanations) Editura All Beck, București, 2004, p. 114.
[41] Published in the Official Journal of the European Union L 121, 1.5.2001, pp. 34-44.
[42] Gheorghe Bocșan, Revista Română de Dreptul Proprietății Intelectuale (Romanian Revue of Intellectual Property Law), nr. 2(55) iunie 2018, p. 10.

innovation based upon scientific research and experimental development"[43].

The Order no.4492/2005 on the promotion of professional ethics in universities establishes the obligation of accredited or authorized to operate provisionally higher education institutions to adopt a Code of Ethics of the University, which should stipulate for the ideals and principles, but also the standards of professional ethics which the members of the concerned academic community shall undertake to comply with. The code of ethics is mandatory and, as a general rule, is part of the Charter of the University[44], containing also correlative sanction for the failure to comply with the obligations imposed. A new requirement the institutions need to comply with, according to this Order, is that of establishing, coordinated by the University Senate, a University Ethics Commission, having attributions related, mainly, to the analysis and settlement of claims regarding breaches of university ethics. All the University commissions of accredited or authorized to operate provisionally higher education institutions are monitored, can receive consultancy on the development and application of ethic codes. Practically, they are in a certain measure subordinate to the University Ethics Council, established at the Ministry of Education, as stipulated in the aforementioned Order.

We believe, however, that the legislative act which represents the principal basis of the subject matter of our analysis is the Law no. 206/2004, with subsequent amendments and supplements, on the proper conduct in scientific research, technological development and innovation. In article $2^1$ it states the facts which constitute violations from the rules of good conduct (referring both to research itself and to its evaluation and exploitation of results), as long as they are not considered crimes under criminal law. In order to emphasize the variety of violations that are likely to take place in practice, we will indicate a number of them, as they are covered by that Article:

- making up results or data and presenting them as experimental data, as data obtained through calculations or numerical computer simulations or as data or results obtained through analytic calculation or deductive reasoning;
- forging of experimental data, data obtained through calculations or numerical computer simulations or of data or results obtained through analytic calculation or deductive reasoning;
- deliberate hindering, blocking or sabotaging the research and development activity of other persons, including by unjustified blocking of access to research and development premises, through the damaging, destroying or manipulating experimental equipment, equipment, documents, computer programs, data in electronic format, organic or inorganic substances or living matter needed by other persons for running, carrying out or completing research and development activities;
- plagiarism;
- self plagiarism;
- the inclusion in the list of authors of a scientific publication of one or more of the co-authors who have not contributed significantly to the publication, or the exclusion of co-authors who have contributed significantly to the publication;
- failure to observe confidentiality in assessment;
- the discrimination, within the framework of the assessment, on the grounds of age, ethnicity, gender, social origin, political or religious orientation, sexual orientation or other types of discrimination, with the exception of affirmative measures stipulated by law;
- abuse of authority in order to obtain the status of author or co-author of publications by subordinates;
- abuse of authority to unduly impose their own theories, concepts or results on subordinate persons.

In order to outline the complete framework of violations of good conduct in the scientific research activity, the provisions of Law no. 206/2004 must be read in conjunction with those of other normative acts. Among them, Law no. 1/2011, as mentioned right in Law No 206/2004, article 4, second paragraph: "Serious deviations from the proper conduct in the research and development activity are those referred to in Article 310 of Law no. 1/2011". This is the article text: "It is a serious offense against the conduct in scientific research and academic activity to: a) plagiarize the results or publications of other authors; b) make up the results or replace results with fictitious data; c) introduce false information in applications for grants and funding". We note, however, that this correlation between provisions of multiple laws establishing provisions on the ethics and deontology of scientific research must be carried out continuously and as a whole, as is the case for any subject matter, not only in the case of these specific references. By way of example, we note another provision of the National Education Law which has a bearing on our subject, namely that which provides for the establishment of the Council for University Ethics and Management, as a body of the Ministry of National Education, unincorporated and aimed at developing the culture of ethics and integrity in Romanian Universities[45].

Returning to Law no. 206/2004, in its provisions we can also find the procedures, but also the competent bodies which are to establish whether or not an

[43] Valentin Mureșan, Mihaela Constantinescu, *Reglementări privind etica în universitățile din România,(Rules Concerning Ethics in Romanian Universities)* in the paper: Emanuel Socaciu, Constantin Vică, Emilian Mihailov, Toni Gibea, Valentin Mureșan, Mihaela Constantinescu, op. cit., p. 50.

[44] An illustrative example are the Charter and the Code of Ethics (part of the Charter) of Nicolae Titulescu University of Bucharest, available on the website http://www.univnt.ro.

[45] Valentin Mureșan, Mihaela Constantinescu, *Reglementări privind etica în universitățile din România,(Rules Concerning Ethics in Romanian Universities)* in the paper: Emanuel Socaciu, Constantin Vică, Emilian Mihailov, Toni Gibea, Valentin Mureșan, Mihaela Constantinescu, op. cit, p. 51.

infringement was committed. In case the answer is yes, one or more sanctions, as the case may be, could be applied, by the management of the unit where the person who is the author of such infringement activates or by the National Council for Ethics[46] – while in compliance with the procedures established by the present law. Of these, we mention:

- written warning;
- the withdrawal and/or correction of all the works published by breaking the rules of good conduct;
- reduction of the basic salary, combined, where appropriate, with the management, guidance and control pay;
- the dismissal from the management of the institution of research and development;
- the withdrawal of the academic teaching title or the degree in research or demotion;
- the disciplinary termination of employment contract.

## 3. Conclusions

The complexity of the subject we analyze is also reflected in the planned regulations applying to it, which is why we did not propose a thorough analysis of them, but wanted to give an overview that can be considered a starting point for further research and extensive peer review. On this line, we will add a few more normative acts which are important in the study of the matter: The Code of Professional Ethics and Deontology of Workers in Research and Development; Law no. 64/1991 regarding patents, republished, with subsequent changes and additions; Law no. 129/1992 regarding the protection of drawings and industrial models, republished; Law no. 8/1996 regarding copyright and related rights, with subsequent changes and additions; The Code of Academic Doctoral Studies.

As mentioned, the academic ethics field is a complex one, and at the moment it surely passes through a transformation that we courageously call evolution (or, at least, we dare to hope that this is the manner it will finally result), despite turbulent times which, we must admit, affect it (or, more properly said, affects its authors).

Certainly, our study did not exhaust elements pertaining to theories, ethical principles, practical examples, nor the aspects of the juridical dimension regarding the violation of ethical and deontology rules in the activity of scientific research, reason for which we express our conviction that this analysis will be expanded in future research.

As we began by remembering Pythagoras's words, respectively "your first law should be to respect yourself", we will close by underlining Nicolae Bagdasar's words, presented in the introduction to one of the works of Immanuel Kant[47]: "... act outwardly in such a way that the free use of your own free will may coexist with everyone's freedom, according to a universal law..."[48].

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[46] Art. 326 of Law no. 1/2011 establishes the bodies or persons entitled to bring into force the sanctions dictated by the National Ethics Council.

[47] *Întemeierea metafizicii moravurilor, Critica raţiunii practice*, (The founding of the Metaphysics of Morals, Critique of Practical Reason,) Scientific Publishing House, Bucharest, 1972, p. IX

[48] Nicholae Bagdasar, as was shown by Verginia Vedinaș, op. cit., p. 55.

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- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction, opened for signature at London, Moscow and Washington on April 10, 1972;
- Declaration of Helsinki, 1964, with subsequent revisions;
- Universal Declaration of Human Rights, adopted and proclaimed on December 10, 1948.
- Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use.
- *Government Ordinance no. 57/2002 regarding Scientific Research and Technological development;*
- *Law no. 1/2011 of National Education, updated, consolidated with subsequent ammends and supplements;*
- *Law no. 129/1992 on the protection of industrial designs and models, republished;*
- *Law no. 206/2004, as amended and supplemented;*
- *Law no. 64/1991 regarding patents, republished, with subsequent amendments;*
- *Law no. 8/1996 regarding copyright and related rights, with subsequent changes and additions;*
- *Order no.4492/2005 regarding the promotion of professional Ethics in Universities;*
- *The Code of Doctoral Studies;*
- *The Code of Professional Ethics and Deontology of Workers in Research and Development;*
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# AUTOPLAGIARISM AND SCIENTIFIC RESEARCH ACTIVITY

**Cristian Răzvan CERCEL**[*]

**Abstract**

*Writing a PhD thesis involves a long and profound scientific research activity. In this context of research, a number of incident factors may lead to the elaboration of a PhD thesis that is original or not. Some of these factors would be plagiarism and autoplagiarism. This paper aims to highlight the issue of plagiarism and autoplagiarism in the context of scientific research activity, while at the same time reaching some essential points regarding the intellectual property right. Last but not least, this paper aims to present some issues related to the current regulation of plagiarism and autoplagiarism, through legal provisions aimed at ensuring good conduct in the scientific research and development activity, but also their relations with the rules on the protection of intellectual property rights.*

**Keywords:** *Intellectual property right, copyright, plagiarism, research activity, autoplagiarism*

## 1. Introduction

### 1.1. Intellectual property right

In order to understand the phenomenon of plagiarism and autoplagiarism, the matter that governs and protects scientific, literary works, copyright and not only has to be identified. So, before we come to the essence of the issue, we will present some essential elements about the importance of intellectual property right.

In the doctrine, the intellectual property right was defined as "*the set of legal rules regulating the relations regarding the protection of intellectual creation in the industrial, scientific, literary and artistic fields, as well as distinctive signs of trade activity*"[1].

However, it is also shown that, "*in accordance with international provisions, which have been taken up in our domestic law, the intellectual property right has two sub-branches: a. copyright and rights related to copyright; b. industrial property*"[2].

Thus, the notion of copyright has several meanings: (i) the legal institution that includes the rules and principles applicable to intellectual creation; (ii) the subjective right itself, which belongs to the author of a work.

Copyright has been defined in the literature as "*the set of legal rules governing the social relations that arise from the creation, publication and exploitation of copyrighted works*[3]*, namely: all works in literary, scientific, artistic, musical, cinematographic, visual art, architecture, maps etc., these being exemplified in Art.7 and Art.8 of the Law no.8/1996 on copyright and related rights*."[4]

As far as copyright subjects are concerned, it should be noted that "*author*" has several meanings. In a first sense, author means "*the creator of the literary, scientific or artistic work*", and in a second sense, "*author*" means the person from whom, in favour or on behalf of another person, a right or obligation or a universality of rights and obligations is transferred[5]. To conclude, the subject of copyright is the person in whose favour the copyright is acknowledged, so we cannot put the mark of equality between the capacity of author of a work and the capacity of copyright holder.

Therefore, in the literature it is stated that "*the author (s) of the intellectual creation work is/are the person (s) who created the works, and the copyright owner is the person who acquired/owns the copyright on an intellectual creation work. But, if the identity between the capacity of author of the work and that of copyright holder of a work does not exist, then the rights enjoyed by the author and, where appropriate, the subject of copyright, are different. Only the author of the work, the primary subject, enjoys all rights*"[6].

The location of the matter in this issue is Law no.8/1996 on copyright and related rights. Art.3 para.(1) stipulates that the subject of copyright may be only the natural person or natural persons who created the work, *per a contrario*, the legal person may not be the subject of copyright. This is a natural issue because the legal person is a creation of law that is not capable of performing a literary work, for example. The legal person lacks those elements specific to man, such as

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[1] Ioan Macovei, *Dreptul proprietății intelectuale. Ediția a 2-a*, C. H. Beck Publishing House, Bucharest, 2006, p. 5.

[2] Viorel Roș, Dreptul proprietății intelectuale. Vol. I. Dreptul de autor, drepturile conexe și drepturile sui generis, C. H. Beck Publishing House, Bucharest, 2016, p. 16.

[3] A. Lucas, H-J. Lucas, A. Lucas-Schloetter, Traite de propriété littéraire et artistique, 4ed., LexisNexis, Paris, 2012, p. 20. *in* V. Roș. *op. cit.,* p. 157.

[4] V. Roș. *op. cit.,* p. 157.

[5] V. Roș. *op. cit.,* p. 159.

[6] *ibidem*

intelligence, emotion, creativity, originality, etc., which prevents it from expressing its personality through a work, and therefore is not original in the sense of copyright.

Further, according to Art.4 para.(1), it is presumed to be author, unless the contrary is proved, the person under whose name the work was first brought to the attention of the public. The law establishes a **relative presumption**, which can be overturned by any means of proof. Thus, it is obvious the interest the author has to bring to the attention of the public the work he has done.

As shown in the doctrine, the author of a work acquires, by the creation and the power of the law, the capacity of subject of copyright. "*But the capacity of author and the capacity of subject of copyright are two distinct notions: if the former is a matter of fact, the second is a matter of law; as we will see, a person may have the capacity of author without having the capacity of subject of copyright and vice versa; a legal person may not have the capacity of author, but may be the subject of copyright prerogatives; the capacity of author derives from a legal fact, the capacity of subject of copyright derives from a legal document."*[7]

### 1.2. Scientific research activity

Scientific research activity is a factor contributing to the social and economic development and implicitly is a fundamental component in the writing of a scientific paper, especially a PhD thesis.

Research activity, in the form of scientific research, consists of theoretical activities carried out mainly in order to acquire new knowledge without aiming, in particular, the immediate application or use[8].

This matter is governed by Law no. 206/2004 on good conduct in scientific activity, technological development and innovation.

As stated in Law no. 206/2004, as it appeared in its original form at the time of entry into force, the research activity is based on a series of rules and principles. As early as in Art.1 of this law, it is shown that:

*"**(1) Ethics** in scientific research, technological development and innovation activities, hereinafter referred to as research and development activities, is based on a set of moral principles and procedures for their compliance.*

***(2) The moral principles** and procedures for their compliance are those incorporated in the Code of Ethics and Professional Deontology of research and development staff, elaborated by the state authority for research and development.*

***(3)** Compliance with these moral principles determines **good conduct** in the research and development activity."*

Therefore, ethics, moral principles and good conduct are an integral part of scientific research activity and play an important role in making a work, regardless of its type, which fulfils the condition of originality.

In Art.2 para.(1) of the aforementioned law, it was stated that "the research and development activity must be carried out in respect for the human being and dignity as well as for the suffering of the animals, which must be prevented or minimized."

Also within the same Art., **good conduct** "*must be carried out with the protection and restoration of the natural environment and ecological balance, ensuring their protection against any aggression produced by science and technology.", and this excludes: "**a)** hiding or removing unwanted results; **b)** making results; **c)** replacing results with fictitious data; **d)** deliberately distorted interpretation of results and deformation of conclusions; **e)** plagiarizing the results or publications of other authors; **f)** deliberately distorted presentation of the results of other researchers; **g)** not correctly assigning the paternity of a work; **h)** introducing false information in grant or funding applications; **i)** non-disclosing conflicts of interest; **j)** misappropriating research funds; **k)** non-recording and/or non-storing the results, as well as the erroneous recording and/or storage of the results; **l)** the lack of informing the research team, before the start of the project, regarding: salary rights, responsibilities, co-authorship, rights to research results, funding sources and associations; **m)** lack of objectivity in evaluations and non-compliance with confidentiality requirements; **n)** repeated publication or funding of the same results as scientific novelties.*"

Subsequently, the Law[9] indicated above was amended by Law no. 398 of October 30, 2006; Ordinance no. 28 of August 31, 2011; Ordinance no. 2 of January 19, 2016. The most important contribution to bringing the law in the current form and which brought the greatest changes was Ordinance no. 28/2011. Through this Ordinance, Art. 1 was amended and it was stipulated that: "***(1)** Good conduct in scientific research, technological development and innovation activities, hereinafter referred to as research and development activities, is based on a set of good conduct rules and procedures for their compliance. **(2)** The rules of good conduct are set out in this law and are supplemented and detailed in the Code of Ethics and Professional Deontology of research and development staff, hereinafter referred to as the Code of Ethics, provided by Law no. 319/2003 on the Status of research and development staff, as well as in the codes of ethics by field, elaborated according to Art.7 (b). **(3)** Procedures to comply with these rules are brought together in the Code of Ethics, in compliance with the provisions of this law and of the National Education Law no. 1/2011. **(4)** Compliance with these rules by the categories of staff carrying out research and development activities, stipulated in the*

[7] V. Roș. *op. cit.*, p. 162.
[8] http://uac.incd.ro/Art/v3n2a08.pdf
[9] http://legislatie.just.ro/Public/DetaliiDocument/52457

*Law no. 319/2003, as well as by other categories of staff, from the public or private sector, benefiting from public research and development funds, determines the good conduct in the research and development activity.*[10]"

At the same time, Art. 2 was amended, having the following content: "*Rules of good conduct in research and development activity include: a) rules of good conduct in scientific activity; b) rules of good conduct in the communication, publication, dissemination and scientific popularization activity, including within the funding applications submitted within publicly funded project competitions; c) rules of good conduct in the activity of institutional evaluation and monitoring of research and development, evaluation and monitoring of research and development projects obtained through actions within the National Plan for Research, Development and Innovation and of people assessment for awarding degrees, titles, positions, prizes, distinctions, bonuses, certifications or certificates in the research and development activity; d) rules of good conduct in leading positions in research and development activity; e) rules of good conduct on respect for human being and dignity, avoiding the suffering of animals and protecting and restoring the natural environment and ecological balance.*[11]"

Further on, it was introduced a new Art .2[1] where, in para.(2), it is shown that *the deviations from the good conduct rules* provided by Art. 2 (b), to the extent that they do not constitute a criminal offense under criminal law, include: a) plagiarism; b) **autoplagiarism** etc.

Thus, it can be noticed that, in the scientific research activity, plagiarism and autoplagiarism constitute serious violations, contrary to the rules of good conduct.

Before going into the issue of plagiarism and autoplagiarism, it should be noted that, in the case of PhD theses, an important ground is added, namely, GD 681/2011 on the approval of the Code of Doctoral Studies, together with the Annex regarding the Code of Doctoral Studies.

## 2. Content

### 2.1. Plagiarism

According to The Explanatory Dictionary of the Romanian Language, **to plagiarize** means "*to appropriate, to copy totally or partially someone's ideas, works, etc., presenting them as personal creations; to commit a literary theft.*" The word plagiarism entered the Romanian language vocabulary through the French word plagier, and has its etymology in the Latin word plagium, which, in Roman law, meant the kidnapping of a slave or a child.

Initially, in Law no. 206/2004, plagiarism was defined, in Art. 4 (d), as "*the appropriation of the ideas, methods, procedures, technologies, results or texts of a person, regardless of the way they were obtained, presenting them as personal creation*."

Subsequently, this article was amended by Ordinance no. 28 of 2011 whereby plagiarism was defined as "*exposure, in a written work or oral communication, including in electronic format, of texts, expressions, ideas, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works, including in electronic format, of other authors, without mentioning this and without referring to the original sources*".

The same definition of plagiarism is found in Order no. 3482/2016 of March 24, 2016 on the approval of the Regulation on the organization and functioning of the National Council for Attestation of University Titles, Diplomas and Certificates, issued by the Ministry of Education and Scientific Research.

*"An author of scientific literature, in order not to be accused of plagiarism, must meet two essential conditions. Above all, he has the obligation to very clearly delimit his own ideas, interpretations and formulations from those of other authors, whose works he consulted during the documenting process. The second condition is originality: the work must be the result of an innovative synthesis and reflection effort, not just a concatenation of formulations and ideas taken from other sources, even if they are quoted correctly."*[12]

Therefore, it is not enough for the author of a scientific/literary work to correctly indicate or quote the source of inspiration but he must also present an element of originality, the author's vision/perspective must be captured. Such a work or paper does not fulfil the condition of originality if it is merely a compilation of works, texts and paragraphs, either with accurate and precise indication of the source.

At the same time, as mentioned in the previous quote, the author of a scientific work must have a very clear delimitation between his own ideas, interpretations, formulations, expressions, etc. which do not belong in fact to the authors studied, their resumption, but in another form, but to be personal.

I believe that the condition of originality is fulfilled if the author brings an element of novelty, if he succeeds in putting the results of his research in another light and if he brings a point of view about the things envisaged in the documenting process.

Plagiarism knows several forms[13]. A first form is that of *qualified/absolute plagiarism*, when the plagiarist presents a work, regardless of its form, elaborated by someone else, as his own creation. Another form is plagiarism by *copying from the*

[10] https://lege5.ro/Gratuit/gi3danzxha/articol-unic-ordonanta-28-2011?dp=gu3dqojsge2tq
[11] https://lege5.ro/Gratuit/gi3danzxha/articol-unic-ordonanta-28-2011?dp=gu3dqojsge2tq
[12] Robert Coravu, *Ce este plagiatul și cum poate fi prevenit (dacă se dorește)*, available on the Internet at: https://www.academia.edu/2700465/Ce_este_plagiatul_%C5%9Fi_cum_poate_fi_prevenit_dac%C4%83_se_dore%C5%9Fte_
[13] ibidem

*original source*, when the author copies paragraphs, passages he inserts into the paper/work and presents them as his own expressions, without indicating the source quoted. In this form of plagiarism is also included the takeover or use of quotes from the papers consulted, without indicating the original source or the source that originally consulted them. Another form of plagiarism is *the use of footnotes* after each sentence or paragraph, because no sentence or no paragraph belongs to the author, the condition of originality not being met. *Partial plagiarism* or *partial compliance with the citation rules* is the case where the author indicates the original source, but only for some of the ideas, and he paraphrases the rest of them or appropriates them as his own creation. *Plagiarism by paraphrasing* involves changing certain sentences, restructuring their word order or replacing words with synonyms and without indicating/quoting the source. If such a method is used, it is imperative that the author quotes the paraphrased source, because the idea is not original, it does not belong to him. This issue leads us to the last form of plagiarism, namely *plagiarism by not using quotation marks*, when the author, although indicating the source, does not put between the quotation marks the sentence/paragraph taken as such, leaving the impression that it is a paraphrasing.

Art. 310 of Law no. 1/2011 on the National Education Law, with the subsequent amendments and completions, stipulates that plagiarizing the results or publications of other authors are serious violations of good conduct in scientific research and academic activity.

Finally, it should be noted that, according to Art.20 para.(3) of GD 681/2011 regarding the approval of the Code of Doctoral Studies, plagiarism within the doctoral school is *academic fraud*, a violation of academic ethics and a deviation from good conduct in scientific research.

### 2.2. Autoplagiarism

After the above, regarding the issue of plagiarism, it is time to go to the quintessence of the present work, namely what autoplagiarism is and what problems it raises.

In Law no. 206/2004, with the subsequent amendments and completions, autoplagiarism was defined, in Art. 4 para.(1) (e), as being: "*the exposure, in a written work or oral communication, including in electronic format, of texts, phrases, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works, including in electronic format, of the same author (s), without mentioning this and without referring to the original sources*.[14]"

"The legal definitions of (plagiarism and autoplagiarism) share two cumulative requirements to qualify a deed as plagiarism and autoplagiarism: retrieving information from the categories listed, from other previously published works *without mentioning this and without referring to the original sources*.[15]"

As stated above, plagiarism and autoplagiarism represent, in accordance with Law 206/2004, deviations from the rules of good conduct in research and development activity.

At the same time, autoplagiarism is not a form of plagiarism, it is self-standing. In the case of autoplagiarism, the takeover is not done from the works of other authors, but from its own works, but without showing/indicating that the "*new*" work reproduces or copies a former work of the same author (s).

Plagiarism is a poor scientific conduct and also a deviation from the rules of good conduct in the research activity. This has to be discouraged, as it can lead to the unfounded professional recognition of an author by repeatedly publishing the same work in several forms or under multiple names, not being, in fact, several intellectual creation "*products*" but the same one.

A person is therefore responsible for autoplagiarism when it publishes, once again, under another title or with another content or in other context, a text or ideas from a text already published/made known to the public, presenting it as a new creation.

"*Incriminating*" autoplagiarism is justified because it prevents a person from obtaining scientific recognition without making an additional effort, by presenting the same work "endlessly" as a new and original one.

With the help of autoplagiarism, the author creates the false public impression that he is the author of several papers/works, being in fact just one, thus gaining undeserved benefits.

Like plagiarism, autoplagiarism knows many forms. A first form is *qualified/absolute autoplagiarism*, through which the author takes over entirely a work already made known to the public and changes its title; for example, the author changes the title of a book already released and presents it as a new own creation. Another form is *partial autoplagiarism*, through which the author takes passages, paragraphs, sentences (in full), from a previous own work and without indicating/quoting the previous source. Another form is "*using your own text already published in a magazine or volume without requesting the publisher the right to publish (this is not just autoplagiarism but also the violation of intellectual property rights)*.[16]"

*"The translation of a PhD thesis to be published in another country does not constitute autoplagiarism, but its use to get a new doctoral degree in that country is fraud.[17]"*

[14] https://lege5.ro/Gratuit/gi3danzxha/articol-unic-ordonanta-28-2011?dp=gu3dqojsge2tq

[15] Sorina Florea. *Plagiatul și încălcarea drepturilor de autor*., available on the Internet at: https://www.juridice.ro/467536/plagiatul-si-incalcarea-drepturilor-de-autor.html

[16] http://araba.lls.unibuc.ro/wp-content/uploads/2014/10/Ghid-impotriva-plagiatului.pdf. P.10

[17] *Ibidem*

I believe that textbooks, books and treatises appearing under a new edition are not circumscribed to autoplagiarism, because the author "warns" the reader that it is the same volume (as the one previously published) but in an edited form, by using the formula "x edition, revised and added", being obvious that it is the work of the same author, but in a new, edited and supplemented form.

It is important to note that autoplagiarism does not sanction the takeover of own ideas, texts, arguments expressed in a previous own work, but their takeover without mentioning that they are taken over, without referring to the original source.

Considering that the mission of the scientific research and development activity consists in the scientific development and the generation of new knowledge[18], it is easy to understand why autoplagiarism is a violation of the rules of good conduct in research and development activity.

## 3. Conclusions

The subject of plagiarism or autoplagiarism has been and is being debated for a long time in the Romanian press, overexciting the attention of the public.

Both plagiarism and autoplagiarism are defined in Romanian law but not also by Law no.8/1994 on copyright and related rights.

*"Regulating and sanctioning plagiarism and autoplagiarism as "deviations from the rules of good conduct in scientific research, technological development and innovation" [the provisions of art. 2[1] para.(2) and of art. 14 para. (1[2]) and (2) of Law no. 206/2004], or as "serious deviations from good conduct in scientific research and academic activity" [the provisions of art. 310 of Law no. 1/2011 on national education] or as "[…] academic frauds, violations of academic ethics or deviations from good conduct in scientific research […]" [art. 20 para. (3) of GD no. 681/2011], distinct from the regulation of the legal regime applicable to copyright and other intellectual property rights corresponds to the standards of good conduct in academic activity already adopted and acquired in European universities"[19].*

Both plagiarism and autoplagiarism can take on many different forms, but the "effect" they produce is the same, it affects the activity of scientific research.

Economic and social development cannot take place through scientific research activity if it is full of plagiarized or autoplagiarized works. Recognition of a work that fulfils the criterion of originality must be based on a long, thorough and serious scientific research activity, that comes up with something new and that brings, as I said, the economic and social development.

Autoplagiarism and plagiarism are a real problem, as claimed authors appropriate creations that do not belong to them (plagiarism) or which, although belonging to them, exploit the same work several times - without indicating this - in order to gain scientific recognition and to benefit from a greater number of benefits, such as financial ones (autoplagiarism).

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[18] Sorina Florea. *op. cit*., available on the Internet at: https://www.juridice.ro/467536/plagiatul-si-incalcarea-drepturilor-de-autor.html
[19] Ibidem

# CHALLENGES OF INTERPRETING THE NOTION OF SOFTWARE COPYRIGHTS IN THE CURRENT ECONOMIC AND SOCIO-POLITICAL CONTEXT

**Ramona DUMITRAȘCU***

**Abstract**

*Every country has it' s own interpretation and enforcement of copyrights. The challenge is in case of a conflict of interpretations to create a common structure accepted by all parties as a base of mutual understanding and agreement. ESCIA guidelines seek to provide a scalable assessment framework which in turn can be a tool for research and development of structures to deal with the different cultural and social economic circumstances of the different countries / the assessment of which system is dominant is an ongoing, ever-changing debate for which you need the guideline tools to steer the discussion in the right direction which is a challenge on it's own.the digital economy is the most important part of the global economy.The digital transformation of international production requires regulation,governing, investor behaviour. The negative impact of manipulation of data obtained from consumers by global powerfull multinationals is to be considered a major insentive for a rigourus monitorization and regulation of international productions. The diversity of interests, political and finacial, make fair regulations covering all aspects of the situation, extremlely difficult, in addition to the ever chainging parameters governing the subject as such. The complexity of the matter should not prevent an indepth assassement and solution seeking policy.*

**Keywords:** *software, piracy, computer, economic effects*

## 1. Introduction

Intellectual property rights (IPR) are assuming an increasingly important role in international trade, in investment and in economic relations and are valuable commercial assets and a driving force in technological progress leading to increasing competitive capability and resultant empowerment in the international marketplace.

The globalization or universalization or internationalization of trade and economy, and the multilateral rules that most of us have accepted to be bound by, require us to adopt a post approach regarding IPR through close interaction between government, industry and the creative / inventive segment of society.

The international norms and national laws on copyright and related rights, while recognizing that the promotion of creativity and cultural and information production is an important public interest, also take into account other public interests, such as those which relate to the availability to the public of all the information necessary for the participation in social and political activities, public education, scientific and scholarly research, etc. For these purposes, these norms and laws contain appropriate exceptions to and limitations on the rights of copyright and related rights owners.

## 2. Content

The intellectual property system might play the main role in modern economic policy, and even though a decade ago it was thought that protecting IP rights for software might determine the chances of an economy to recover or to become competitive, the reality we live in proves that society is becoming more and more global, linking people together by their needs and interests and yet still leaving room for national or regional specificity without creating a conflict in between the two areas, but proving that there are natural ways of evolving in your specificity and yet be connected and be a part of the global.

Software industry and IP is increasingly becoming an important tool for sustainable development. Understanding and appreciating the social, cultural and the economic foundations of intellectual property and the copyright system, is a prerequisite for comprehending its increasing importance and role in national strategies for enhancing competition.

In software solutions, intellectual property is not and should not become the end in itself, but a catalyst for accelerating social, cultural and techno-economic growth and development and it's evolution in offering effective protection and use has proven spurs socio-economic growth through providing the necessary incentives for increasing creativity, inventiveness and competitive capability. It is (was) believed that a quality conscious approach towards economic

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management would generate higher growth and greater resources for social programs although this approach might increase the gaps between humans, communities, interests.

Intellectual property comprises creations of human mind, of the human intellect. It consists mainly of two branches, one dealing with industrial property comprising technological inventions, utility models, trademarks for goods and services, industrial designs, etc. and the other being copyright. The existence of such exclusive rights is also the legal basis for contractual arrangements between the creators or the ones developing the idea, on the one hand, and the institutions or entrepreneurs wishing to use those ideas in the manufacturing process, on the other. The recognition of the creator, the protection of his rights and the rights of those who invest in the making of his creations, contributed positively to socio-economic development of a developing country and yet now we can see some of the side effects and forsee possible questionable consequences.

With the extension of this system during the last two decades to the protection of computer software, a considerable size of commercial activity of a country involves use of rights protected by copyright. Until recently, one did not have a real idea as to the extent of the economic dimensions of the copyright or cultural industry. In the last two decades, however, independent surveys and studies in certain industrialized countries have indicated how sizeable the industry is. All these studies indicated the contribution of the copyright or cultural industries to their GNP, in Australia 3.1%; Germany 2.9%; India 5.06%; Netherlands 4.5%; New Zealand 3.2%; Sweden 6.6% (although Jennifer Skilbeek in the economic importance of copyright published by the International Publishers Association places it at 3.16%, which seems more likely); the United Kingdom 3.6%; the United States 3.3% for the core industry and 5.8% for the total copyright including the dependent industry.

Computer software industry is a classic example of what effective intellectual property protection can do to ensure economic growth. Protected as a literary work under copyright law since 1984, the industry has grown to be of the foremost in the world with a compounded growth more than 50% between 1990 and 1997, and is increasingly becoming the driving force in information technology. Exports of software increased from US $225 million in 1992-1993 to US $1760 million in 1997-1998, to US $2650 million in 1998-1999 and up 57% to over US $4 billion in 1999-2000; the projection was that this wioud go up to US $9 billion by 2001-2002, to US $25 billion by 2004-2005 and to US $50 billion by 2007-2008[1] and it was confirmed. By then the country's software industry is expected to earn an annual revenue of US $85 billion. The exports, for example, in 1998-1999 were 61 billion to the USA and North America and 23% to Europe. The compound advantage of the software industry is based on its cost effect world class quality, high reliability and rapid delivery of all of it powered by the state-of-the-art technologies.

China's software industry, has made a substantial contribution to the country's economic development. This industry has created more than 60.000 jobs. The average annual growth rate of the software industry was expected to be 28% in the 5 years, 2000 to 2005. It was also estimated that China will by become one of the world's largest Internet markets and that estimation was confirmed. The number of Internet users in China increased, for example from 2.1 million in 1998 to 8-9 million in 1999. The websites were expected to grow to e-commerce activities and their e-commerce turn over was expected to reach US $1.2 billion by 2002[2].

The digital economy is becoming an ever more important part of the global economy. It offers many new opportunities for inclusive and sustainable development. It also comes with serious policy challenges – starting with the need to bridge the digital divide. Both the opportunities and challenges are top policy priorities for developing countries. The digital economy is fundamentally changing the way firms produce and market goods and services across borders. Digital multinationals can communicate with and sell to customers overseas without the need for much physical investment in foreign markets. Their economic impact on host countries is thus more ethereal and less directly visible in productive capacity generation and job creation. And, today, the digital economy is no longer just about the technology sector and digital firms, it is increasingly about the digitalization of supply chains across all sectors of the global economy. The digital transformation of international production has important implications for investment promotion and facilitation, and for regulations governing investor behavior. Rules designed for the physical economy may need to be reviewed in light of new digital business models. Some countries have already taken steps to modernize policies; others face the risk of letting rules become obsolete or of unintentionally slowing down digital development. Many countries around the world have development strategies for the digital economy. Yet most of these strategies fail to adequately address investment issues. And those that do tend to focus exclusively on investment in telecommunication infrastructure. The investment policy dimension of digital development strategies should be broadened to enabling domestic firms to reap the benefits of digitalization and easier access to global markets. The World Investment Report 2017 makes a cogent argument for a comprehensive investment policy framework for the digital economy. It demonstrates how aligning investment policies with digital

[1] Shahid Alikhan, The Role of Copyright in the Cultural and Economic Development of Developing Countries, in Journal of Intellectual Property Rights, 7, 2002, p. 489-505.

[2] Ibidem.

development strategies will play a pivotal role in the gainful integration of developing countries into the global economy and in a more inclusive and sustainable globalization in the years to come. This is an indelible contribution to the discourse on how to narrow the digital divide and meet the enormous investment challenges of the 2030 agenda on sustainable development[3].

The most attractive industries include services and technology-based activities. The annual parallel survey of IPAs in 2017 provided a ranking of the most promising industries for attracting Foreign Direct Investment in their region. The results for 2017 are broadly in line with responses from past years, with IPAs in developed economies focusing on IT and professional services, while those in developing economies all mention agribusiness among the most attractive industries. Information and communication – which includes telecommunication, data processing and software programming – is emerging as an attractive industry in selected developing regions, confirming that the digital economy is growing in importance beyond developed economies[4].

Of all suppliers of copyrightable works, suppliers of computer software generate by far the greatest added value. Markets for business software and entertainment software (for example video games) are much younger than other copyright industries and as a rule, they have grown rapidly over recent years. Software is also unique because in contrast to literary texts, movies or sound recordings, the market for software has been subject to unauthorized, digital copying for as long as it exists.

In 1980, software has enjoyed copyright protection in the USA, analogous to literary texts. In many other countries, software also falls in the realm of copyright law but enforcement varies, as will be discussed below. In contrast to other types of copyright works, machine-readable software can also be patented if it is accepted as non-obvious (or considered to constitute an 'inventive step' in many European countries). Suppliers of software thus have a choice. Copyright protection concerns the code itself, requires no registration fee, lasts longer and allows for the software itself to remain a trade secret[5]. Patent protection prevents others from putting software with equivalent functions to use, requires complete disclosure, a test of non-obviousness and a registration fee.

There may be a particularly great rift between legal arrangements regarding copyright protection and protection in practice. For example, peer-to-peer file-sharing of copyright works is illegal in most major economies today, but it still occurs on a massive scale. Part of the problem is that in contrast to patents, benefitting from the ideas and works protected by copyrights does not require much expertise or capital. Copyright infringements occur more frequently and often in the private domain, which inhibits effective enforcement of copyright law. This is one reason why most studies on unauthorized, digital copying use measures of copying rather than measures of the strength of copyright law to assess IP protection.

One problem in research on copyright is that most research on innovation has deliberately ignored the types of aesthetic and intellectual innovations covered by copyright law. To be sure, in the copyright industries technical innovations do occur as well. The adoption of new media technologies is a case in point. However, much innovation in the copyright industries concerns the creation of new media content. In order to measure innovation in copyright industries, it is useful to distinguish between more conventional 'humdrum innovation' and 'content creation'. Humdrum innovation concerns all facets of technological innovations and can be assessed with the familiar instruments of empirical research on innovation. 'Content creation' concerns aesthetic and intellectual variations that distinguish different copyright works from each other. To measure content creation, it seems necessary to adapt traditional methods of innovation research. Innovation input is traditionally measured by the size of R&D departments. Regarding content creation, there are two outstanding problems. First, much content creation occurs in relatively small firms and particularly volatile organizational set-ups. Second, content creation is not usually conducted in formally defined R&D departments. Other measures of innovation input are necessary to deal with innovation in small enterprises, with self-employed creators, or with user / amateur innovation that seems to play an important role in the cultural sector (e.g. regarding user-generated content)[6].

Empirical studies concerned with so-called 'piracy' of computer software often deal with copyright and patent infringements at the same time, and the authors rarely bother with this distinction. Many empirical studies on software piracy precede the current interest in copying of other types of copyright works. The bulk of this literature takes a business and management perspective. It is less concerned with social welfare and implications for public policy but with the interests of private business, in particular suppliers of software. Furthermore, in contrast to research on unauthorized, digital copying of recorded music or movies, the extensive literature on software 'piracy' features few original assessments of the impact on sales and rights holder revenues. Estimates of lost sales due to piracy come from software suppliers and their representatives.

[3] Mukhisa Kituyi, *Foreword*, in *Word Investment Report 2017, Investment and the Digital Economy*, United Nation Conference on Trade and Developement, Geneva, 2017, p. IV.

[4]. *Ibidem*.

[5] Christian Handke, *Economic Effects of Copyright. The Empirical Evidence So Far*, Rotterdam, 2011 p. 8-9.

[6] *Ibidem*, p. 15.

The academic literature mostly discusses piracy rates (the ratio of users utilizing legitimate software and users of pirated software) but does not quantify the likely impact on rights holder revenues. There may be several reasons why academic researchers hesitate to forward estimates of lost sales due to piracy. The rapid rate of product innovation in the industry makes it hard to isolate the effect of unauthorized use on sales. There may have been few sudden and substantial changes in the de facto level of copyright protection for software, which could have been analyzed as natural experiments. Furthermore, the rapid growth of the market for computer software could reduce the concern for sales displacement from piracy[7]. The coincidence of rapid revenue growth, great innovation intensity and extensive piracy seems to have motivated many studies on how network effects may mitigate any adverse effects of piracy[8].

The role the protection of copyright and related rights is above all the promotion literary, musical and artistic creativity, the enrichment of national cultural heritage and the dissemination of cultural and information products to the general public. Such protection offers the indispensable incentives for the creation of new valuable works and for the investment into production and distribution of cultural and information goods. This is done through granting appropriate economic and moral rights to authors, performer, producers and publishers, through establishing adequate framework for the exercise of these rights, and through providing efficient mechanisms, procedures, remedies and sanctions that are necessary for their enforcement in practice.

It was accepted that an efficient and well-balanced system for the protection of copyright and related rights is necessary for the preservation of national culture and identity. Experience shows that for this, it is not sufficient to grant protection to national creators, producers and publishers. Without adequate protection also for them, foreign works and cultural products may inundate the markets of the given country and create a kind of unfair competition for any domestic creations and publications[9]. Yet again, one cannot stop wondering nor question, g iven the today market, how it was possible for the software protection of certain products to motivate and chalenge a fearcefull competition provoked by markets like Vietnam or China.

It is / was accepted and embraced by a large part of the academic community the idea that an appropriate copyright system is also indispensable for the participation of international cultural and economic cooperation. Without this, a country may not be able to attract foreign investment in a number of important fields, and may not get access to certain cultural and information products and services in such an obstacle-free manner as it would be desirable for the acceleration of the social and economic development. Yet, the paradox faced by the economic development for areas that use world heritage inovations to provide alternatoves without trademarks for disproportional law prices that allow the consumers south east Asian markest to benefit of the same technology as western Europe or American markets for sometimes less then 10 percent of the EU or US market price.

The protection of IP is based on many examples to prove that an appropriate, well-balanced copyright regulation may contribute both to the survival and to the success – sometimes spectacular success – of smaller and medium-sized enterprises.

One example is an old story- but the example is from an early period of its history when, on the basis of the present criteria, it still could have been regarded a kind of developing country: the United States of America from the period when it had just obtained its independence and was in the stage of establishing its own economic, social and legal system. As far as copyright was concerned the first idea – which, at the first sight, perhaps seemed to be attractive and clever – was to promote local culture and creativity through granting copyright protection for the works of domestic authors, leaving, however, foreign works – first of all works published in England – unprotected. The results proved to be catastrophic from the viewpoint of what the isolationist approach to copyright was believed to serve. Those publishers – according to our present comparative scale, certainly small or, at least, medium-sized ones – that had chosen to invest in the publication of some still less well-known American authors were unable to compete with the others which achieved easy and safe success by publishing unprotected works of famous and popular English writers and poets without any need whatsoever for bothering with obtaining authorization and paying remuneration to them. The then "SME" publishers supporting local creativity either went bankrupt or changed publishing policy in abandoning their patriotic extravaganza.

Another example is from a developing country, and quite a huge one, which just as a consequence of the success story involved, is emerging as one of the most important players in the field concerned: India. The great success of the Indian software industry has even started its dynamic extension also to the European and U.S. markets (and not only through "exporting" its excellent experts). There is general agreement that, in the success story of the numerous software SMEs of that huge country – some of which, of course, in the meantime, have grown out this category – in addition to certain other factors (such as a well-thought governmental development strategy and an

[7] *Ibidem*, p. 19.
[8] *Ibidem*, p. 19.
[9] Mihály Ficsor, *The Importance of Copyright and Related Rights for Economic Development with Special Reference to the Position of SME'S,* In *Wipo National Seminar On Copyright, Related Rights, And Collective Anagement*, organized by the World Intellectual Property Organization (WIPO) in cooperation with the Ministry of Culture, Khartoum, February 28 to March 2, 2005, p. 2

advantageous educational structure), the early introduction of a well-balanced copyright protection for computer programs played a decisive role.

Another one is from a country which, at the time of the story was still a reluctant member of the group of the so-called socialist countries (although, as the Western press put it, the merriest barrack in the camp), which then happily became a "transition country", and in 2004, became a member of the European Union: Hungary. Copyright protection was recognized in the statutory law (the first time in Europe) in 1983. This alone would not have been sufficient in a so-called socialist country to become the basis for an SMEs success story. By that time, however, certain economic and political changes allowed the establishment of small private enterprises (or sometimes even medium-sized ones). The carrier of the small software houses established in that period became truly a great success story, bringing Hungary into the frontline of software development in Central and Eastern Europe and contributing – along with many other factors – to a smooth transformation of the (ever less) centrally planned economy into a full-fledged market economy.

At the end of the 70's and the beginning of the 80's, there were still a lot of heated debates at the international level on what kind of intellectual property protection might be adequate for computer programs**,** the growing importance of which at that time was becoming evident. During those debates, patent protection – which now, in certain countries, has started a spectacular, although in some aspects controversial, new carrier – was, in general set aside and rejected as a major option. The possibility of a sui generis system was considered more or less seriously (of which still there are some very much articulate arrière-guard advocates), but copyright was emerging as the most ready-made and most easily applicable option. The breakthrough towards copyright as a generally accepted option took place in February 1985, at a meeting organized in Geneva at the WIPO headquarters. It was due to the excellent working paper, to the thorough discussion at the meeting, but also to the existing positive examples to which the working paper had been able to refer. At that time, in addition to some positive developments in the case law of some countries, there were already five countries where statutory law explicitly recognized the copyright protection of computer programs.

It may not be a surprise that the United States of America was among the first five. In the case of that country, the contribution of copyright protection might not be so easily and evidently identified as the single key factor for the enormous success of the software industry, although its important role could hardly be neglected. However, India and Hungary were also among those first five countries, and, in the case of these countries it is easier to identify what kind of impact copyright protection had made.

Yet again, one cannot ignore the history and the lessons that past times emphasize: the main basis and premises for some of the national economies to emerge was, at least at a certain point, the ability to use freely, without financial restraints, the world heritage of the best creation of human kind. My wonder: how will the evolution of the world software development is going to be influenced by the lack of reglementation / zero recognition for IP on markets like east south Asian markets. Furthermore: is it possible that overprotective regulations that focus on the software's author s financial rights might turn into a subtle, masked brake for triggering the creativity and the evolution from public usage? And how well is the example of decompilation of computer programs is actually being taken seriously.

There is no need to elaborate on some very well known examples where the breathtaking success of certain software enterprises – which at the beginning were born even not just as small or medium-sized ones but as micro-enterprises – has led. They have obtained quite an extensive market dominance with the possibility of their proprietary products obtaining the status of de facto world-wide standards relegating by this their potential competitors (among them all software SMEs) into the depending status of simple clients.

This evolving scenario was recognized and duly taken into account in the European Community in the framework of the preparation and adoption of the directive on the legal protection of computer programs. The directive (Council Directive No. 91/250/EEC of 14 May 1991) contains certain provisions to protect users of computer programs against the dangers of overprotection in favor of software developers: such as the ones guaranteeing for the lawful owners of copies of computer programs to be able to use it for the intended purpose, including error protection (Article 5(1)), to make back-up copies (Article 5(2)) and to observe, study or test the functioning of the program in order to determine the ideas and principles underlining any element of the program (Article 5(3)).The latter provision has already quite a substantial relevance also for the possible competitors – among them many small medium enterprises – in the software markets. However, what is particularly important for them – especially for the more vulnerable SME's of the field – is the regulation of the issue of "reverse engineering" or "decompilation" of programs in Article 6 of the directive. This regulation became necessary in order to eliminate the possibility of some anti-competitive practices of owners of certain widely used computer programs based on the exclusive right of reproduction and / or the exclusive right of adaptation (and translation) granted to them by Article 4 of the directive. In the absence of an appropriate regulation, owners of rights in such programs would have been able to prohibit the transformation of the programs (only made available by them in object code form) into source code form (this transformation is called "decompilation" – or "reverse engineering" of the program). And without such decompilation, the potential competitors would not have been able to develop and make any computer programs that would have been able to function together – "interoperate" – with the existing and widely used, quasi standard programs. Such a

consequence would have been, of course, particularly disastrous for SMEs of the software development sector. The regulation was not easy. There was quite an important resistance against any specific rules authorizing decompilation, since some major software houses were afraid that the new norms may be used also for simple piratical activities. It seems, however, that the provisions in Article 6 of the directive have established an appropriate balance between conflicting legitimate interests and eliminated the possible dangers as much as possible. The said Article of the directive provides that the authorization of the rightholder is not required where reproduction of the code and "translation" of its form are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that certain conditions are met. These conditions serve as guarantees that the limited freedom granted in this field does not prejudice the legitimate interests of owners of rights. The conditions are as follows: (a) these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorized to do so; (b) the information necessary to achieve interoperability has not previously been readily available; (c) these acts are confined to the parts of the original program which are necessary to achieve interoperability; (d) the information obtained must not be used for goals other than to achieve the interoperability of the independently created computer program; (e) it must not be given to others except when necessary for the interoperability of the independently created computer program; and (f) must not be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright[10].

It was proven that software piracy determined economic development. Most leading studies on software piracy are cross-sectional or panel studies with countries (or US states) as the unit of analysis: there were explored explanations for different piracy rates for business software, there were resoults that suggested highly developed countries exhibit lower piracy rates, there were conclusions stating inverse relationship between development and the extent of software piracy as well.

Next to income / economic development, the literature discusses a number of other factors determining software piracy, like the fact that culture that puts greater emphasis on individualism rather than collectivism correlates with less business software piracy . Also, it was stated that various indicators of the strength of the legal and judicial system are associated with less piracy.

While dealing with official, secondary data is usually considered to be preferable among economists, existing data does not address many specific phenomena related to unauthorized copying. Surveybased studies on the determinants of software piracy confirm that increasing retail prices are associated with greater piracy rates, consistent with what economic theory predicts for relative prices of close substitutes. Unauthorized copies seem to be inferior goods in the sense that demand for them decreases with wealth. Also, it was concluded that the type of education mattered.

It seems clear enough that unauthorized copying occurs in part because of financial incentives. With access to some widely diffused ICT, the pecuniary costs of acquiring an unauthorized copy are usually much lower than retail prices[11].

Unauthorized copies are no perfect substitutes for authorized copies, however, in software domain, it might be that the quality of the the unauthorized copy is just as good as the original. Also, decompliation and the ability to modify, adapt a nd improve a software might have better consequences for the consumer

## 3. Conclusions

This well-balanced and precise regulation *has made it possible* – not only in the European Community but also in other countries where this model has been taken over and applied – *for software-developers to continue and extend their creative activities with a chance to succeed***,** and many of them have used this opportunity with great efficiency. The big chalenge is still to be ruled by the free market, a natural consequence of globalization, and that will still provoke major debates with no certain forseeble effects on software intellectual property rights.

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[10] *Ibidem*, p. 5-6.
[11] Christian Handke, *op. cit.*

# NEW TYPES OF TRADEMARKS – PROTECTION OF MULTIMEDIA TRADEMARKS

**George-Mihai IRIMESCU**[*]

**Abstract**

*The Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks.and the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark changed one of the classical registration conditions for trademarks. More specifically, the graphical representation of the trademarks was replaced by the possibility to represent trademarks in a manner that enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.This change enabled a more appropriate representation for sound marks, motion marks and holograms and, more important, made it possible to register a new type of trademarks – the multimedia trademarks. The complexity of multimedia trademarks could raise interesting practical challenges regarding their scope of protection, assesing their distinctiveness and their opposability . Moreover, given that such marks represent a combination of sound of images, the overlap with other intellectual property rights, such as copyrights, is more probable. Considering this element of novelty, this paper aism to analyze the early stages of the practice and anticipate potential challenges that multimedia trademarks would create, also based on the practice so far with respect to other types of non-traditional marks.*

**Keywords:** *multimedia trademarks, EU IPO, EU case-law, non-traditional trademarks, copyright*

## 1. Trademark definition. Registration conditions for trademarks according to the current Romanian legislation[1].

From the point of view of international regulations, the possibility of registering non-traditional trademarks was strongly encouraged by the Singapore Treaty of 2006 which, in its Implementing Regulation, at Rule 3 it details the content of the trademark application for registration of three-dimensional marks, holograms, motion, color or positioning marks, as well as *non-visual* signs. With particular relevance to the subject matter of this paper, we reiterate the provisions on the representation of the motion trademarks, to which the Regulation establishes that: *Where the application contains a statement to the effect that the mark is a motion mark, the representation of the mark shall, at the option of the Office, consist of one image or a series of still or moving images depicting movement. Where the Office considers that the image or images submitted do not depict movement, it may require the furnishing of additional images. The Office may also require that the applicant furnish a description explaining the movement.*[2].

The doctrine also considers the Singapore Treaty to be the first international instrument to remove the condition that a trademark consists of visible signs. However, as rightly pointed out in the cited article, and as we will further detail, the difficulty of registering such signs as trademarks remains because of the absence of a direct link between the trademark and the goods and / or services applied to, the difficulty or the impossibility of graphic representation, and last but not least, the lack of distinctiveness[3].

The national law lists, without limitation, a series of signs that can be registered as trademarks. As the doctrine has identified, the phrase *such as* clearly indicates that it is a non-exhaustive enumeration of signs that may constitute marks[4].

Prior its republication in 2010, the Trademarks Law contained a less detailed list of possible types of trademarks. The doctrine thus concluded that the amendment of this article in Romanian law is the direct result of the Treaty of Singapore[5]. We do not exclude the fact that the reformulation of this article, following the republication, is to be done in the spirit of the new international commitments ratified by Romania, considering that even the Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States

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[1] This introduction was addressed within the article *Protecția mărcilor netradiționale*, published in Revista Română de Dreptul Proprietății Intelectuale, no. 1 / 2017, p. 183 – 198;

[2] Rule 3 para. (4)-(6) of the Regulations under the Singapore Treaty on the Law of Trademarks (as in force on November 1, 2011), ratified by Romania through Law no. 360 / 04.12.2007;

[3] Ioan Macovei, Nicoleta Rodica Dominte, *Reflecții asupra înrgistrării semnelor netradiționale ca marcă*, Revista Română de Dreptul Proprietății Intelectuale, no. 2 / 2013, p. 19;

[4] Viorel Roș, Octavia Spineanu-Matei, Dragoș Bogdan, *Dreptul Proprietății Intelectuale. Dreptul Proprietății Industriale. Mărcile și indicațiile geografice*, All Beck Publishing, Bucharest, 2003, p. 39;

[5] Ioan Macovei, Nicoleta Rodica Dominte, *Op.cit.*, p. 20;

relating to trademarks, which stood at the base of the republishing of the Romanian law in 2010, also provided for a relatively limited list of possible trademarks[6]. We only wish to point out that, apart from affirming the possibility of registering certain types of trademarks, such a change is not aimed to permit the registration of those marks *per se*. Before republication, as it is the case today, we share the opinion that the listing of Article 2 of the Trademarks Law was and is not exhaustive. Consequently, not legislative confinement is the main obstacle to the registration of non-traditional trademarks, but the way in which they may or may not meet the conditions imposed by the definition of the mark.

In turn, Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks maintains this narrow list of signs that can be registered as trademarks[7], despite the fact that it opened the door to new types of trademarks due to amending the trademark registrability conditions.

According to the current form of Law no. 84/1998 on trademarks and geographical indications, republished, the trademark is defined as *any sign capable of being represented graphically, such as: words, including personal names, designs, letters, numerals, figurative elements, three-dimensional shapes and, particularly, the shape of goods or of packaging thereof, colors, combinations of colors, holograms, acoustic signals, as well as any combination thereof, provided that such signs are capable of distinguishing the goods or services of one enterprise from those of other enterprises* [8].

This legal definition includes essential elements, which we consider to be relevant in this presentation related to the protection of multimedia trademarks.

First, it highlights a first condition for a sign to be a trademark, namely that it is susceptible of graphic representation. Thus, this condition is one of the main obstacles to the possibility of registering certain categories of non-traditional trademarks, including, for example, sound trademarks. From this perspective, non-traditional trademarks are defined by doctrine as those marks that are not directly perceptible or for which it is difficult to achieve a graphic representation[9], if not impossible, we might add.

Second, through the condition that the trademark distinguishes the goods or services of an undertaking from those of other undertakings, the Romanian law defines the distinctive character of the mark.

As regards the distinctiveness of a sign, the doctrine emphasizes that it shoul not be confused with the novelty, originality or creativity of the sign[10]. The first two concepts are rather linked to the condition of availability of the sign as a mark. As regards the third element, namely creativity, it may be a factor in assessing the distinctiveness of a trademark, in the sense that a more creative sign sets the premises of a stronger, but not necessarily, distinctive feature. It is not enough for a sign to be creative to be considered distinctive. We will see how this aspect is particularly important in interpreting the distinctiveness of new types of trademarks, especially multimedia trademarks that, although they enjoy originality, as a form of manifestation of the creativity of those who have created them, they are not necessarily and distinctive.

The distinctiveness, that is, that capacity to distinguish the goods and / or services of an entity from those of another entity, is therefore appreciable in relation to the goods or services designated by that trademark. It is equally important that this appreciation is made through the public filter, the consumers of those goods and / or services. As a consequence, the doctrine has very rigorously defined distinctiveness as a *triangular relation between trademark - product - public*. Moreover, distinctiveness, although it is a condition of registration of the sign, it is not a characteristic of the sign *per se* (although in practice we say that a trademark is distinctive), it is rather a characteristic of the relationship trademark - goods. Moreover, as the doctrine rightly emphasizes, the distinctiveness of a sign cannot be determined in isolation from the designated goods[11]. Although we agree with all the considerations underlying this view, another possible approach is to take into account the fact that although the distinctiveness undoubtedly leads to an analysis of that relationship, it is rather a characteristic of the trademark, of course characteristic relating to the designated goods and / or services.

Also related to distinctiveness, it should be noted that this characteristic is variable in time. The distinctiveness of a trademark must be maintained, either by its use as a trademark, in the case of trademarks with acquired distinctiveness, or, in case of the intrinsic distinctiveness, itself may be lost if its proprietor does not take care that the trademark does not become a common or generic name for its goods or services[12].

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[6] Art. 2 of the preamble of Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks, published in the Official Journal of the European Union of November 08, 2008;

[7] Art. 3 of Directive (EU) 2015/2436 of the European Parliament and of the Council of December 16, 2015 to approximate the laws of the Member States relating to trademarks, published in the Official Journal of the European Union of December 23, 2015;

[8] Art. 2 of Law no. 84 / 1998 regarding Trademarks and Geographical Indications, republished in the Official Gazette no. 337 from May 8, 2014;

[9] Ioan Macovei, Nicoleta Rodica Dominte, *Op. cit.*, p. 19;

[10] Viorel Roș, Octavia Spineanu-Matei, Dragoș Bogdan, *Op.cit.*, p. 89;

[11] Idem, p. 91-92;

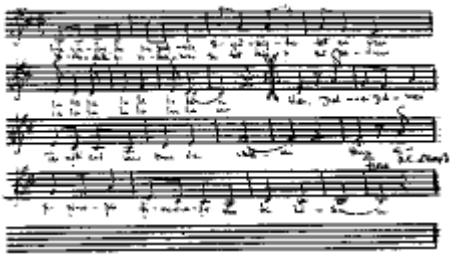
[12] Ștefan Cocoș, *Mărci naționale și mărci comunitare*, Tribuna Economică Publishing, Bucharest, 2007, p. 34 și urm;

## 2. Trademark definition following the EU legal developments

As regards the trademark definition, article 3 of the Directive renounces to the phrase signs capable of being represented graphically, stating that trademarks should be represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor[13].

The European trademark regulation, like the directive, defines the European Union mark as being any signs, in particular words, including personal names, or designs, letters, numerals, colors, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:

a) distinguishing the goods or services of one undertaking from those of other undertakings; and
b) being represented on the Register of European Union trade marks ('the Register'), in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor[14].This change is essential to open the path of recording multiple types of unconventional trademarks, especially those that are perceived by other senses than the sight. Thus, the new regulation allows the register to be adapted in a manner that trademarks could be shown through any technological form, as long as it is able to accurately determine the scope of its protection. For example, in terms of sound trademarks, they are traditionally rendered by a portative. However, we consider this only to be a compromise solution, given that not every consumer, who consults a register, may have the representation of a musical piece only by reading its portative (only a rather limited number of consumers have this capacity). For example, how many consumers can "read" the national sound trademark no. 062091, from the simple view of a fairly long portative?:



Much more effective is, for example, uploading an audio file, a practice that was not categorized as a graphic representation of the sign. From this point of view, we will detail below Metro-Goldwyn-Mayer's attempt to record the famous lion roar as a trademark at European Union level in 1996 (application no. 000143891) for goods and services in classes 09, 38 , 41 and 42, a sound that is impossible to reproduce accurately through a portative. It was represented by a spectrogram, with the description *the sound made by the roar of a lion and represented in the attached spectogram*. The mark was refused, one of the invoked reasons being that the graphic representation of the mark is not such as to enable the public to perceive the sound, even with the above-mentioned explanation[15]. However, the new definition allows offices to use the appropriate technical means to reproduce a sound trademark in such a way that it is perceived precisely by the public, as the EU IPO has already implemented even before the adoption of the new regulation, as we will see in the following.

Nevertheless, the use of new technical means could allow for a better and clearer representation of motion trademarks or holograms and, more recently, of multimedia trademarks, a new type of trademark established by the European legislation and practice. However, if the EU IPO is now ready to represent trademarks by means of video files, as we shall see, part of the Member States' offices (some of which have not even implemented the new directive yet) are not yet prepared. Under such circumstances, how could a European multimedia trademark be converted into a national trademark? Thus, a first aspect that we can now point out is the gap between the EU IPO's technical means and the national ones, which could hinder the cooperation between national systems and the European trademark system.

## 3. What is a multimedia trademark, what does it protect and how is it filed for registration

The European Trademark Regulation does not provide a definition of multimedia trademarks. Nevertheless, the article cited above has opened the way for the representation of motion marks and holograms by means of video files, given that traditionally, if we can talk about the representation of non-traditional trademarks using such wording, they were represented by a stream of images that would indicate possible movements.

As regards the European Union Trade Mark Implementing Regulation, its only reference to the multimedia trademarks is that of the formal requirements for the constitution of the regulatory deposit: *Where the application concerns any of the trade mark types listed in points (a) to (j), it shall contain an indication to that effect. Without prejudice to paragraphs 1 or 2, the type of the trade mark and its representation shall accord with each other as follows:*

1. in the case of a trade mark consisting of, or extending to, the combination of image and sound

[13] Art. 3 of Directive (UE) 2015/2436;
[14] Art. 4 of the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, published in OJ from June 16, 2017;
[15] EU IPO's refusal decision concerning EUTMA 000143891 issued on 29.09.199, pg. 1;

(multimedia mark), the mark shall be represented by submitting an audiovisual file containing the combination of the image and the sound;[16]

Thus, a first possible definition of these marks, namely that they are a combination of images and sounds, is delineated.

As for motion trademarks, uploading a video file is not the only way for it to be represented. Although preferable, such video can be replaced with a sequence of images, as it was the practice before the implementation of the technical means for uploading video files. Such a file is, however, the only one able to represent, in an acceptable manner, a possible combination of sounds and images, which are today the multimedia trademarks. However, it is interesting that in the case of multimedia trademarks it is not permissible to submit a description thereof, given that, as recently claimed in an on-line webinar hosted by the EU IPO, for such marks *such descriptions could rather tangle than help*[17].

Therefore, it is important to note that the representation of this type of trademark is the only one that indicates the extent of its protection, without any additional information (description of colors, visual elements, image sequence etc.)

The EU-IPO's joint communication on the representation of new types of trademarks sets out the technical limits for the submission of multimedia trademarks. Thus, they can be represented by uploading an audio-visual material in MP4 format, this document also showing that at this time only Hungary and Latvia have expressed their opinion on possible acceptable formats for representing the multimedia trademarks[18], which again shows the very long distance up to the harmonization of European-wide practice on with respect to this type of marks. It is also established that the uploaded video materials cannot exceed 20 MB[19]. It is noteworthy that the materials have no limitations in terms of their duration. It is true that file size delimitations are, in fact, a time limitation, but this is not an accurate one, a lengthier video material of poorer quality having the same dimensions as a shorter one but having a better-quality image. We insist on this issue, because, from our point of view, the lengthier a multimedia trademark is, the more its distinctive character may be affected, given that it would be more and more difficult for a consumer memorise it, or retain its message. Moreover, even new types of trademarks, including the multimedia trademarks, in order to be registered must comply with the conditions laid down in the *Sieckmann* judgment, namely to be clear, precise, self-contained, easily accessible, intelligible, durable and objective[20]. We are of the opinion that a video, the longer it is from the point of view of its duration, the harder it is to meet these conditions.

As regards the Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing Delegated Regulation (EU) 2017/1430, it does not provide any provisions on multimedia trademarks.

On the basis of the above, it follows that multimedia marks are therefore combinations of sounds and images. Thus they could consist of a fairly wide range of trademarks themselves: first of all traditional trademarks, whether word marks, figurative or combined, sound trademarks, three-dimensional trademarks, motion trademarks, color marks and so on. Or, being signs that combine such a wide range of elements, we consider that they are likely to raise a number of practical questions.

To this end, we are looking forward to EU IPO's rendering of the first opposition decision involving a multimedia trademark. The registration of EUTM 017961198 THUNDER BALL consists of a 7 seconds clip, where initially the name THUNDER BALL is depicted, along with the appearance of an animated thunder, and at the end of an animated blue sphere with a thunder inside. The mark also consists of the sound of a voice saying "THUNDER BALL":


[16] Article 3 para. (3) letter (i) of the COMMISSION IMPLEMENTING REGULATION (EU) 2018/626 of 5 March 2018, laying down detailed rules for implementing certain provisions of Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing Implementing Regulation (EU) 2017/1431, published in the EU Official Gazette of June 16, 2017;

[17] https://euipo.europa.eu/knowledge/mod/scorm/player.php?a=2501&currentorg=&scoid=7396&sesskey=JaHqNCHw5X&display=popup&mode=normal;

[18] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/768538/en-common-communication - 2018.pdf;

[19] https://euipo.europa.eu/ohimportal/en/trade-marks-examples;

[20] Judgement of the European Court of Justice of December 12, 2002 in the matter C-273/00;


This mark was opposed based on the following UK national trademark registration:


Regardless of the outcome of the opposition, the EU IPO's decision and reasoning will certainly be an interesting read.

In its chapter regarding the assessment of distinctive character, the EU IPO Practice Guidelines describes the multimedia trademarks as follows: *a multimedia mark is a trade mark consisting of, or extending to, the combination of image and sound. The term 'extending to' means that these marks cover not only the combination of sound and image per se but also combinations that include word or figurative elements* [21].

Therefore, what we consider as specific to this type of trademark is that it represents a possible combination of elements that in turn can be non-traditional trademarks, as will be explained below.

Multimedia trademarks are the natural consequence of diversifying the technical possibilities of creating a trademark deposit. As regards the EU IPO, this development began with the difficulties of registering sound trademarks, where the fulfillment of the graphic representation requirement raised difficulties for certain trademarks that could not be reproduced on the portative. We will summarize, briefly, the evolution of the representation of the sound trademarks before the EU IPO.

Concerning the graphic representation of these signs, in line with the current practice of OSIM and the EU IPO, it was emphasized that a trademark, as long as it can be represented on the portative, fulfills the condition of susceptibility to graphic representation[22].

There are, however, sounds which, although they can be considered distinctive, in the sense that a consumer makes a direct connection with the commercial origin of the goods or services they designate, cannot be represented in the form of a portative. We have mentioned above that Metro-Goldwyn-Mayer wanted to register the famous lion roar as a trademark at European Union level and how that mark was refused, one of the reasons being that the graphic representation of the mark does not allow the public to perceive that sound[23].

Although filing an audio file would be more conclusive, such a practice could not at this time be categorized as a graphical representation of the sign. One of the most relevant decisions from this point of view was Case C-283/01 *Shield Mark*, where it was established that a sound trademark can be constituted only by a sound susceptible to graphic representation, and that its representation must be clear, precise, self-contained, accessible, intelligible, durable and objective. As a consequence, onomatopoeias, animal noises or other sounds that cannot be represented graphically were excluded from protection[24].

In 2005, a first step was taken by the decision of the President of OHIM (at that date) on the electronic filing of sound trademarks, which established that it is possible to upload an MP3 document, having a maximum size of one Megabyte. According to this decision, loops and / or streams are not allowed[25]. The first European mark registered by this procedure is European trademark no 004901658 on behalf of INLEX IP EXPERTISE, where the audio file can be downloaded directly from the trademark file of the EU IPO database[26].

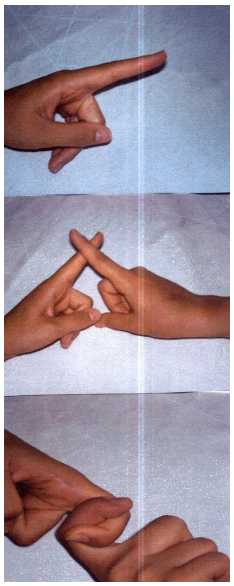
Another interesting case is the attempt to register Tarzan's cry of Edgar Rice Burroughs, Inc. We quote from the EU IPO press release of 5 November 2007 (at that time OHIM) on the efforts to register this trademark, summarizing the above developments: *We all know that Tarzan of the monkeys, the character created by American novelist Edgar Rice Burroughs, has a distinct cry (...). Over the years, (...) OHIM (...) received three requests to register this appeal (...). The first application, in February 2004, included a graphical representation of the call. It was refused by the OHIM examiners on the grounds that it did not comply with the requirement that the graphic representation of the mark should be clear, precise, self-contained, easily accessible, intelligible, durable and objective and concise. The independent Boards of Appeal confirmed the examiner's objection on 27 September 2007. (...) However, a second application for the musical notation, also made in February 2004, was accepted for registration because it complied with the above formalities and "the cry" which he described was considered to be distinctive. In addition, a third*

[21] EU IPO Practice Guidelines, https://euipo01app.sdlproducts.com/819173/720967/trade-mark-guidelines/16-motion--multimedia-and-hologram-marks;
[22] Viorel Roș, Octavia Spineanu-Matei, Dragoș Bogdan, *Op.cit.*, p.81;
[23] EU IPO's refusal decision regarding EUTMA 000143891 issued on 29.09.199, pg. 1;
[24] WIPO - Smell, Sound and Taste – Getting a Sense of Non-Traditional Marks, http://www.wipo.int/wipo_magazine/en/2009/01/article_0003.html;
[25] Art. 4 para. 2 of Decision no. EX-05-03 of the President of the Office of October 10, 2005 regarding the online filing of sound marks;
[26] https://euipo.europa.eu/eSearch/#details/trademarks/004901658;

*request, made in May 2006, which combines a sonogram with an MP3 sound file, is currently being examined. This was possible through a change in legislation in 2005, which means that the Office is capable of accepting sonograms provided they are accompanied by an MP3 audio file at the time of filing.* It is also reiterated the increased interest in such trademarks in the market, the availability of the EU IPO to sound trademark registration as well as the need to adapt the protection conditions to the development of technological possibilities[27].

On the same line of development, we may consider that the emergence of multimedia trademarks was also the result of the difficulties of graphic representation of trademarks such as, for example, motion trademarks.

Motion trademarks consist of a series of two-dimensional images that, if succeeded by a certain frequency, give the feeling of movement[28]. An example of this is the national trademark no. 080630, registered as a motion trademark, consisting of successive images of the disposal of fingers of a hand:



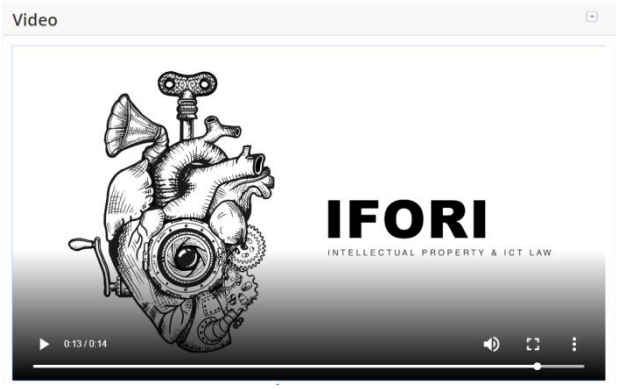
However, by means of multimedia trademarks allowing to represent motion and hologram trademarks by means of the availabe technology, such a movement can now be rendered *per se* and not only suggested by a series of images in which the position of its elements is altered, since it is possible to represent the motion, holograms and multimedia trademarks before the European Office via video files.

## 4. The distinctiveness of multimedia trademarks

The practice of the Alicante office has been generous to these trademarks. At the time of writing this paper, 21 trademark applications have already been filed, of which 13 have already been registered

In fact, the EU IPO Practice Guidelines mentions, in the case of multimedia trademarks, that: in the absence of relevant case-law, the general criteria for the assessment of distinctiveness will apply to these marks. The mark will be distinctive within the meaning of Article 7(1)(b) EUTMR if the sign can serve to identify the product and/or services for which registration is applied for as originating from a particular undertaking, and thus to distinguish that product/service from those of other undertakings. This distinctiveness will be assessed by reference, first, to the goods or services for which registration is sought and, second, to the relevant public's perception of that sign. These marks will not necessarily be perceived by the relevant public in the same way as a word or figurative mark (our underlining) [29]. Or, we consider this last sentence to be essential in terms of the distinctiveness of the multimedia trademarks.

The first multimedia trademark applied for registration before the EU IPO was EUTM 017279704, a trademark designating intellectual property services and legal services in Class 45. This mark consists of the stylized representation of a moving heart, from which various other visual elements emerge, from a sound representing heart beats and the text IFORI INTELLECTUAL PROPERTY & ICT LAW:

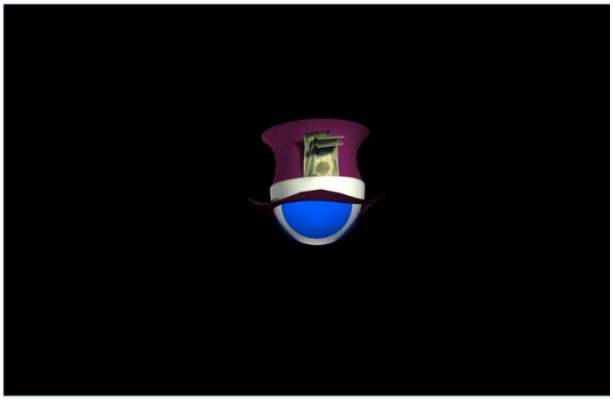



The mark has been registered without any objection to its distinctiveness.

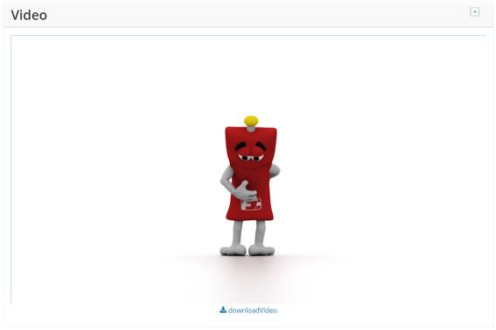
Another trademark that we find interesting is EUTM 017411315, registered, among others, for games similar to gambling. It consists of a topper that falls from a ball in the shape of a dice, a topper that has attached some paper bills, all this movement being accompanied by a drum sound, like the one who creates suspense before a draw. This mark successfully passed the examination on absolute grounds, probably on considerations that, although it contained a number of

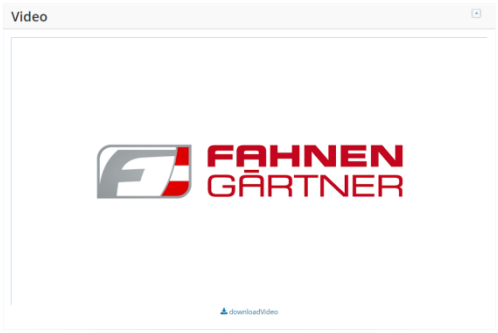
[27] OHIM's press release CP/07/01 of November 5,2007, General Affairs and External Relations Department;
[28] Ștefan Cocoș, *Op. cit.*, p. 82 și urm;
[29] EU IPO Practice Guidelines, https://euipo01app.sdlproducts.com/819173/720967/trade-mark-guidelines/16-motion--multimedia-and-hologram-marks;

evocative elements of gambling, their combination was considered to be only allusive and "creative" enough to confer distinctiveness:



However, by analyzing other multimedia marks accepted by the Alicante Office, we cannot fail to notice that, through them, the advertising function of a trademark becomes increasingly important. Thus, if trademarks are generally directly applied to marketed products, non-traditional trademarks in general and multimedia trademarks in particular are often encountered by consumers separately from the products or services they designate. To this end, the doctrine noted that the advertising role of a trademark is rather linked to the *originality* of the mark itself, by the ideas and impression it raises to the public, its attraction, thus becoming an autonomous element of the commercial success thereof[30]. Or, if we take a look at trademarks such as trademark no. 017451816, it does not move away from a possible advertising spot: it begins with a character waving its hand, taking a bow while ovations and applause are heard in the background, the final sequences showing the animated logo of the trademark owner:



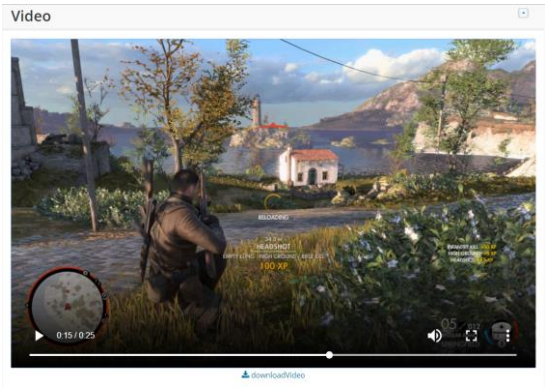




We ask ourselves, looking at this material, what is the scope of protection for the trademark represented through this video material? The red character? The combined trademark depicted at the end of the video? Both? In the latter case, this trademark has a scope of protection that, traditionally, could have made the subject of several trademark applications. The answer to this question is important because it will subsequently determine issues such as its opposability to other subsequent trademarks or, for example, what constitutes effective use thereof if it is challenged in order to remain valid.

In fact, the more complex the uploaded video material is, the more complicated we find it to assess the extent of its scope of protection as a trademark.

We take another example to this end, in respect of which the examination procedure has not yet been completed. It's EUTM no. 01728220, consisting of sequences from a video game, where the track of projectiles gone from what appears to be a sniper's weapon is followed, and the way they reach their human targets. Going beyond the possible objections based on public policy considerations, these images being able to overcome the tolerance of violence, even for the target audience, namely consumers of video games, we believe that this mark could also raise questions regarding its distinctiveness. To give a picture of this 25-second video, we've provided some screenshots of this trademark below:


[30] Yolanda Eminescu, *Regimul juridic al mărcilor*, Lumina Lex Publishing, Bucharest, 1996, p. 27;



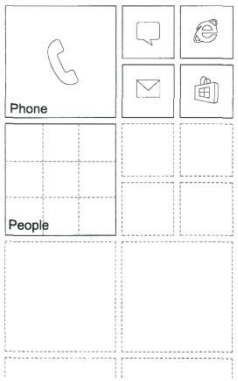


Again, it is quite difficult to imagine what could be the extent of protection for such a mark in the event it is registered. We quote an article that, although does not originate from a specialized source of intellectual property, being a website dedicated to video games, is edited by a specialist in the field and provides an interesting insight into the breadth of the protection of a multimedia trademark. This article highlights the fact that multimedia trademarks can revolutionize the means of protection for so-called *game mechanisms*, which are difficult to protect because they squeeze between different types of intellectual property rights: patents are often not applicable because the condition of novelty is difficult to fulfill, and methods are exempted from patent protection, copyright protects the source code, images, movies, but not ideas or game mechanisms, and industrial designs protection is limited to the external shape of a product. That's why, video game *cloning* is a common phenomenon[31].

However, we are of the opinion that the protection of ideas should not be subject to trademark protection, and that the multimedia trademarks should not be used to obtain a monopoly in that direction. It is to be taken into account that these images are obtained once the game is played, so not at the time when a consumer makes his choice and therefore are not meant to indicate a commercial origin.

Also, starting from this trademark application, the problem has arisen in the same recent EU IPO-hosted webinar[32], if the interface of a computer program could be registered as a multimedia trademark. There is no clear answer yet, and the practice is in far too early stages to give a solution. Although, of course, such situations are to be examined on a case-by-case basis, it is not necessary to overlook the purpose of a trademark, namely to indicate the commercial origin of a product or service, and not to monopolize certain ideas or creations.

An interesting example in this regard is the attempt by a well-known software company that tried to gain protection for its operating system interface. Thus, it applied for registration the EUTM no. 011752863, for specific products related to the computer program interface:




This trademark has been refused, and the applicant did not successfully appeal the decision. In maintaining the rejection decision, the Board of Appeal noted that the arrangement of the multi-square interface is common for mobile phones or tablets, so that it is not meant to indicate the commercial origin of the designated products. Thus, such an interface can be registered as a trademark only to the extent that it is capable of attracting public's attention and of indicating the commercial origin of the product.[33].

However, there are cases where protection for multimedia marks has been refused. For example, the European multimedia trademark no. 017889338 whose claimed figurative element is the '€' symbol, has been refused registration and is now pending appeal proceedings. We continue the hard work of talking about multimedia marks in a written work, but we will try to overcome this obstacle through its verbal description, accompanied by screenshots. Basically, this trademark consists up of a colored circle, placed on a black background, the size of which changes in a pulsation motion. Also, its color changes at intervals. In the middle of the circle are displayed different values, followed by the symbol "€". At the end of the video, the sound of 3 bells is heard:

[31] https://www.gamesindustry.biz/articles/2018-02-19-multimedia-trademarks-kill-cloners;

[32] https://euipo.europa.eu/knowledge/mod/scorm/player.php?a=2501&currentorg=&scoid=7396&sesskey=JaHqNCHw5X&display=popup&mode=normal;

[33] Decision of the EU IPO's Fifth Board of Appeal of November 7, 2014;

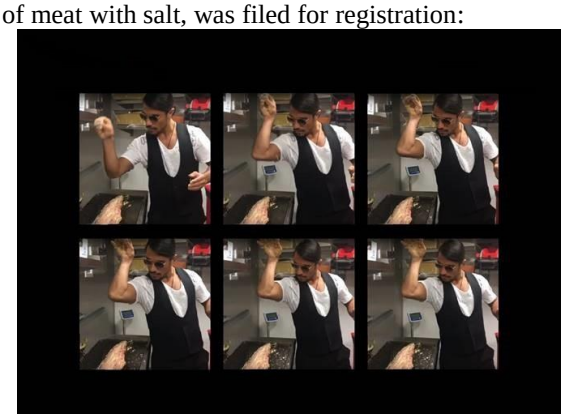

The initial test of the refusal is not available in the EU IPO electronic database. However, it is clear from the decision that this refusal was issued for the infringement of Article 7 (2) of the European Trade Mark Regulation, namely for lack of distinctive character. A thing that we recognize as interesting for a trademark consisting of visual elements, dynamic elements, colors, words and even sounds.

Despite this, the Office starts to argue that the trademark does not contain any verbal elements which could serve to identify the commercial origin of the designated goods / services. As for the number sequence, negative when the fund is red and positive when it is green, the office asserts that it is usual in commerce to reflect amounts, so they are not an element of identification. The amounts shown in the video can be used in connection with any product or service. The presentation of these elements is common and the form of presentation of the number sequence consisting of colors and sound elements is not sufficient to offer the mark distinctive character[34].

We chose this example to highlight the fact that, in our opinion, with regard to these types of trademarks, the test of distinctiveness appears to be more rigorous than for other traditional trademarks. Moreover, the fact that the trademarks are composed of a combination of several elements in themselves unusual for a trademark does not in itself confer distinctiveness for the mark. We therefore reiterate the conclusion that it is not the originality of the manner the elements are combined that is the one that takes precedence in appreciating the distinctiveness of the multimedia trademark, but the analysis of the perception of the sign as a whole.

Therefore, we believe that for these trademarks, the distinctiveness test will move from the realm of the analysis of the trademark – product – consumer trinomial and will rather concentrate on its ability to indicate a certain commercial origin. The objection of the Office in the example above is also analyzed among these lines. Thus, although it does examine the constituent elements of the mark, their combination and their distinctiveness in relation to the goods and services designated, the way in which the mark as a whole is capable of indicating a commercial origin seems to have more weight in the overall assessment. What is perhaps natural, since these types of trademarks are often not attached to the designated goods or services.

In fact, we consider that what is being analyzed is the overall message transmitted by such video material at a higher abstraction level than for traditional trademarks, so that the eventual distinctiveness of component elements is lost in what the trademark transmits overall. An example that we find interesting about this is referring to a trademark that, although it is a motion trademark, the basis for its partial refusal may also be applicable to multimedia trademarks. EUTM no. 016433369, consisting of a cook that spices a piece of meat with salt, was filed for registration:



Although the applicant argued that the way the chef spices that piece of meat is far from being a common one, explaining in detail every movement known as the "saltbae" technique belonging to the cook Nusret Gökçe, the Board of Appeal did not find this as a convincing argument. It held that this mark essentially consists of the image of a chef who seasoned a piece of meat with salt, the way he moves his hand not being of the essence of the mark. Therefore, the image of a chef who performs a banal act in the kitchen cannot be distinctive for some of the services designated under the trademark, so that the mark cannot fulfill its essential function[35]. It is interesting to see that what the Board of Appeal has examined has been the overall message of the trademark, abstracted, without giving a significant importance to other creative elements of te motion trademark.

[34] EU IPO's Decision of 13.09.2018 on the refusal of EUTMA. 017889338;
[35] Decision of EU IPO's Fifth Board of Appeal of June 8, 2018, in the matter R 2661/2017-5;

## 5. Conflict with other intellectual property rights – copyright

Specific to some types of non-traditional trademarks is the fact that some of them are more likely to interfere with possible protection for other categories of intellectual property rights.

A good example of this is the three-dimensional trademark, where the shape of a product or packaging is traditionally the subject of industrial design protection. It would appear, at first sight, that a right-holder has a choice between two possibilities, namely to register the shape of his product both as an industrial design or as a trademark. The doctrine considered that although the industrial design appeared to have a *competitor*, namely the three-dimensional trademark, it must not be forgotten that although the trademark appears to offer a preferable protection, at least by the fact that the protection is unlimited in time, the possible objections to the registration of a a three-dimensional sign as a trademark makes this a solution to be chosen only when that shape has the ability to distinguish the commercial origin of the designated product. Thus, an important point is emphasized, namely the need to synchronize the marketing strategy with the strategy of protection of intellectual property rights, since the acquired distinctiveness is proved by intensive use, whereas protection through industrial design registration implies the novelty as a condition[36].

Thus, the role and function of each means of protection must be taken into consideration: if a trade mark has the role of determining the commercial origin of products and services, industrial designs have the function of protecting the aesthetic appearance to a product[37]. In other words, the trademark protects the consumer against the risk of confusion, as long as the industrial design protects the product itself.

It should also be emphasized that through the imposed prohibitions, the trademarks law seeks to limit the cumulative protection of three-dimensional marks with other intellectual property rights, such as patents (when the form of the product is necessary for a technical result) or copyright (for forms which give a substantial value to the product)[38].

After the expiry of a certain patent, however, by prohibiting the registration of a three-dimensional sign consisting of a form necessary to obtain a technical result, it is also intended not to establish a monopoly by registering as a trademark on that shape. This would partly circumvent the legal provisions on the limited protection in time of the patent by monopolizing as a trademark a certain shape relevant from a technical perspective[39].

Reverting to the multimedia trademarks, the most likely overlap is copyright protection. However, with regard to this overlapping, the prohibition to exclude from protection those shapes which give substantial value to products has a low relevance, and may be applicable only to potential situations in which the multimedia trademarks contain the image of the designated product. Originality in the case of multimedia trademarks may consist of the way in which their elements are combined. Therefore, the overlapping of the two types of rights is more likely.

If, with regard to overlap between trademarks and industrial designs, the conditions for protection can be delimited with some clarity, the boundaries are not very clear when it comes to the intersection of multimedia trademarks and copyright.

With regard to the protection of copyrights, the condition of their protection is originality, which, without going into discussions about the objective and subjective conceptions about it, is generally defined in the continental legal system as *the personal footprint the author gives to his work* and, moreover, it is presumed, so that the infringer has the burden of proving, on a case-by-case basis, that the violated work is not, in fact, original[40].

However, although distinctiveness and originality are different notions, with different purposes, overlaps between them are not negligible. Most of the time, distinctiveness derives from a creative process, like the one behind the original creation. Elements of originality can also be found in traditional trademarks, in their figurative elements, or in non-traditional trademarks such as sound trademarks. Even more so, in the case of multimedia trademarks, which consist of combined sounds and images in a way so that they may be original.

The importance of this intersection is also due to the fact that copyright protection is spontaneous, starting with the creation of the work, while industrial design protection (with the exception of the unregistered European designs under certain conditions) or trademark protection depend on the choice of its holder to take the necessary steps to apply for registration.

Faced with these developments, the following issues, raised over time by jurisprudence and doctrine, go back to the present: circumventing the limited term of protection for copyrighted works by registering them as trademarks and the possibility or the impossibility of registering as a trademark the works fallen in the public domain, which we will especially analyze.

Regarding the registration as a trademark of works that fell into the public domain, the EU IPO

[36] Ekkehard Stolz, Relația dintre protecția modelelor și mărcile comerciale, Revista Română de Dreptul Proprietății Intelectuale, no. 2 / 2008, p. 55-56;

[37] Viorel Roș, Octavia Spineanu-Matei, Dragoș Bogdan,Op.cit., p.52;

[38] Idem, p.53-54;

[39] Ștefan Cocoș, Op. cit., p. 56 și urm;

[40] Viorel Roș, Dreptul Proprietății Intelectuale. Vol.I. Dreptul de autor, drepturile conexe și drepturile suis-generis, C.H. Beck Publishing, Bucharest, 2016, p. 210-217;

Guidelines does not seem to exclude this possibility. For example, in the case of sound trademarks, the Guidelines enumerates so-called sounds from the public domain, such as Beethoven's Für Elise, which may be registered as trademarks if the proprietor proves the distinctiveness acquired on the market[41]. Moreover, through a decision that triggered the criticism of part of the doctrine, EU IPO accepted, in 2017, the registration of the EUTM no. 016613903, on behalf of a known Intellectual Property Agency, consisting of the Rembrandt Harmenszoon van Rijn's painting *The Nightwatch*:

That law firm continued its "experiment" before the Benelux Office for Intellectual Property, which rejected the trademark, a decision maintained by the Hague Court of Appeal, which, in addition to the lack of distinctive character of the trademark due to the fact that it is a well-known work which may not indicate the commercial origin of a product, it held that the applicant has no interest in requesting this trademark for registration. The Benelux Office also claimed that the registration of such a trademark would be contrary to public policy, being unacceptable for a company to obtain protection in respect of a good belonging to the cultural heritage by applying the law on trademarks[42].

Can we, however, consider the acquired distinctiveness to be sufficient to register a mark in spite of a public interest, perhaps greater?

In this regard, the *Shield Mark* judgment is not representative only for determining of the registration conditions for trademarks. The opinion of Advocate General Ruiz-Jarabo Colomer of 3 April 2003 contains a final remark which, although going beyond the framework of the questions referred, raises questions as to the possibility of registering works fallen in the public domain as trademarks: *it must not be overlooked that the sound signs which Shield Mark claims as being in its exclusive ownership are a cockcrow and the first notes of what is perhaps the best-known piece for piano in the history of music, a work by one of the great composers, whose genius was quickly recognized by the other composers of his day (…).Two points must be made. First, there are considerations of public interest that militate in favor of limiting the registrability of certain signs to enable them to be freely used by all traders. The theory of the need to keep certain signs available has been evaluated by the Court of Justice in its judgments in* Windsurfing Chiemsee *and* Philips. *I find it difficult to accept that individuals may, by means of a trade mark, perpetuate exclusive rights in natural indications and signs or those that are a direct manifestation of nature. I find it more difficult to accept, and this is the second refinement, that a creation of the mind, which forms part of the universal cultural heritage, should be appropriated indefinitely by a person to be used on the market in order to distinguish the goods he produces or the services he provides with an exclusivity which not even its author's estate enjoys*[43].

Another interesting decision in this respect is the one issued by the EFTA Court, whose role is the interpretation of the Treaty on the European Economic Area. The context in which this decision was issued was Oslo Municipality's application for registration of trademarks consisting of works that were to enter the public domain under Norwegian law, including the works of Gustav Vigeland, one of the most important Norwegian sculptors. Some of these requests have been refused entirely or partially. At the appeal stage, the Board of Appeal, following the ruling of the German Federal Court of Inventions in the Mona Lisa case, raised the question of whether, if well-known works of art are refused registration on grounds of lack of distinctiveness, raises the possibility of obtaining protection by proving the acquired distinctiveness, allowing, at least theoretically, any undertaking to obtain the trademark registration of a valuable work. On the basis of this issue, the Board of Appeal sent EFTA a preliminary question asking whether the trademark registration of works of art whose copyright period has expired may be rejected as trademarks contrary to public policy and morality, and if such rejection is conditioned by the well-known character or the value of the work.

In its recitals, the Court held that:

The term of copyright protection serves the principles of legal certainty and the protection of legitimate expectations, providing a pre-established timeframe, after which anyone can use the *creative content* of others. Considerations of the public domain serve, to a certain extent, the general interest in protecting the mind's creations from *commercial greed*. *The public domain entails the absence of individual protection for, or exclusive rights to, a work. Once communicated, creative content belongs, as a matter of principle, to the public domain. In other words, the fact that works are part of the public domain is not a consequence of the lapse of copyright protection. Rather, protection is the exception to the rule that*

[41] https://euipo01app.sdlproducts.com/819173/720963/trade-mark-guidelines/15-sound-marks;
[42] http://www.chiever.com/uncategorized/nightwatch-trademark-application-rejected/;
[43] Opinion of Advocate General Ruiz-Jarabo Colomer of April 3, 2003 in the matter C-283/01 Shield Mark BV v. Joost Kist;

*creative content becomes part of the public domain once communicated.* The Court also notes that the interest in rescuing the public domain is superior to individual protection or exclusive rights to the work that is the subject of a possible trade mark. Referring to the question referred to it, the Court emphasized that, in order to be applicable to that ground of refusal, it is not necessary to consider only the situation in which that mark is contrary to public policy but whether the very act of registration of such a trademark would be equivalent to a trademark removal in the public domain, is contrary to public order. This should be considered on a case-by-case basis. Thus, the Court concluded that the answer to the first three questions is that registration of a sign consisting of works for which copyright protection has expired as a trademark is not in itself contrary to public policy or to principles of morality. If registration of signs consisting of works of art as a trademark can be refused on the basis of the principles of accepted morality, it depends, in particular, on the status or perception of the relevant works of art in the relevant EEA State. The risk of misappropriation or profanity of a work may be relevant to this assessment. Registration of a sign can be refused only if the sign consists exclusively of a work belonging to the public domain and if the registration of that sign constitutes a genuine and sufficiently serious threat to a fundamental interest of society[44].

## (To early for) Conclusions

*Starting from the mere trademark definition, the registrability of nontraditional trademark encountered serious obtacles to registration mainly due to the condition that a trademark should be rerpresented graphically. However, the changes brought by the EU legislation brought a fresh perspective on trademark registrability, and multimedia trademarks were created. Nevertheless, many steps are yet to be taken until the practice with respect to this type of marks will be harmonized at EU level, considering that now EU member states will need to find their own solutions for the purpose of implementing their new ways of representing non-traditional trademarks.*

*The complexity of such signs will probably create a very diverse practice with respect to assesing the distinctive character of such trademarks and to their enforcement. In these early stages, one can only anticipate that that the distinctiveness assesment will focus on the overall message and concept transmitted by the trademark.*

*As for the potential overlap with copyright, an important issue that we see is the potential registration of works fallen in the public domain. To this end, the courts will need to assess wether transferring the cultural meaning of a short movie to a commercial one is acceptable, or it would represent a cultural impediment, considering that a monopoly established through trademark rights could represent a potential censorship of derivative work.*

*In any case, these recent changes represent, for sure, a new era in trademark protection, and we certaily look forward to practice developments.*

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# TEXT AND DATA MINING EXCEPTION - TECHNOLOGY INTO OUR LIVES

**Monica LUPAȘCU***

**Abstract**

*Since 2016, when the Copyright Reform Directive (Directive in the Digital Single Market) had been proposed for adoption, two major versions of the text were under examination and negotiation in the European Parliament. The comparative study of those two legal texts proposed allowed a more comprehensive understanding of the provisions' scope as well as of the different public interests that sustained the recently introduced exceptions. This paper focuses on interpretation of the proposed provisions of text and data mining exceptions by mostly explaining the technical concepts involved. The text and data mining exception has a very important place between the proposed legal texts since its corresponding provision addresses some new type of uses that should be understood in a technological context and have the potential to affect our lives.*

**Keywords:** *data-mining, copyright exceptions, Copyright Reform, public interest, technology, Big Data,*

## 1. Introduction. The need to know the technical implications of data-mining in the context of the new copyright changes

This paper aims at presenting the content of the text and data mining exception from a comparative perspective, showing the provision proposed in 2016[1] in parallel with the one adopted[2], to highlight some of the main changes made within its content, namely: (i) the ones regarding the expansion of the sphere of beneficiaries, (ii) modification of the automatic analysis sphere, following which data mining will function over "works and other subject matter", (iii) expanding the analysis scope, by highlighting the fact that the information generated through the process of data mining will not need to be limited to "trends, patterns, and correlations".

Without doubt, these changes would be relevant to be studied from the perspective of the interests that generated them, but before we can study the extent to which an exception can or cannot support public interests, as it is normally and naturally determined by the concept of "exception" itself and in relation to the position that the exception has as a norm, we will focus on the importance of the technical details involved, since this paper incorporates a lot of technical explanations that will translate the relevant terminology.

In addition to the importance that the technical explanations will demonstrate in relation to the study of some of the abovementioned modifications, these will also facilitate the understanding of the exception as a whole and the value it has in the general legislative framework, and not only as a part of what was called "Copyright Reform" at a European level. To identify just one example, as we will show, "data mining" is not limited only to pattern extraction or, even if it will be understood exclusively in relation to pattern recognition[3], the implications of such an assessment brings the process itself closer to artificial intelligence, and this will certainly have its say in appreciating the way in which the expansion of the beneficiary sphere can be understood, indeed as supporting public interests or, on the contrary, certain private interests.

On the contrary, omitting to study the exception by relating to as profound and correct of a study of the technical details involved in data mining, risks limiting the interpretation, the application sphere being incomplete or even completely misunderstood. The example of the erroneous translation of the Romanian version is a small one, yet edifying, the exception of the text and data mining being translated as "extraction of text and data", a title that contradicts not only what the usage within the industry defines as text and data mining, but even the very provisions of the Directive which define the activity itself[4]. The similarities with extraction of text and data, even if they exist from a semantic point of view, do not explain the activity of data mining, the extraction at all, though it exists, concerns a completely different object, with an aim to generate completely different information to the data on which the process of data mining is performed (namely, certain patterns, correlations, etc.). Without advancing too far with the details of the following

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[1] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Copyright in the Digital Single Market - https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0593:FIN

[2] http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2019-0231&language=EN&ring=A8-2018-0245#BKMD-16

[3] Pattern recognition - an introduction to data mining https://www.dataiq.co.uk/articles/articles/marpattern-recognition-introduction-data-mining

[4] art.2 paragraph 1, point 2 of the proposed Directive:

"text and data mining means any automated analytical technique aming to analyse text and data in digital form in order to generate information such as patterns, trends and correlations" recital 8 of the proposed Directive:

"those techniques allow researchers to process large amounts of information and to gain new knowledge and discover new trends"

chapter, we only mention that the wrongful interpretation of the process as "data extraction" takes the reader towards completely different activities, such as data analysis[5], there being some significant differences[6] between that and data mining.

In any case, this paper aims at studying the exception from the perspective of the technology involved, without insisting over some personal opinions, which, even if they could be inferred from subsequent interpretations, do not represent an objective in itself, their role being rather informative, the study being presented as a start for a future and more complex approach of the same subject not only from the standpoint of the new Copyright Directive, but also of the Directive regarding databases, the new Regulation[7] regarding the protection of personal data, as well as of the Commission's communications in the field of Artificial Intelligence[8].

## 2. Technical details about text and data mining

What does "**text and data mining"** actually mean? The Romanian version of the Directive's proposed text, mentions exclusively **the extraction of text and data**, which would sound, at least for a connoisseur of copyright, quite similar to the terminology that identifies the permission to use short extracts from works. This would not be hard to understand, because "mining" identifies, indeed, the action of "extracting", "removing", "taking over", in a broad sense – "separation of a substance from a compound". And yet, even if perceived exclusively as an individual term, neither "mining", nor its activity of "text and data mining", is not resumed to just that, a complete interpretation leading to concepts such as "exploitation", "transformation", and even "the release of some ideas or conclusions from a set of facts."

In fact, the technical details of data "mining", highlight, clearly, the fact that the main purpose of this activity is not the data itself, the process of extraction, although it operates on them, regards, in fact, **the patterns and corresponding knowledge** of this data, and not the data itself[9].

Specialized literature tends to equate data the mining of data to its exploitation, to further highlight the analytical and transformative process that is the foundation of this activity. The difference between the simple analysis of data and the exploitation of data (data mining), also mentioned in the introductory chapter, is that "data analysis" is used to test models and hypotheses on the data set in question, for example, analyzing the efficacy of a marketing campaign, regardless of the quantity of data, however, data mining (also known as "data exploitation") uses models of automated learning and statistics to discover **clandestine or hidden models** in a high volume of data. The analysis process and the purpose of each one is, therefore, different, the **main task**[10] **being the semi-automatic and automatic analysis of large quantities of data**[11] **in order to extract previously unknown, potentially useful patterns from databases**[12]**, such as data records (cluster analysis), unusual records (anomaly detection), and connections between data (association rule mining, sequential pattern mining).**

Although a definition can be identified, including relating to what the European law has defined as being this process, "text and data mining" represents an operation fairly hard to appreciate in relation to other technological processes that work in the pattern sphere, of generating new knowledge or predictabilities, being often presented as an expression used interchangeably to also define "pattern recognition", "knowledge discovery" in databases (KDD), the abovementioned "data analysis", "artificial intelligence", and even the entire field of "data science". The differences between data mining and each of the aforementioned processes exist and, nevertheless, using data mining to designate other technological phenomena is not exactly a mistake, because such operations merge with each other, most often, being even difficult to delimit. Without a doubt there are works that have established differentiating elements, useful for both the industry, as well as for the study of the phenomena in question and implications, for example, it is stated that pattern recognition, although aiming at the same purpose as data mining, represents, along with machine learning, a

[5] "The difference between data analysis and data mining is that data analysis is used to test models and hypotheses on the dataset, e.g., analyzing the effectiveness of a marketing campaign, regardless of the amount of data; in contrast, data mining uses machine-learning and statistical models to uncover clandestine or hidden patterns in a large volume of data." - Olson, D. L. (2007). Data mining in business services. Service Business, 1(3), 181-193. doi:10.1007/s11628-006-0014-7

[6] https://www.educba.com/data-mining-vs-data-analysis/

[7] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data - https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1532348683434&uri=CELEX:02016R0679-20160504

[8] Artificial Intelligence for Europe - COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS - https://ec.europa.eu/digital-single-market/en/news/communication-artificial-intelligence-europe

[9] It should also be mentioned that, in the general sense, text information is integrated in the data category, being, in other words, a subset of it. Although the legal definition identifies, in the designation of this type of analysis, both "text" (text information), as well as "data", the explanations in this paper will regard, without any distinction, the mining of data, which practically includes the operations of the first category.

[10] https://en.wikipedia.org/wiki/Data_mining.

[11] Big Data

[12] It not being yet clear for most people that "text and data mining" is not just text extractions but, primarily, computerized analysis of information, and that "databases" is not limited to MySQL, but involves any collection of information, user-generated content platforms, for example, being based on such databases, collections with information generated by the activity of the users of such platforms.

supervised method, as opposed to data mining that is presented as being one of the unsupervised[13] ones.

In this context, it must be mentioned that, although data mining represents and activity known and practiced for approximately 20 years with profound implications including in regards to the lives of each and every one of us, and pattern extraction, although previously done manually, is hundreds of years old[14], its regulation and the regulation of technologies associated with this type of data analysis, artificial intelligence and automated data processing, only now knows a sustained approach[15], including by attempting to develop ethics policies[16] in the field of artificial intelligence. For example, the definition of artificial intelligence as it was set out through the Communication[17] of the European Commission, presents such an AI system[18] as being that which analyses the environment[19] and acts, with some autonomy, to reach certain goals[20], which would bring the concept closer to those unsupervised methods of data mining, mentioned above, perceived as being some of the analysis methods with the purpose of extracting patterns and correlations, or other types of knowledge. Of course, there is no equality sign between the two "phenomena", artificial intelligence not limiting itself to pattern extraction, and being able to autonomously act (but, in other words – unsupervised, in an independent manner in relation to other systems, or even with the human admin) to reach a larger, wider palette of purposes, nevertheless, the data mining algorithms are frequently used by AI systems, an operation which in itself represents, sometimes, the main component of such a system. On the other hand, as it's been identified through recent studies[21], the knowledge process of it is specific to both methods, and AI techniques can further augment the ability of existing data mining systems to represent, acquire, and process various types of **knowledge and patterns** that can be integrated into many large, advanced applications, such as computational biology, Web mining, and fraud detection.

But that "knowledge" is more than an abstract concept and the need to understand (to assimilate that knowledge) was transposed into computerized systems for a certain reason. "The traditional method of turning data into knowledge relies on manual analysis and interpretation. (…) The specialists then provide a report detailing the analysis. Be it science, marketing, finance, health care, retail, or any other field, the classical approach to data analysis relies fundamentally on one or more analysts becoming intimately familiar with the data and serving as an interface between the data and the users and products. For these (and many other) applications, this form of manual probing of a data set is slow, expensive, and highly subjective. In fact, as data volumes grow dramatically, this type of manual data analysis is becoming completely impractical in many domains. The need to scale up human analysis capabilities to handling the large number of bytes that we can collect is both economic and scientific. Because computers have enabled humans to gather more data than we can digest, it is only natural to turn to computational techniques to help us unearth meaningful patterns and structures from the massive volumes of data. Hence, KDD is an attempt to address a problem that the digital information era made a fact of life for all of us: **data overload**[22]."

But, perceived in abstract, mining and the data on which it operates, may seem like algorithms willing to perform only on a series of 0s and 1s. From a certain perspective this simplification wouldn't be wrong either, but despite that, we would be far from identifying real mining examples. Indeed, the process itself would not mean anything if we wouldn't be able to appreciate **the environment** in which these types of algorithms function, more precisely, **the data that is now in abundance and that is known, effectively, as the World Wide Web**, an enormous collection of information – the largest database that gathers information (or in which information gathers) in text, video, and audio formats, transposing **works that are protected by copyright or not, personal data, metadata**. This association with databases is not a coincidence, disposing all of the information available online, publicly, and through cloud and intranet systems, being subordinated to databases in which **all of this information is organized** in such a way as to be administrated or accessible to the public in a certain form. The electronic data collections that define the concept of database according to Directive 96/9/EC regarding databases[23], are not limited to those MySQL formats that professionals in the field recognize as

[13] although there are several unsupervised data mining techniques (or predictive) which are appropriate when you have a specific target value you'd like to predict about your data. The targets can have two or more possible outcomes, or even be a continuous numeric value.
https://cloudtweaks.com/2014/09/use-supervised-unsupervised-data-mining/ - the article identifies three supervised data mining techniques classification, regression and anomaly detection those unsupervised being – clustering, association and feature extraction.

[14] Bayes Theorem (of the 1700s) and the regression analysis of the 1800s.

[15] https://ec.europa.eu/digital-single-market/en/artificial-intelligence

[16] https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai

[17] https://ec.europa.eu/digital-single-market/en/news/communication-artificial-intelligence-europe

[18] *Artificial intelligence (AI) refers to systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals.*

[19] The environment being represented, in fact, by the data that the AI system acts upon.

[20] *"analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals"*

[21] https://pdfs.semanticscholar.org/d21a/faeffa895c0a641a5aa64248d2401db5f572.pdf

[22] https://www.kdnuggets.com/gpspubs/aimag-kdd-overview-1996-Fayyad.pdf

[23] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31996L0009

such, being available for all desktop and mobile applications. To give an even more simple example, even if we are used to interact with the interface of a website, in fact, the interaction is made with the collection of information belonging to that website, the access of which, in reality, is called "database access."

So, aside from the private collections[24] of research organisms and institutions, or the collections identified as such, aside from the specialized format, such as MySQL, all online information is accessible within some databases[25], whether we're looking at simple websites, or large user-generated data platforms, or e-commerce websites, news and media outlets, the only difference lies only in the size and content of the database or in the method through which it can be accessed.

Simplification of the multitude of information mentioned previously and which is found in any types of databases, public or private, is part of the mining process, the knowledge it aims towards meaning, practically, the order of some information disposed randomly and provided from different sources, to identify patterns and correlations. The essence of the data -mining is „the Pattern" - that "Consistent and recurring characteristic[26] or "trait" that helps in the identification of a phenomenon or problem, and serves as an indicator or model for predicting future behavior." Futurist and entrepreneur Ray Kurzweil considers pattern recognition so important that in his recent book, *How to Create A Mind*, he argued that "**pattern recognition and intelligence are essentially the same thing.** Expertise, in essence, is the familiarity of patterns of a specific field." A related concept is that of cause and effect[27]. "We expect meaning in the patterns we see because, in a random universe, it takes energy to create order. So when we see a particular pattern, we expect that through investigation we can identify the force that caused it. **That's how we learn new things**." Due to its predictable characteristics[28], patterns are also used to predict some phenomena and behaviors, and reports can be made regarding the extent to which the present databases will be capable of generating others, similar or identical. In fact, in the study "From Data Mining to Knowledge Discovery in Databases", the author stated that „*data* are a set of facts (for example, cases in a database), and *pattern*[29] is an expression in some language describing a subset of the data or a model applicable to the subset." But the relationship between data and patterns, and the fact that the latter transpose real rules for data, doesn't wholly explain what data mining is, because the result being sought isn't limited to restoring some order in chaos or a certain structure in a set of unstructured data set, but, more than that. As it's explained above, through pattern recognition it's attempted to identify causes of that other information that generated the data itself. These examples also explain the transformative process that data is subjected to, following mining there being discovered some hidden patterns and correlations, non-evident through mere analysis, highlighting them creating a completely new perspective over initial data.

From concretely identifying the elements specific to data mining, namely - databases and the type of information that is being operated on, the essential piece of the puzzle that would be missing for an integral perception of the concept, would be the concrete examples of data mining.

If we were to transpose in actuality the hypothesis in which we should understand a part of all that is stored at the level of the Internet, in a type of social media platform (an example of database in which users are the ones generating the information that end up being stored in the database of the platform in question), we should first organize the chaos of comments, photos, likes, discussion groups, and location tracking, group them according to preferences and observe what kind of correlations there are between them. These would be just a part of the possibilities that would make way for other types of information – the knowledge being sought through data mining. The example of the social media platform (Facebook, Instagram) is not coincidental, other very important examples being that of e-commerce platforms (Amazon, eMag), and especially those of large communities – like Flickr, Github, Gitlab, which constitute immense data resources generated by users, the latter two being extremely relevant to open-source development. Businesses that incorporate these services, which generate information (data) or collects it, either through user activity, or by making available some methods of interaction with products or services, are, in fact, the best examples for this paper, because in each of these cases, the providers make use of data mining methods, for all kind of reasons including those that can translate

"For the purposes of this Directive, 'database' shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means."

[24] The term 'database' (...) includes a method or system of some sort for the retrieval of each of its constituent materials. A fixture list for a football league such as that at issue in the case in the main proceedings constitutes a database within the meaning of Article 1(2) of Directive 96/9. The expression 'investment in … the obtaining … of the contents' of a database in Article 7(1) of Directive 96/9 must be understood to refer to the resources used to seek out existing independent materials and collect them in the database.

https://ipcuria.eu/case?reference=C-444/02

[25] More information regarding databases is available in the paper: DATABASES AND THE SUI-GENERIS RIGHT – PROTECTION OUTSIDE THE ORIGINALITY. THE DISREGARD OF THE PUBLIC DOMAIN

https://www.academia.edu/36276259/DATABASES_AND_THE_SUI-GENERIS_RIGHT_-_PROTECTION_OUTSIDE_THE_ORIGINALITY._THE_DISREGARD_OF_THE_PUBLIC_DOMAIN

[26] http://www.businessdictionary.com/definition/pattern.html

[27] https://www.forbes.com/sites/gregsatell/2015/05/01/the-science-of-patterns/#4816ced71900

[28] A pattern is a form or model proposed for imitation. The elements of a pattern repeat in a predictable manner.

[29] https://www.kdnuggets.com/gpspubs/aimag-kdd-overview-1996-Fayyad.pdf

into improving user experience or subordination to various marketing strategies.

Below are examples that also show specific data mining methods used to obtain certain results[30].

"**Cluster Analysis** is a data mining technique that is useful in marketing to segment the database and, for example, send a promotion to the right target for that product or service (young people, mothers, pensioners, etc.). Regression analysis, another data mining technique enables us to study changes, habits, customer satisfaction levels and other factors linked to criteria such as advertising campaign budget, or similar costs. Classification analysis is the data mining technique that enables recognizing the patterns (recurring schemes) inside a database thus allowing us to detect spam and improve your marketing strategy performance. To eliminate any database inconsistencies or anomalies at source, a special data mining technique is used called anomaly detection. To avoid using databases infected by intruders (individual values added by hackers, or even viruses that duplicate the data) it is sufficient to search for the intruders, a data mining technique that decontaminates the database and guarantees greater security for the entire system. Association rule learning is used for all product sale activities, especially when large volumes are concerned. Neural networks is one of the latest data mining applications whereby the means you use for marketing operations, i.e. the computer managing your database, "learns" to identify a certain pattern containing elements with precise relationships with each other. The outcome of this learning is the recognition and storing of patterns that will be useful, perhaps not immediately, but in the future to decide whether and how to pursue a goal. The same neural network can also help to recognize the composition of the product or service target more precisely. The last, essential data mining technique, or better said application, is data warehousing. We are now in the sphere of customer (and not only) profiling, especially regarding Big Data processing. Data warehousing means simplifying your database, extracting the most interesting data about your customers, simplifying the creation of detailed reports and much more besides."

## 3. How does the European law define data mining

The definition given by the Directive in its initial phase[31] (the DSM version proposed in 2016), identified mining of text and data as being **any automated analytical technique that aims at the analysis of text and data in digital form in order to generate information such as patterns, trends and correlations**. This definition has added, in the final form (meaning the version adopted on 26 March, 2019), details regarding the object over which the mining activity will be operated, replacing "text and data" with "**works and other subject matter**" to make even more evident the fact that not only copyrighted information are subject to mining, but also other works (including other "data" not classified as "works" that we can identify as being personal data plus data that is unprotected/unprotectable – still being, for various reasons, part of the public domain).

For a more precise highlight of the modifications from 2016 to 2019 over the exception from the directive, find below a comparative presentation of the text of art. 2, paragraph (2), as it's presented in both versions of the law:

| Article 2 – paragraph 2 point 2 - text proposed by Commission | article 2 paragraph 1 point 2 – adopted text |
|---|---|
| "text and data mining means any automated analytical technique aiming to analyse text and data in digital form in order to generate information such as patterns, trends and correlations;" | "text and data mining means any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations." |

The change made in the adopted text also generated a clear increase in the scope of the mining activity, which no longer limits to patterns, trends and correlations. It's much clearer the fact that the extraction doesn't concern the data itself that the mining will be performed on, **but the previously unknown and potentially useful information of the data stored in databases**[1]. This useful information represents, in essence, **a first component of the knowledge sought to be obtained** as a result of this analysis, which may consist of **patterns**, **trends** and **correlations**, but **not only**, obtained through the application of some techniques such as **classification or characterization**. It's not by accident, as shown above, that the data mining can be confused with the whole process of knowledge discovery, since the data extraction, although just one stage, represents an essential component of the process of "Knowledge Discovery in Databases" (or "KDD"). Going through such a system allows the extraction of the essence from the evaluated information, highlighting the connections between data and even the methods through which some of the data is capable of generating similar ones, as part of a process whose goal is predictability.

The legislation supports a part of these technical explanations that identify data mining as part of a data

[30] https://www.egon.com/blog/666-techniques-data-mining-marketing

[31] https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52016PC0593&from=EN

[1] The text is also supported by the first part of recital 8 ***"Text and data mining makes the processing of*** large amounts of information ***with a view*** to ***gaining*** new knowledge and ***discovering*** new trends possible."

discovery and transformation process, within the recitals of the proposed Directive[2], a relevant role in this context belonging to recital 8 and the following.

In the context of the explanations that the legislator offers regarding the relevance of the new technologies for the automate analysis of electronic data, in the initial form of recital 8[3], it was appreciated that these new types of technologies would allow researchers to process high quantities of data to obtain new knowledge and discover new trends. The researchers are no longer mentioned in the new adopted version of the paragraph, mentioning only that the text and data mining activity allows for the read and analysis of a high quantity of digitally stored data with the purpose of gaining new knowledge and discovering new trends.

The lack of a limitation in the new version of the law creates, in fact, an expansion of the sphere of beneficiaries, **the activity being no longer associated with a certain subject group**. This is also supported by the modification process of recital 5, shifting **from research to innovation**[4], implying, in fact, an expansion of the sphere of beneficiaries.

Another important aspect of the provision is the fact that both versions of recital 8 mention the term of "**process**" or "**processing**", the first mention of its kind that brings **copyright reform closer to the other European initiative regarding privacy**[5] – as data mining and the analysis involved, regardless of the form in which it is perceived and the data on which it operates, **is, above all, data processing**[6], the new Regulation applicable in the field even treating in detail a form of data mining applicable to personal data, namely – **online profiling**[7], defined as being "*any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular* ***to analyse or predict aspects***[8] *concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements."*

An intermediate form of the Directive (from September 2018)[9] which, even not adopted, is important to consider because it brought information to complete the definition of mining as part of a more ample process of interference on data. **The text of** recital 8 a) **provided limitations in exercising the right of text and data mining,** the "**right of access**" to information (lawful access) being mentioned as a condition that needs to pre-empt the activity itself to ensure what the norms called "**content normalization**", meaning the method through which the content's format is changed or it is **extracted** from a database in a **format** that allows the mining of data. The text of this recital 8 a) explained that the process of data mining in itself **does NOT present relevance in the field of copyright**, but, rather the action through which **content is accessed, as well as the procedure through which a certain information is normalized to allow automatic analysis**, so long as this process involves database extraction. So, the exceptions of the text and data mining need to be understood as referring/being applicable (to) **processes relevant to copyright needed for mining**, considered to be, at least according to the paragraph in question, not mining in itself, but "**the right of access" and the right to**

[2] Recitals 5-18 have been identified as being relevant for the new exception of text and data mining introduced through the proposed directive regarding copyright on the digital single market.

[3] New technologies enable the automated computational analysis of information in digital form, such as text, sounds, images or data, generally known as text and data mining. Those technologies allow researchers to process large amounts of information to gain new knowledge and discover new trends. Whilst text and data mining technologies are prevalent across the digital economy, there is widespread acknowledgment that text and data mining can in particular benefit the research community and in so doing encourage innovation. However, in the Union, research organisations such as universities and research institutes are confronted with legal uncertainty as to the extent to which they can perform text and data mining of content. In certain instances, text and data mining may involve acts protected by copyright and/or by the sui generis database right, notably the reproduction of works or other subject-matter and/or the extraction of contents from a database. Where there is no exception or limitation which applies, an authorisation to undertake such acts would be required from rightholders. Text and data mining may also be carried out in relation to mere facts or data which are not protected by copyright and in such instances no authorisation would be required.

[4] If in the initial form of this paragraph, only the "research" (meaning the activity of examination and profound analysis in a certain field made by certain identified entities) was appreciated as representing a public interest solid enough to enforce the implementation of an exception for ensuring a state of equilibrium with the rightsholders, in its revised form, "innovation" joins in as a distinct type of activity, which, although it supposes a smaller scope of actions, being limited by the creation of an improvement, of an added value, can be exercised by any entity, no longer representing a specific of certain entities.

[5] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1532348683434&uri=CELEX:02016R0679-20160504

[6] Art.4(2) of GDPR -'processing' means „any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction".

[7] several other references explain how data mining techniques are used for profiling users of online services: "Using Data Mining Methods to Build Customer Profiles" by Gediminas Adomavicius and Alexander Tuzhilin New York University - https://pdfs.semanticscholar.org/b298/e06b9ee4b3056c68a023035f228527a891a2.pdf

"Customer Profiling and Segmentation using Data Mining Techniques" by Prof. Tejal Upadhyay, Assistant Professor, Nirma University Atma Vidhani, Student, Nirma University

Vishal Dadhich, Student, Nirma University - http://csjournals.com/IJCSC/PDF7-2/10.%20Tejpal.pdf

Data Mining and Internet Profiling: Emerging Regulatory and Technological Approaches by Ira S. Rubinstein, Ronald D. Lee, & Paul M. Schwartz- https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1116728

[8] Follow the technical explanations from the previous chapter to be able to identify data mining as being a method of identification of patterns to predict their repeatability.

[9] https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0337+0+DOC+XML+V0//EN

**reproduction** in a format that allows automatic analysis – "*but the **process of accessing** and **the process by which information is normalised to enable its automated computational analysis**, insofar as this process **involves extraction from a database or reproductions**."* This "**normalization process**" is no longer taken over in its adopted form except as an independent mention within recital 8, but its explanations, as they were expressed in the intermediate form of the directive, can remain valid, because they transpose that which is essential to be studied in the context of data mining operated on data protected by copyright, namely the fact that exceptions work to create a **right of access** and **adaptation**, operations which are implicit to **reproduction and other transformation specific to data mining**.

In any case, even if the form adopted in 2019 no longer takes the full **process description**, the explanations are available, as they describe correct technical explanations, with strict regards to an essential aspect of mining, namely **the data access**, in our opinion implicit, but which, as we will see, will be regulated in a different way within the new articles introduced in the adopted version of the directive, namely art. 3 and 4, texts which represent, in fact, primary provisions in the context of this paper, regulating the new exceptions of text and data mining, through which transposes the permissions to **perform acts of reproduction and extraction for the purpose of data mining.**

| Article 3 – text proposed by Commission | Article 3 – adopted text |
|---|---|
| "Text and data mining<br><br>Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC and Article 11(1) of this Directive for reproductions and extractions made by research organisations in order to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research." | "Text and data mining for the purposes of scientific research<br>Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, and Article 15(1) of this Directive for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access." |
| | Article 4<br>Exception or limitation for text and data mining<br>1. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 15(1) of this Directive for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining.<br>2. Reproductions and extractions made pursuant to paragraph 1 may be retained for as long as is necessary for the purposes of text and data mining.<br>3. The exception or limitation provided for in paragraph 1 shall apply on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their rightholders in an appropriate manner, such as machine readable means in the case of content made publicly available online.<br>4. This Article shall not affect the application of Article 3 of this Directive. |

Aside from the expansion of the sphere of beneficiaries, the first paragraph of art. 3 states that the subjects indicated as beneficiaries of the exception are conditioned by the existence of a "**right of access"** to works and materials over which the computerized analysis will be performed, which contradicts, from a certain viewpoint, what would be specific to mining, from a technical standpoint.

The term of **legal access** imposed as a preemptive condition in this situation, seems to contradict the very activity aimed at being legalized, as well as the concept of exception itself, which should, at least theoretically, transpose **granting of some freedoms, some rights, in essence, of reproduction or extraction**. But these freedoms ( or rights) cannot be exercised, in fact, except by accessing the works, for what value would granting rights of reproduction to other subjects, if the access

would remain conditioned on the rightsholder's permission? It would be, most probably equivalent with granting a freedom only theoretically, as in practice it would still depend on the rightsholder's will, whereas the existence of an exception in the field of copyright consists of precisely the freeing of the public from the necessity of authorization.

Moreover, if in the case of reproduction, the possibility could be admitted that the "access" represents an earlier stage, therefore different, and which can manifest in time, previously to the act of reproduction itself, in the case of **extraction, access could be confused with the action of extraction itself**, and it cannot be admitted that, in fact, an extraction could be made without the actual access to the database.

The "legal access" phrase cannot be conceived outside of the concept of consent, **legal access** being, above all, the access that is granted, which is allowed, unrestricted, consented or accepted by those entitled to grant and coordinate it, meaning the rightsholders. The **permission to access** the work is, in a way, synonymous with what we could call **authorization** but does the **lawfulness of access** depend entirely on consent?

Or, in other words, **are these rightsholders the only ones entitled to intervene within the action of accessing works to grant the legal attribute, to legalize it**? The answer seems to be affirmative in regards to works already attributed (or that are the object of protection) but what happens in the case of those outside the scope of protection or works that, although belong to certain rightsholders, can be used/modified, in certain limits and circumstances by other individuals specifically identified as part of certain exceptions?

It's possible that the answer to these questions depends largely to the way in which **the institution of copyright exceptions and limitations is interpreted, as involving rights of access or not**. For more details, refer to the author's paper - Public Domain Protection. Uses and Reuses of Public Domain Works[1], in which it's appreciated that the same so-called freedoms derived from the applicability of copyright exceptions and limitation, could not be exercised without the existence of an **implicit right of access**, because the lack of it and the uncertainties in regards to its existence question even the validity of the exception since it is impossible to imagine the public having the possibility to reproduce texts for private purposes without first accessing those works. To call these possibilities (freedoms) "rights", whether we're talking about the **right to reproduce** for private purposes or **the right of access** (implicit, prior, necessary, obligatory) to works for the purpose of reproduction (in the same private purpose), depends on the perception of copyright as a whole, to the extent to which the public interest is or isn't appreciated as being valuable in its relationship with the interests of rightsholders.

Coming back to the text and data mining exception, a correct interpretation of what "legal access" means depends the validity of the exception itself, as a whole, as the rights conferred through derogation itself could not even be exercised in the case in which they are conditioned by an access that could be legal only to the extent that the rightsholders would decide it. **Admission of this situation would be equivalent with a right of reproduction awarded only to the extent to which the rightsholders consent to it** but this would have been achievable anyway, even without any regulation in regards to it, because rightsholders can grant authorization for any kind of use, including for data mining activities.

Until the emergence of the new directive[2], a legal definition of what "lawful access" means does not exist, however. Benjamin Ferrand[3] said that **lawful access** is not limited only to obtaining a permission, but rather to obtaining **the permission that is needed for the intended use**, a first conclusion that can be drawn from this opinion being that of the existence of **an equivalence between right of access and right of use**, as the access detached from the granted permission cannot be admitted. In this vision, the access is not general, but regards a certain type of usage.

Despite this, and especially, in the context of the new provisions in the field of copyright, we cannot place an equal sign between "**access" and "use"**, especially considering the fact that, at the level of the current legislation the term of "access" doesn't replace but, on the contrary, is presented in addition to the term of "usage". An example is the Directive regarding databases itself, which, in Melanie Dulong de Roney's[4] opinion, grants **the maker the right of "access" and "reuse".** We will render below a selection of dispositions from the aforementioned Directive, in which the terms of access and use or reuse are mentioned, especially, with regards to the authorized/lawful user.

*"Whereas, nevertheless, once the rightholder has chosen to make available a copy of the database to a user, whether by an on-line service or by other means of distribution, **that lawful user must be able to access and use the database for the purposes and in the way set out in the agreement** with the right-holder, even if such access and use necessitate performance of otherwise restricted acts;"*

*"Whereas the term 'database' should be understood to include literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts, and data; whereas it should cover collections of independent works, data or other materials which are*

[1] https://www.academia.edu/22943385/Public_Domain_Protection._Uses_And_Reuses_of_Public_Domain_Works
[2] See recital 14, which can be interpreted as regulating lawful access.
[3] https://www.copyrightuser.org/understand/rights-permissions/legal-access/
[4] https://halshs.archives-ouvertes.fr/halshs-01572132/document

*systematically or methodically* ***arranged and can be individually accessed****;"*

*"art.1. (1) For the purposes of this Directive, 'database' shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and* ***individually accessible by electronic or other means****."*

*"art.6 (1) The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary* ***for the purposes of access to the contents of the databases and normal use of the contents by the lawful*** *user shall not require the authorization of the author of the database."*

Indeed, each of the above texts seems to identify differently and distinctly "access" over "use", making the term of access to be perceived more as identifying **the action of visualization** preemptive to any form or usage. Despite this, we must consider that the **general** definition of access does not identify visualization or, at least, not the superficial form through which a user becomes aware of the content, but diving deeper, more profoundly, entering. We will remember this definition and we will observe that this context of databases allows the interpretation according to which, most likely, the meaning taken into account by the legislator is that access involves entering the database, similarly to the permissions which require passwords for accessing certain platforms, networks, systems.

To access, therefore, does not only mean to view and is, probably, an action that also depends on the intention of the database maker, who controls entry at the level of the data collection he owns. However, that is, even in the context in which they are accepted as being different actions, **the idea of a common permission must not be rejected**, which is, exactly as the law says – the access and use (being performed in the same time) (of a certain type). This is explained because, in practice, it's harder to accept a situation in which **permission is granted only for access, but not for a method of usage**. A different example, though, would be the one in which the lawfulness of the access depends on the rightsholder previously making available the work for the public, in which case a lawful access could be observed in the case of all information made available to the public from the rightsholder's initiative.

Without a doubt, there are also arguments for which a lawful access can only be authorized expressly by the rightsholder, the permission not being deduced from the simple public release of the work. In these two latter cases, in which, therefore, access must be authorized previously and distinctly from any other form of use, one could ask the question, what will be the situation of public information? Would these need express explanations regarding access and use for the purpose of in-depth analysis (automated processing), for example (text and data mining)? To answer this question, we can look to the new text of art. 4, interpreted in corroboration with recitals 10[5] and 14[6], newly introduced with the adopted directive, both texts transposing a view of the legislator in regards to the **works made available online**. And because reference to free license works – identified as being open source or creative commons, were mentioned within recital 10, a concrete example of the software development communities would be relevant to study in this context. Gitlab[7] or GitHub[8], for example, represent two of the platforms that make available software works in a collaborative system, being subordinate to open-source licenses, each of them having an immense database to which access is offered through sign-up. Undoubtedly, the interest for the mining of such databases is quite high and mainly due to the popularity among software developers, these communities attracted developers from all over the world, who brought important contributions to the industry that lead to many developments including in the field of artificial intelligence. The specific nature of these works lies, however, in the fact that they are freely licensed, most of the applicable licenses allowing reuse of those specific works[9].

Referral to art. 4 in this context is justified by the fact that, in essence, this article **transcribes a data mining permission in a context that is not subordinate to research**[10], permitted, practically, to all subjects of right, but conditioned by the same **lawful**

[5] (10) Union law provides *for* certain exceptions and limitations covering uses for scientific research purposes which may apply to acts of text and data mining. However, those exceptions and limitations are optional and not fully adapted to the use of technologies in scientific research. Moreover, where researchers have lawful access to content, for example through subscriptions to publications or open access licences, the terms of the licences could exclude text and data mining. As research is increasingly carried out with the assistance of digital technology, there is a risk that the Union's competitive position as a research area will suffer, unless steps are taken to address the legal uncertainty concerning text and data mining.

[6] (14) Research organisations and cultural heritage institutions, including the persons attached thereto, should be covered by the text and data mining exception with regard to content to which they have lawful access. Lawful access should be understood as covering access to content based on an open access policy or through contractual arrangements between rightholders and research organisations or cultural heritage institutions, such as subscriptions, or through other lawful means. For instance, in cases of subscriptions taken by research organisations or cultural heritage institutions, the persons attached thereto and covered by those subscriptions should be deemed to have lawful access. Lawful access should also cover access to content that is freely available online.

[7] https://about.gitlab.com

[8] https://github.com

[9] However, an essential attribute of free licenses is the fact that reuse is conditioned on making the work available with the same open source terms. There are variations, of course, there being several types of similar licenses.

[10] Art. 3 and 4 transcribe, in fact, the two exceptions that will function for data mining operations, one that will have a purpose dedicated exclusively to **research field**, deduced also from the title of art. 3 and from the restricted beneficiary sphere in the field of research organizations and cultural heritage institutions, and the other – art. 4, **which isn't constrained by such a beneficiary sphere**, the absence of an express

**access** mentioned in art. 3. An additional mention, which also marks an essential difference between the exception provided by art. 3, is pt. 3[11] of this article 4, in which it's mentioned that the permission in question will function **only if the right was not expressly reserved by rightsholders**. This mention allows the interpretation that, in the absence of an express mention that would exclude data mining from the authorizations accepted by rightsholders, the beneficiaries of the exception will be allowed to perform data mining activities on the data in question. As opposed to the art. 4 situation, in the context of mining performed by **researchers** (art.3), the mentions in recital 10 allow the interpretation according to which, **even in the situation in which the terms of licensing will exclude mining, the permissions granted by virtue of the exception will be able to function**, this also being, most probably, the reasoning that justified the adoption of a mandatory exception for the field of research.

For an overview on the way in which mining will function according to the two articles from the Directive, we consider the text of recital 14, which, although debuts with a referral to the research sphere, can be applicable in both situations, as the definition it incorporates is no longer aimed at a specific field of beneficiaries. Another argument in support of general applicability is the fact that research organizations were mentioned only with the title of example or in contexts which represent an alternative to situations of (non-differentiated) access to content based on free licenses.

*"(14)* ***Lawful access*** *should be understood as covering* ***access to content based on an open access policy*** *or through* ***contractual arrangements*** *between rightholders and research organisations or cultural heritage institutions, such as* ***subscriptions****, or through other* ***lawful means****. For instance, in cases of subscriptions taken by research organisations or cultural heritage institutions, the persons attached thereto and covered by those subscriptions should be deemed to have lawful access.* ***Lawful access should also cover access to content that is freely available online****."*

By virtue of the above text, a text made publicly available or to which the access is based on free license, involves, clearly, **a context in which access is appreciated as being lawful**, **allowing mining,** even in the context of art. 4, that is even in other purposes other than those of research, if we consider the provisions within the Directive. As the text of recital (14) expresses, access is interpreted as not being able to be differentiated from "viewing", with the mentions previously stated in this paper, a paper made available without the restriction of an imposed password, **being considered freely accessible and, most important, freely to be mined.**

We come back to the example of the aforementioned big collaborative development platforms to mention that this interpretation can only be to the detriment of these communities, the results of which could be accessed lawfully by any entity, by virtue of the above mentioned provisions. The only way to make this exception inapplicable would be, as per the text of art. 4, pt. 3, providing some special exceptions to forbid data mining, but this would only contradict the spirit by virtue of which these communities were created.

## 4. Conclusion

The issue of data mining is far from being resolved through this paper. Moreover, as it was mentioned at its beginning, this was not the purpose, not only due to the fairly complex technical details, but especially to the fact that the text and data mining permissions are newly regulated, there being no history of neither jurisprudence nor doctrine to support the method of approach and nuanced interpretations. In addition, the implications of the operation in itself, are multiple because, as could be seen in the chapter on technical details, operations included a lot of specific techniques, any one of which being able to operate for a variety of purposes and on a diversity of data. In this context, an aspect that could not be integrated in this paper and is necessary to be approached in other studies, is the information on which mining would be performed, the existing differences between them giving rise to new possibilities of interpretation.

Another aspect which wasn't analyzed in its entirety is that of the sphere of beneficiaries, this subject being one that could be discussed in a separate paper, as beneficiaries are to be appreciated including in correlation with the types of data on which mining could be performed. This is one very important aspect since the appropriate identification of the beneficiaries has relevance for the study of the public interest that justified the adoption of the new exceptions in the European legislation on copyright.

Despite the shortcomings generated, mainly, by the extent of the subject, this study primarily clarified essential technical details needed to understand any subsequent interpretation on the legal text of the exceptions. Moreover, the study of lawful access in this context, brings new light on works presented/made available online, especially those under free licenses.

mention being understood as a possibility awarded to any subject of law of becoming a beneficiary of it. - Ubi lex non distinguit, nec nos distinguere debemus = where the **law does not** distinguish, **nor** the interpreter must distinguish.

[11] The exception or limitation provided for in paragraph 1 shall apply on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their rightholders in an appropriate manner, such as machine readable means in the case of content made publicly available online.

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# THE PUBLIC LENDING RIGHT (PLR)

**Ana-Maria MARINESCU***

**Abstract**

*The study underlines the main characteristics of the public lending right (PLR) and the systems implemented at the level of the European Union and also internationally.*

*In brief, the public lending right (PLR) is the economic right that allows authors and other copyright owners to receive payments in order to compensate the free loan of their books by public and other libraries. Usually, the payments are ensured by the state budget of the state in which the system is implemented.*

*Most PLR systems are founded in Europe (Denmark being the first country to establish a PLR system in 1946, followed by Norway in 1947 and Sweden in 1954), where the member states of the European Union are required by law, under the Rental and Lending Right Directive (Directive 2006/115/EC), to provide authors with an exclusive right over the lending out of their works or at least to provide them with a remuneration for the lending out of their works. Other systems are implemented also internationally, at the present in the world are established 33 systems and 27 countries are counted as in development, even that the public lending right is not compulsory required under any international convention or treaty, by consequence the states are not obliged to regulate or to implement it. This demonstrates the importance of the public lending right in the general context of copyright development and infrastructure.*

*Also, the study draws attention to the fact that in Romania the system is neither implemented nor functional, which has caused prejudice to authors and other copyright holders who have not been remunerated for the use of their works through the public lending made in libraries.*

**Keywords:** *public lending right, remunerations, Renting and Lending Directive, systems implemented, Romanian latest developments.*

## 1. Introduction

The public lending right is one of the economic rights establish in the favour of the rights holders.

At international level, the treaties and conventions in the field of copyright and related rights are regulating distinctively the right of lending and the right of renting. The first is referring to activities that are made without looking for a profit, and the second for those made with the scope of obtaining a profit.

The rental right was regulated for the first time under the TRIPS[1] Agreement in connection with the letting of the originals or copies of computer programs to the public. Subsequently, the World Intellectual Property Organization Copyright Treaty[2] (Article 7) extended the scope of rental right to computer programs, cinematographic works and phonograms, and the World Intellectual Property Organization Performances and Phonograms Treaty[3] (Article 9 and 13) to works and interpretations fixed on phonograms. The Berne Convention for the Protection of Literary and Artistic Works and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations do not regulate the rental right.

The public lending right is not governed by any convention or international treaty or the TRIPS Agreement. In the mid-1990s, the World Intellectual Property Organization proposed a Protocol to amend the Berne Convention to regulate the lending right, but the proposal was not supported by the Member States.

In 1992, the European Commission adopted the Renting and Lending Right Directive[4], which is currently the only supranational law on lending, and which sets out the specific legal framework for the recognition by the Member States of the lending right for the copyright and related rights owners.

Article 1 of the Directive regulates the exclusive right of lending and Article 2 provides the definition of the lending right meaning: making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.

The rightholders and subject matter of lending right are[5]: the author in respect of the original and copies of his work; the performer in respect of fixations of his performance; and the phonogram producer in respect of his phonograms; the producer of the first

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[1] Trade Related Aspects on Intellectual Property Rights.

[2] WCT.

[3] WPPT.

[4] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version)

[5] Art. 3 of Renting and Lending Right Directive.

fixation of a film in respect of the original and copies of his film. The exceptions to the subject matter are: buildings and works of applied art.

The lending right may be transferred, assigned or subject to the granting of contractual licences.

Article 6 of the Directive establishes a derogation from the exclusive public lending right. In this way, the Member States may derogate from the exclusive lending right in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.

Most PLR systems are founded in EU, where from 28 member countries 24 implemented PLR systems, namely: Austria, Belgium, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Slovakia, Slovenia, Spain, Sweden and United Kingdom. The 4 countries in EU that have not implemented PLR systems are: Bulgaria, Greece, Portugal and Romania.

Denmark was the first country in the world that established a PLR system in 1946, followed by Norway in 1947 and Sweden in 1954.

At international level, the countries that implemented PLR systems are: Australia, Canada, Faeroe Islands, Greenland, Island, Israel, Liechtenstein, New Zeeland and Norway.

By consequence, at the present in the world are established 33 PLR systems[6]. The PLR system is not implemented in USA or Russia.

The number of the countries that implemented PLR systems demonstrates the importance of the public lending right in the general context of copyright development and infrastructure.

Still at international level, 27 countries are considering implementing PLR systems[7]: Albania, Andorra, Armenia, Butan, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Switzerland, Ethiopia, Greece, Hong Kong, Kazakhstan, Kenya, Kosovo, Macedonia, Malawi, Mauritius, Moldova, Mozambique, Portugal, Romania, St. Lucia, Samoa, Serbia, Singapore, Turkey and Ukraine.

Maureen Duffy, writer and veteran of the authors that led to the right being introduced in the UK in 1979 after a twenty-year struggle, summarizes PLR as follows: *"First and foremost, PLR upholds the principle of 'no use without payment'. This is the basis for the concept of 'fair remuneration' which then carries over into photocopying and digital uses. It is based on the Universal Declaration of Human Rights by which we are entitled to receive income from any exploitation of our work. If it is claimed that this interferes with another universal right – to access to knowledge and culture – our answer is that it supports the creation of new work, and we do not ask teachers to work for nothing."*[8]

## 2. Content

Analysing the established PLR systems in the world[9], result their main characteristics which in some cases can vary between countries.

In most of the countries the legal basis for the PLR is the copyright law like: Austria (1993), Belgium (1994), Croatia (2003), Czech Republic (2006), Estonia (2000), Finland (1963, 2007 and 2016), Germany (1972), Hungary (2008), Ireland (2007), Latvia (2000), Lithuania (1999), Luxembourg (2001), Netherlands (1988), Poland (2015), Slovakia (2015), Slovenia (1995), Spain (1994) and Sweden (1954). Some other countries provide for a particular law regarding PLR like: Australia (1974), Faeroe Islands (1988), France (2003), Italy (2206), Norway (1987) and United Kingdom (1979), and other countries regulate the PLR system through the law on public libraries: Denmark (1942), Greenland (1993) and Island (1988 and 2007). Few countries implemented the PLR system without any legal regulation like: Canada, Cyprus, Israel, Liechtenstein, Malta and New Zeeland.

All the PLR systems establish eligibility criteria for the rights holders, usually they have to register their works within the system, they must be citizens or have permanent residence in the country in which the system is implemented and must distribute the remunerations also for the foreign rights holders based on reciprocal agreements concluded with similar bodies or collective management organisations abroad. So, some of the criteria are referring to citizenship and/or language requirement. For example, in Austria beneficiaries of the PLR system are Austrian/EU citizens and permanent residents of Austria; in Canada beneficiaries are Canadian citizens wherever they reside and permanent residents of Canada; in Germany, there is no nationality or language restriction, but the distribution to foreign authors is made only through the collecting management organisations. For small countries, like Faeroe Islands and Greenland, the language and/or the citizenship are considered core restrictions, by consequence the beneficiaries must have the Faroese citizenship or must write in the Faroese, respectively the publications must be in Greenlandic or translated into Greenlandic. The same is the situation in Israel, where beneficiaries are only the citizens of Israel who write in Hebrew or Arabic.

In the majority of the countries that have implemented PLR systems the method of calculation of the remunerations is the loans based (Austria, Belgium, Croatia, Czech Republic, Estonia, Finland, Germany, Hungary, Island, Ireland, Israel, Latvia, Liechtenstein,

[6] https://www.wipo.int/wipo_magazine/en/2018/03/article_0007.html
[7] https://plrinternational.com/indevelopment
[8] https://www.wipo.int/wipo_magazine/en/2018/03/article_0007.html
[9] https://plrinternational.com/established

Lithuania, Luxembourg, Malta, Poland, Slovakia, Slovenia, Spain, Sweden and United Kingdom). In some other countries, the method is the stock count (Australia, Denmark, Faeroe Islands, Greenland and Norway), or the titles published and how many libraries hold a copy of each title (Canada), or the number of copies of each eligible material (New Zeeland), or direct grants paid to rights holders (Cyprus, Finland and Norway). In France, the method of calculation is complex formed by payment per copy purchased (6% of book price) and Euro 1.5 per library member and Euro 1 for university library members.

In conclusion, the remuneration due to the rights owners is calculated based on the number of loans of the work made through public libraries, or remuneration is paid depending on the number of copies of books of an author under the stock libraries, or on the number of users of public libraries, or through direct grants to the rights holders.

The eligible materials are in the majority of the countries the books. Some other eligible materials are the audiovisual works (Austria, Belgium, Germany, and Italy), recorded music or phonograms (Denmark, Latvia, and Lithuania), multimedia materials (Netherlands) and sheet music (Latvia). Very important, in some of the countries, eligible materials are also the e-books and/or the audio books (Belgium starting from 2017, Denmark starting from 2018, Germany, Greenland, Island, Italy, and United Kingdom starting from 2010 for the audio books and from 2017 all the e-books).

For introducing the e-books as eligible materials and for establishing the notion of e-lending, the judgement of the Court of Justice of the European Union in the Case C-174/15 Vereniging Openbare Bibliotheken v Stichting Leenrecht, a reference for a preliminary ruling from the Rechtbank Den Haag — Netherlands, was very important.

The Court ruled that the[10]:

- Article 1(1), Article 2(1)(b) and Article 6(1) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property must be interpreted as meaning that the concept of 'lending', within the meaning of those provisions, covers the lending of a digital copy of a book, where that lending is carried out by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user.
- the EU law, and in particular Article 6 of Directive 2006/115, must be interpreted as not precluding a Member State from making the application of Article 6(1) of Directive 2006/115 subject to the condition that the digital copy of a book made available by the public library must have been put into circulation by a first sale or other transfer of ownership of that copy in the European Union by the holder of the right of distribution to the public or with his consent, for the purpose of Article 4(2) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
- Article 6(1) of Directive 2006/115 must be interpreted as meaning that it precludes the public lending exception laid down therein from applying to the making available by a public library of a digital copy of a book in the case where that copy was obtained from an illegal source.

Some of the systems are excluding from payment categories of materials like: textbooks for student use, remaindered books, old or used books, sheet music, self-published books sold by authors, journals, magazines etc. (France) or non-fiction books (Israel).

Taking into account the eligible materials the main eligible recipients (rights owners) are the authors, illustrators, editors, translators and publishers. In some countries, the eligible recipients are also the performers and producers (Belgium, Latvia), photographs (Czech Republic, Ireland, and Netherlands), composers (Denmark and Island), film producers (Latvia), directors and screen writers (Slovenia). The diversity of the PLR systems indicates that some countries limit the eligible recipients only to authors (Hungary, Malta, New Zeeland, Norway, Slovakia and Spain) or are excluding from the payment the editors/publishers (Denmark and Finland).

The general fund for PLR is allocated from the state budget, central or local. In general, the remunerations distributed to the rights holders are modest, establishing the maximum and the minimum remunerations to be paid. For example, the maximum remuneration that can be paid to an author in United Kingdom is £ 500.

From this point of view, was very important the judgment of the Court of Justice of the European Union in the Case C-271/10 Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgische Staat, a reference for a preliminary ruling from the Belgian Raad van State (Belgian Council of State)[11].

VEWA, a Belgian collective management organisation, brought an action in the Belgian courts to annul the Royal Decree transposing Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (now replaced by 2006/115/EC). According to VEWA, by fixing a flat rate of remuneration of 1 EUR per adult per year and 0.50 EUR per child per year, Article 4 of the Royal Decree infringed the provisions of Directive 92/100/EEC

[10] https://publications.europa.eu/en/publication-detail/-/publication/39a236ef-dbbe-11e6-ad7c-01aa75ed71a1/language-ro/format-PDFA1A
[11] https://www.ifrro.org/content/ecj-ruled-belgian-plr-case-case-c-27110-vewa-v-belgische-staat

which require that 'equitable remuneration' be paid in respect of a loan or rental.

Consequently, the Belgian court asked the Court of Justice whether Directive 92/100/EEC precludes a national system under which the remuneration payable to authors in the event of public lending is calculated exclusively in accordance with the number of borrowers registered with public establishments, in particular libraries, on the basis of a flat-rate sum fixed per borrower per year.

The Court of Justice ruled that the remuneration must enable authors to receive an adequate income; its amount cannot be purely symbolic. Even though it is in the discretion of the Member States to determine the most relevant criteria when calculating the amount of the remuneration within their own territory, the amount of the remuneration payable should take account of the extent to which those works are made available, as that remuneration constitutes consideration for the harm caused to authors by reason of the use of their works without their authorisation. Thus, a public lending establishment should take account of the number of protected works made available. Large public lending establishments should pay a greater level of remuneration than smaller establishments. Also, account should be taken of the number of persons having access to the protected works, i.e. the borrowers registered with an establishment.

Also, the Court of Justice ruled that the Belgian royal decree takes into account the number of borrowers registered with public lending establishments, but not the number of works made available to the public. Moreover, given that the Royal Decree provides that in case a person is registered with a number of establishments, the remuneration is payable only once regarding that person, that system may have the result that many establishments are, de facto, almost exempted from the obligation to pay any remuneration in accordance with Directive 92/100.

In conclusion, the Court of Justice held in the VEWA Case that the Belgian law does not comply with Article 5(1) of Directive 92/100/EEC, as it does not take into account, on the one hand, the number of a copyright owner's works made available by a lending establishment, and, on the other hand, the number of establishments lending a particular work.

In some systems, the remuneration shall be distributed also to pension funds, health insurances, grants or scholarships (for example, in Austria 26% of funds are allocated to the social needs of the authors, in Germany 55% for health insurances, in Slovenia 50% for grants and scholarships, in Sweden and France for supplementary pensions).

In the majority of the countries, the system is managed by a collective management organisation (in Austria by Literar Mechana[12], in Belgium by Reprobel[13], in Croatia by ZAMP[14], in Czech Republic by DILIA for authors, translators, adaptors and by OOA-S for illustrators, photographers, in Finland by SANASTO for authors, KOPIOSTO for artists and TEOSTO for composers, in France by SOFIA[15], in Germany by VG Wort for authors and Bild Kunst for artists, in Hungary by MISZJE[16], in Latvia by AKKA/LAA[17], in Liechtenstein by ProLitteris[18], in Lithuania by LATGA-A[19], in Luxembourg by LUXORR[20], in Netherlands by Stichting Leenrecht[21] working with LIRA[22], in Poland by Copyright Polska[23], in Slovak Republic by LITA[24] and in Spain by CEDRO[25]). Also, in other countries the system is managed by state or government departments (Australia, in Canada by PLR Commission under the Canada Council for the Arts, in Denmark by the Agency for Culture and Palaces / Literature, in Estonia by the Authors Remuneration Fund, Island, in Ireland by the PLR office under The Library Council, in Malta by the National Book Council, Norway, Slovenia by the Slovenia Book Agency and in Sweden by the Swedish Authors Fund), by the writers unions (Cyprus and in Italy by the Federazione Unitaria Italiana Scrittori) or by the National Library (Faeroe Islands, Greenland, New Zeeland and United Kingdom).

In the majority of the PLR systems, the libraries covered are the public ones, including specific libraries like educational or scientific ones (Australia, and Austria), on contrary in some countries the educational or scientific libraries are excluded (Belgium, Italy, Latvia and Luxembourg), and also the university and schools' libraries (Denmark, Faroe Islands, France, Germany, Island and Norway).

In Romania, according with the Article $14^4$ alin. (1) of Law on copyright and related rights, lending means making available for use, for a limited period and without a direct or indirect economic or commercial advantage, of a work through the agency of an institution allowing access of the public for this

[12] http://www.literar.at/
[13] https://www.reprobel.be/
[14] The collective management organization of the performers.
[15] http://www.la-sofia.org/
[16] http://www.miszje.hu/
[17] http://www.akka-laa.lv/lv/
[18] https://prolitteris.ch/
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[22] https://www.lira.nl/
[23] https://www.copyrightpolska.pl/
[24] http://www.lita.sk/
[25] https://www.cedro.org/

purpose, and PLR is regulated at the same article alin. (2) and (3) as follows:

*"(2) Lending through the agency of libraries does not require author's authorization and entitles him to an equitable remuneration. This right cannot be waived.*

*(3) Equitable remuneration provided for under paragraph (2) shall not be owed, if the lending is made through the libraries of educational establishments as well through public libraries with free access".*

The Rental and Lending Directive was transposed into Romanian domestic law starting from 2004, based on the provisions of Law no. 285 amending and completing the Law no. 8/1996, thus regulating the legal regime of PLR.

As results from the above-mentioned legal dispositions, the provisions of the Directive have been incorrectly transposed into the national law, since libraries in all educational institutions and all public libraries with free access are exempt from the payment of PLR equitable remuneration. For this reason, the PLR system has not been put into practice, and currently there is no methodology on PLR, so the collective management organisations have not collected PLR remunerations, and the right holders have not benefited from the appropriate remuneration.

Not even in 2018, when the Law on copyright and related rights was republished, as amended and supplemented[26], this problematic aspect of PLR, wasn't took into consideration by the legislator.

The latest developments in the field date from 2018, when the collective management organisations in the field of written works (books) and visual arts under the supervision and coordination of the Romanian Copyright Office have proposed new amendments of the Law on copyright and related rights regarding the PLR and have argued to the Ministry of Finance the necessity to allocate from the state budget a minimum amount for implementing the PLR system. The Ministry of Finance has declined its competence in the field, indicating the Ministry of Culture and National Identity as the specialized body of the central public administration with attributions regarding the drafting or endorsement of normative acts in the field, including PLR, as well as the initiator of the Law on copyright and related rights.

By consequence, the copyright holders and the collective management organisations in the field will continue their efforts towards the Ministry of Culture and National Identity and the Romanian Government in order to implement the PLR.

## 3. Conclusions

The PLR systems are covered under the umbrella of PLR International (PLRI) that brings together countries with PLR systems in order to facilitate the exchange of best practice. PLRI also provides advice and technical assistance to countries looking to set up PLR systems for the first time[27].

PLR currently applies in many countries to both printed books and a range of audiovisual material (including 'talking books') lent out by public libraries. In these countries a wider range of creators will therefore be eligible for payment, including authors, composers, publishers, producers and performers[28].

Being an important source of remuneration for the copyright owners, the states should pay more attention for regulating and implementing in the national legislation the PLR system. The same is the case of Romania in which the PLR system is not implemented nor functional.

All the Romanian interested entities, including the Romanian Government should take the necessary measures for implementing the PLR.

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# PLAGIARISM IN THE CASE OF DOCTORAL THESIS AND THE SANCTIONING OF THIS TYPE OF PLAGIARISM

**Dantes MARCOVICI**[*]

**Abstract**

*Considering the magnitude of the phenomenon in general and the public debate on plagiarism, in the present study I proposed to analyze the plagiarism situation, with particular reference to doctoral theses.*

*Thus, I will present the regulation in the Romanian legal framework of the notion of plagiarism and the content of the obligation regarding the violation of good conduct in research and development through plagiarism and self- plagiarism.*

*At the same time, will be annalyzed the possible consequences of the plagiarism ascertained both before and after the granting of the doctor's degree, with the presentation of the situation of notifications through the CNATDCU, the way of sanctioning the plagiarism deeds, as well as the participation of the general public in the reporting of breaches of the norms of academics conduct on publicly presented doctoral theses.*

**Keywords:** *plagiarism, self-plagiarism, PhD thesis, academic conduct, CNATDCU, Law no.1 / 2011, Law no.206 / 2004*

## Introduction

It is unequivocal that plagiarism makes the world of knowledge more fragile and, in this context, there is justification for the growing concern of the public to report such facts, especially from the academic sphere.

As the phenomenon of plagiarism in general and the public debate on plagiarism is of interest, I will analyze the plagiarism situation, with particular reference to doctoral theses.

At present, in Romania, there is a strong concern at the legislative level for the prevention, detection and sanctioning of plagiarism deeds, as well as the participation of the general public in the reporting of violations of the academic conduct norms regarding publicly presented doctoral theses.

## 1. The notion of plagiarism and self-plagiarism

### 1. 1. Etymology and short history

The term plagiarism comes from the Latin word "plagiarius", which translates as a person that kidnaps children or who sells a free person as slave and was first used when the Roman poet Martial accused his rival, Fidentinus, of unfair appropriation of his lyrics.[1]

The concept of plagiarism was born in the form close to the one we know today as a result of two important socio-cultural revolutions: the transition from an oral culture to a culture of writing and the mass reproduction of written texts after the descovering of the tipography in the years 1440.[2]

However, the exclusive outline of the negative meaning of the term appeared only in the 18th century[3], with the valorisation of the idea of originality, although the historical and cultural context of those times polished the idea of originality so as to encompass, for example, the writings assumed aluzive, imitative or derived from previous literary[4] or scientific[5] writings.

With the gradual overturning of the humanist trend, suggesting a return to the Greek-Roman antiquities, considered to be the real standards of life, of thinking and artistic creation, and the adoption of the principles of Romanticism, which included the emergence of an economic link between the authors and the recipients of works, the idea of protecting intellectual property has emerged.

As a result of the French Revolution, this principle was first established in France in the Chapelier Law of 1791, which stated that "the most sacred and personal of all properties is that of the creation - the fruit of a writer's thinking."

These ideas were subsequently transposed into many legal systems in Europe, in particular. However,

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[1] Jack Lynch, The Perfectly Acceptable Practice of Literary Theft: Plagiarism, Copyright, and theEighteenthCentury, în Colonial Williamsburg: The Journal of the Colonial Williamsburg Foundation 24, nr. 4, p. 51–54.

[2] Malcolm Coulthard, Alison Johnson, *An Introduction to Forensic Linguistics: Language in Evidence*, Londra and New York, Routledge, p. 155-160.

[3] As the poet Horatius claimed, "the circumstances, characters and ideas in the classics are, after all, common property". *Ibidem*, p. 51.

[4] In literature, Shakespeare's influences on the historical descriptions of holinshed, the borrows of Samuel Taylor Coleridge and Thomas de Quincey from previous authors, were widely debated. It is appropriate to remember an anecdote about Oscar Wilde and James Abbott McNeil Whistler, in which Oscar Wilde said to his friend: "I wish I had said that!", And Whistler's replica would have been "don't worry, you'll say it, Oscar, you'll say it." See, Hesketh Pearson, Oscar Wilde: His Life and Wit, Harper & Brothers, New York, p. 87.

[5] Robert Macfarlane, Original Copy: Plagiarism and Originality in Nineteenth-Century literature,Oxford,2007, Cap. Legitimizing Appropriation, available online at http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199296507.001.0001/acprof-9780199296507-chapter-3 address.

Plagiarism was not perceived as an act devoid of academic ethics than in the second half of the nineteenth century.[6]

### 1.2. Legal regulation in the Romanian legal framework. Definitions

According to Art. 310 of the National Education Act Nr. 1/2011, constitutes serious misconduct from good conduct in scientific research and university activity: a) Plagiarism of other authors ' results or publications; b) Manufacture of results or replacement of results with fictitious data.

The deed of plagiarism can meet the material element of a crime, according to art. 141 of the Law No. 8/1996, which criminates the action of appropriation, without right, of the work of another author and the presentation of that work as an intellectual creation of the perpetrator.

According to art. 4 para. (1) letter d) of Law No. 206/2004 on good conduct in scientific research, technological development and innovation, Plagiarism is defined as "exposure in a written work or oral communication, including in electronic form, of texts, expressions, ideas, demonstrations, data, assumptions, theories, results or scientific methods extracted from written works, including in electronic form, of other authors, without mentioning this and without referring to the original sources ".

At the same time, the self-plagiarism, according to art. 4 para. (1) letter e) of Law No. 206/2004, represents 'the exposure in a written work or oral communication, including in electronic form, of texts, expressions, demonstrations, data, assumptions, theories, results or scientific methods extracted from written works, including in electronic form, of the same author/s, without mentioning this and without referring to the original sources '.

From the legal definitions of the two terms, it follows that there are certain traits for the qualification of a deed either as plagiarism or as self-plagiarism, as a proxime type:

1. The preexistence of a written work, which constitutes the source of inspiration;
2. The appropriation of texts, phrases, demonstrations, data, assumptions, theories, results or scientific methods extracted from that pre-existing written work by inserting into another written work;
3. Lack of a bibliographical reference to draw attention to this.

The specific difference characteristic of self-plagiarate is that the pre-existing work belongs to the same author/s.

As regards the third condition, it must be noted that that obligation implies either the performance of a classical reference, by indicating the name of the author, the name of the written work, the publishing house which published the pre-existing works, the place and year of publication, identification of the takeover by the corresponding page/chapter number, by an unambiguous delimitation of the appropriated text and of its own contribution (e.g. by quotation marks) or a simplified reference, with references to the content of another work.[7]

It is appropriate to mention the definition that the National Ethics Council for Scientific Research, technological development and Innovation in the Ministry of Research and Innovation included it in a guide published by this institution. Thus, "plagiarism is the takeover by an author of elements of the intellectual creation work of another author and their presentation in the public space as components of their own works. Plagiarism is the result of the action to raise and refer to the work generated by unlawful takeover, intentional or not, from a deontological standpoint. "[8]

It is worth noting, as is also inferred from the legal texts, that it is not relevant in the aspect of the subjective side if the deed is committed intentionally or by fault, or as a simple mistake. For example, the plagiarizing person does not know the rules of academic citation or considers, wrongly, that the text that it appropriates belongs to the public patrimony.[9]

We can conclude, by using real examples to show the facts of possible plagiarism in the academic field, that there may be plagiarism in the case of the contraction of an original idea by paraphrazing, but the indication of the source is omitted, by using, in the contents of an academic work, tables, images, graphs, data, etc. originating from another written work, but without indicating the bibliographical source, the partial or total translation of a text without mentioning the original bibliographical source, The use of the Grosso modo of a work drawn up by another person and its presentation as own, etc.

The object of the academic activity must, on the one hand, prove the ability to investigate and draw up a research paper with a certain scientific value and, on the other hand, advancement in research, which is, in fact, the primary purpose of justification of such action.

Finally, it should be noted that ideas, assumptions, theories are not protected in itself by intellectual property rules, by copyright Law No.

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[6] Jennifer Sharkey și Bartow Culp, *Cyberplagiarism and the Library: Issues and Solutions*, Faculty and Staff Publications – Milner Library, 2005, p. 43.

[7] About ways to avoid plagiarism, especially the involutar, see Septimiu Chelcea, Drafting Handbook in socio-human sciences, Comunicare.ro, Bucharest, 2011, p. 46-49.

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8/1996, which excludes from the protection of the ideas, but it is incumbent upon the authors to take academic ethics to mention the takeover of other authors ' IDs and to report their own contributions in connection with them in accordance with Law No. 206/2004.[10][10]

### 1.3. The personal scope of the rules

As previously stated and the provisions of art. 1 para. (1) of the Law No. 206/2004, it protects good conduct in scientific research, technological development and innovation.

According to the provisions of art. 1 para. (4) of Law No. 206/2004, the obligations relate to the categories of staff provided for in Law No. 319/2003, as well as to other categories of staff, from the public or private environment, benefiting from public funds of development and investigations.

In accordance with the provisions of art. 6 of Law No. 319/2003 on the Staff Regulations of the investigation-development personnel, the categories of staff referred to in are research-development staff, academics, auxiliary staff from the research-development activity and staff in the functional apparatus.

In interpreting the notion of investigation-development staff, it must be used the provisions of article 26 letter (a) of law No. 319/2003, according to which the professional improvement of the investigation-development staff is mainly carried out, inter alia, through doctoral degrees.

By G.R. No. 681/2011, the code of doctoral studies was adopted. According to art. 17 para. (5) letter (e) of this act, the Doctoral School regulation establishes mandatory criteria, procedures and standards for, inter alia, ' ways to prevent fraud in scientific research, including plagiarism '.

As regards the addressee of special liability, art. 20 para. (3) of the Code establishes that ' in the case of possible academic fraud, violations of university ethics or misconduct from good conduct in scientific research, including Plagiarism, the PhD student and/or doctoral director respond under the law. “

Specifically, according to art. 65 para. (7) of that code, ' the doctoral director shall be held accountable with the author of the thesis on compliance with the standards of quality or professional ethics, including ensuring the originality of the content, according to the provisions of art. 170 of the Law No. 1/2011 “.

Therefore, the obligations relating to good conduct in academic scientific research arising from the identification and elimination of the facts of plagiarism and self-plagiarism are incumbent to the PhD student and/or the doctoral leader under the law.

## 2. Content of the obligation on good conduct in investigation-development, plagiarism and self-plagiarism

There are two types of obligations set out in art. 24 of Law No. 319/2003 on the investigation-development staff duty, to respect the ethics and deontology of the research and development activity and to respect intellectual property rights.

For these facts, the penalties are laid down distinctly, for the first obligations there is a sanctionality set out in the code of Ethics and professional deontology of investigation-development staff and for the other obligations there are penalties provided for in Law No. 64/1991 on invention patents, republished, with the previous amendments, in Law No. 129/1992 on the protection of designs, republished, and in Law No. 8/1996 on copyright and related rights, with subsequent amendments and additions.

The conclusion drawn from the mere reading of the indicated normative provisions shows that the legislature does not assimilate the obligation to respect the ethics and deontology of the investigation-development activity with the obligation to respect intellectual property rights. These obligations are distinctly regulated, as are the incident sanctions, which can also be applied cumulatively, and the procedures for the application of sanctions.

As previously stated, the Law No. 8/1996 penalises, inter alia, the act of plagiarism falling within the sphere of criminal offence, and the Law No. 206/2004 penalises the contravention offences concerning plagiarism.

### 2. 1. Synthetic description of the process of obtaining a doctor's title

The organisation and functioning of doctoral schools is governed by Law No. 1/2011. According to art. 158 para. (1) of the law, ' doctoral degree programmes shall be organized in doctoral schools accredited or provisionally authorised '. Likewise, “universities, i.e. partnerships or consortals of one or more doctoral schools accredited or provisionally authorised constitute an organisational institution of doctoral University studies”.

Para. (6) of the same legal text mentions two types of doctoral studies: Scientific doctorate, “which has as its purpose the production of original scientific knowledge, internationally relevant, on the basis of scientific methods, organised only in the form of a frequency education ', respectively the professional doctorate, ' in the field of arts or sports, which has as its purpose the production of original knowledge on the basis of the application of the scientific method and the systematic reflection '.

The duration of a doctoral study program is of 3 years, but can be extended by 1-2 years, with the

[10] About the distinctions between Law No. 8/1996 and Law No. 206/2004 from the perspective of the protection of ideas, see Viorel Roş, Plagiarate, Plagiomania and Deontology, 2016, available at the address https://www.juridice.ro/essentials/475/plagiatul-plagiomania-si-deontologia, last accessed on 27 January 2019.

approval of the University Senate. The ministry's funding is achieved through the annual allocation of grants, based on a methodology for calculating the funding of universities.

The process that a PhD student goes through to get a doctor's title is long and etapized. First, the doctoral work is elaborated at universities, under the guidance of a scientific coordinator. Subsequently, if an agreement is obtained for the realisation of public presentation, from the Guidance Commission and the Scientific Coordinator, the latter will propose a doctoral committee consisting of at least five members, the specialists in the field of reference, of which at least two are not affiliated to the institution that organizes doctoral University studies, and one is the scientific leader. The composition of the Commission will be approved by the Council of Doctoral and University school.

The members of the Board of support shall individually analyse the work and carry out a reference, the doctorate will publicly present the work, in the presence of at least four members of the Committee, and the references shall be made public with this circumstance. The President of the Commission will form minutes of the presentation. If the doctoral student receives one of the "excellent", "very good", "good" or "satisfactory" ratings, the work is submitted for analysis to a specialized committee in the reference field, which operates within the CNATDCU.

CNATDCU bases the measure of approval or rejection of the doctoral thesis reference. In the case of approval of the reference, the award of the University's PhD is made by order of the Minister of Education.

**2. 2. Possible consequences of plagiarism found prior to the granting of a doctor's title**

According to art. 65 para. (5) of the Code of doctoral studies, "The doctoral thesis is an original work, and it is compulsory to mention the source for any material taken over". Article. 67 para. (3) provides that ' following the identification of breaches of good conduct in Investigation - Development inclusively the plagiarising of the results or publications of other authors, the production of results or the replacement of results with fictitious data, when it is made the evaluation of the PhD thesis by the PhD leader or the Guidance Committee, the public support agreement shall not be obtained. "

It is therefore incumbent on the doctoral leaders and the Guidance Committee to identify the violations of good conduct in Investigation - Development and the sanction which they apply to the doctoral student, in the event that an infringement of the the abovementioned obligation, is the failure to grant the public presentation of the doctoral work.

The first thesis of art. 68 para. (2) of the code, provides that, if a member of the Doctoral Committee identifies in the assessment of the thesis, **prior to public presentation**, serious misconduct from good conduct in scientific research and academic activity, including the Plagiarism of the results or publications of other authors, it is for him to refer the matter to the ethics committee of the Higher Education institution in which the student-PhD is registered and the Ethics Committee of the institution in which is employed the doctoral leader for the analysis and resolution of the case, including by expelling the PhD student, according to art. 306-310 and 318-322 of the Law No. 1/2011 and the provisions of Law No. 206/2004 on good conduct in scientific research, technological development and innovation.

According to the second sentence of art. 68 para. (2) of the code, if a member of the Doctoral committee identifies, in the assessment of the thesis, in the public presentation, serious misconduct from good conduct in scientific research and academic activity, including the plagiarism of the results or publications of other authors, shall be subject to the following obligations:

- The obligation to notify the ethics committee of the higher Education institution in which the PhD student is registered and the Ethics Committee of the institution in which the doctoral leader is employed for the analysis and settlement of the case, including by expelling the PhD student, according to art. 306-310 and 318-322 of the Law No. 1/2011 and the provisions of Law No. 206/2004 on good conduct in scientific research, technological development and innovation;
- the obligation to bring the deviations to the knowledge of the other members of the doctoral Committee and to propose the award of the ' unsatisfactory ' qualification.

According to the provisions of art. 69 para. (5) of the same act, if such a qualification is attributed, the doctoral committee must show the content to be remade or supplemented in the doctoral thesis and calls for a new public presentation of the thesis.

The second public presentation of the thesis takes place in front of the same doctoral committee as in the case of the first one. If the same qualification is obtained at second public presentation, the title of Doctor shall not be granted and the PhD student is expelled.

After the public presentation of the work, it may happen that the National Council for Attestation of titles, diplomas and university certificates (hereinafter referred to as "the CNATDCU") argumentatively invalidates the doctoral thesis, and the institution that organizes studies of Doctoral degree receives from the Ministry of Education, Research, Youth and Sport a written motivation of invalidation, drafted on the basis of the CNATDCU observations. The doctoral work may be retransmitted to the CNATDCU within one year from the date of the first invalidity. If the PhD thesis is invalidated for the second time, the title of the doctor will not be granted, and the student-doctor will be expelled.

It is therefore possible for the plagiarate to be identified prior to public presentation and prior to the establishment of the Doctoral committee,by the doctoral coordinator or any of the members of the

Guidance Committee, who are required not to give their consent to public presentation under such conditions.

Prior to public presentation, but subsequent to the establishment of the Doctoral committee, any of the members of the Commission who founds indications of plagiarism are required to notify the ethics committee of the higher education institution in which it is registered the PhD student and the Ethics commission of the institution in which the doctoral leader is employed for the analysis and resolution of the case, including by expelling the PhD student.

In the context of public presentation, any of the members of the doctoral committee who find that there are indications of plagiarism the publications of other authors, have both the obligation to refer the ethics committee of the higher education institution in which it is registered the PhD student and the Ethics Committee of the institution in which the doctoral leader is employed for the analysis and resolution of the case, including by expelling the PhD student and the obligation to notify the other members of the Doctoral Committee about the deviations and propose the awarding of the ' unsatisfactory ' qualification.

**After the public presentation, but prior to the granting of the title of Doctor by Order of the Minister of Education, CNATDCU, in the context of the evaluation of the doctoral thesis, has the obligation to observe a possible failure to comply with the standards of professional ethics**, including the existence of Plagiarism, in the thesis and/or activities that led to its realization. If such a finding occurs, members of the CNATDCU invalidate the doctoral thesis, communicate these findings to the other members of the evaluation Board and notify the matter to the General Board of the CNATDCU for the analysis of the responsibility of PhD leader or of the doctoral school.

According to the provisions of art. 69 para. (5) of the Code, the General Board of the CNATDCU, notified by one or some of the members of the CNATDCU that evaluate the PhD thesis, may decide to withdraw the quality of doctoral leader and/or withdraw the accreditation of the doctoral school, if the case may be.

These penalties will be applied by taking into account the social hazard of the offence, the manner of plagiarism or violation of the standards of professional ethics, the consequences of such deeds, the possible complicity of the members of the Committees of Evaluation of the thesis, etc. For example, in the context of the individualisation of the Act, the CNATDCU General Council cannot decide to withdraw of the accreditation of the doctoral school, where plagiarism is not coarse/gross, and the institution has taken the incumbent measures upon it according to the law to avoid such situations.

Anyway, according to Order No. 5403/2018 on the establishment of the methodology for the evaluating of doctoral studies and the systems of criteria, standards and performance indicators used in the evaluation, for the accreditation and periodic evaluation of doctoral schools and of doctoral academic studies, the institution of doctoral academic studies must meet certain criteria, standards, performance indicators, including:

- the existence and use of a software and evidence of its use to verify the percentage of similarity in all doctoral theses;
- to allow each doctoral student the access, on request and with the consent of the doctoral leader, to an electronic system for verifying the degree of similarity with other existing scientific or artistic creations.

In the light of the foregoing, it must also be pointed out that the failure to comply with the obligations imposed by law in relation to the discovery and sanctioning of the facts of plagiarism to the members of the Guidance Committee and the Doctoral Committee may be penalised from disciplinary perspective and/or, where appropriate, criminal.[11][11]

### 2. 3. Possible consequences of plagiarism found after the award of the Doctor's title

According to art. 1 para. (3) of Law No. 206/2004, the procedures for the application of disciplinary sanctions provided for in the Code of Ethics and professional deontology of the investigation-development staff are ' brought together in the code of ethics, in compliance with the provisions of this law and of the Law on national education no.1/2011 ".

With regard to the power to ascertain the conduct of plagiarism and self-plagiarism and to impose sanctions, it should be noted that it does not lie with the courts. However, the courts may, if they are seised, verify the legality of the administrative provisions issued by the competent bodies under the special legislation in the matter, in particular according to Law No. 554/2004 on administrative litigation, supplemented by common law rules of civil procedure. Under Art. 10 of that law, the substantive settlement of the application requesting the annulment of acts issued by the central organs of the public administration (such as the Minister for Education or the CNATDCU) is the exclusive jurisdiction of the Court of Appeal of the applicant's domicile.

The procedures for the application of penalties under the laws of intellectual property rights are governed by special laws and by the Code of Civil Procedure, and the power to resolve infringement proceedings rests solely with the judicial courts.

According to art. 68 para. (3) of the code, "if the PhD student has fulfilled all the requirements laid down

[11] About the possible coexistence of several types of liability, see Simona Cirean Oprişan, "the responsibility of the PhD and the Public presentation Committee of the doctoral thesis for violating the rules of deontology in the work of drawing up the PhD thesis, as regulated in the National Education Act Nr. 1/2011, government Decision No. 681/2011 on the code of Doctoral University studies. The legal nature of the liability, the sanctions and its consequences ', in the magazine *The Law*, No. 7/2018, p. 40 and 41.

in the scientific research program and the assessments on the doctoral thesis allow the attribution of the qualification " excellent ", " very good ", " good "or " Satisfactory ", the Doctoral committee proposes to grant the title of Doctor. The proposal shall be submitted to the CNATDCU for validation. CNATDCU, following the evaluation of the file, proposes to the Minister of Education, Research, Youth and Sports to grant or not to grant the title of Doctor. "

According to art. 69 para. (1) of the Code, "the title of Doctor shall be awarded by order of the Minister of Education, Research, Youth and Sports after the validation of the doctoral thesis by CNATDCU".

**2.3.1. Referrals via the CNATDCU**

After granting the title of Doctor, under the above-mentioned conditions, any natural or legal person, including the members of the CNATDCU and of the doctoral academic study institution, may refer in writing, through the Executive establishment for the financing of higher education, research, development and innovation (public institution subordinated to the Ministry of Education), the General Council of the CNATDCU on non-compliance with quality or professional ethical standards , including the existence of plagiarism, in a doctoral thesis, irrespective of the date of its presentation, and of the date of the award of the Doctor's title.

The importance of complying with anti-plagiarism rules may be drawn from the fact that no limitation period has been foreseen for the finding and sanctioning of such a fact.[12][12]

If such a referral is recorded, the General Council of CNATDCU shall have a period of 45 days to analyse and decide on the basis of the evaluation of the work within the limits of the referral. In order to resolve the referral, the General Council may consult any other members of the CNATDCU and/or decide to consult external experts. In the choice of these consultants, the lack of any conflict of interest with the author or the doctoral leader must be ensured.

Within the period of 45 days, the General Council of the CNADTCU shall request the institution of Doctoral University studies the opinion on those presented in the referral. The institution shall, in turn, have a deadline of 30 days from receipt of the request to formulate in writing the point of view. If the institution confirms the violation of standards of quality or professional ethics, it shall transmit to the CNADTCU the decision on the proposal to withdraw the title, signed by the Rector or, as a matter of case, by the president of the Romanian Academy, duly endorsed by the Legal view of the university or, in the case, by the Romanian Academy.

Within the period laid down in para. (2) The General Board of the CNATDCU decides whether or not the standards of quality or professional ethics have been complied with, including the existence of plagiarism, and the president of the CNATDCU shall transmit to the author of the referral, to the author of the thesis and to the Doctoral academic studies organisers the decision of the General Council of the CNATDCU and its motivation. These Parties shall have 10 days to formulate any appeal concerning the procedure and the General Board of the CNATDCU has 10 days to respond to the appeal.

Where the General Council of the CNATDCU decides that the standards of quality or professional ethics have not been complied with, including in relation to plagiarism, the president of the CNATDCU proposes to the Ministry of National Education and Scientific Research one or more of the following sanctions, as provided for in art. 170 of the Law No. 1/2011 that refer to the same penalties:

a) withdrawal of the quality of doctoral leader;
b) withdrawal of the doctor's title;

The minister, following this proposal, on the basis of the legal opinion of the Ministry of National Education and Scientific Research, has the obligation to take these measures, if any. The Ministry of National Education and Scientific Research shall inform all parties of the provisions issued.

Specifically, with regard to the penalty for the withdrawal of the title of Doctor, the Minister for National Education and Scientific Research shall issue an order[13] in this respect, in accordance with art. 13 para. (3) of GR No. 44/2016 on the organisation and functioning of the Ministry of National Education and Scientific Research. Under this administrative text, "in the exercise of its duties, the Minister of National Education and Scientific Research shall issue orders and instructions under the law."

**2.3.2. Proposals formulated by CSCS, CEMU or CNECSDTI**

According to art. 170 of the Law No. 1/2011, the Ministry may take one of the abovementioned sanctions also on a proposal from the National Council for Scientific Research, the Council of Ethics and university management or the National Ethics Council for Scientific Research, Technological development and innovation.

I. CSCS

According to art. 158 para. (4) of Law No. 1/2011 and the order of the Ministry of Research and Innovation No. 213/2017 on the approval of the regulation on the organisation and functioning of the National Council for Scientific Research and its nominal composition, the National Scientific Research

[12] The absence of a limitation period for the finding and sanctioning of the offence is found in most of the law systems. For example, in Hungary, on 29 March 2012, to the President of the Hungarian Republic, Pál Schmitt, they withdrew his Ph.D. for a thesis presented 20 years before the Olympics, which takes a French text of a Bulgarian author. He was forced to resign from the post of President of the Republic of Hungary on 2 April 2012

[13] See the order of the Minister for National Education and scientific research No. 6146/21.12.2016, on the withdrawal of the scientific title of Doctor in the field of military science, granted to Mr P.F.C., by Order No. 5837/04.11.2018, issued by the same institution, available at http://www.cnatdcu.ro/wp-content/uploads/2016/12/pandele.pdf address, last accessed on 28 January 2019.

Council (hereinafter referred to as "CSCS") has, among others, the drafting tasks of the reports on the quality of research for the evaluation of doctoral schools. In exercising this task, it may propose penalties such as the withdrawal of the accreditation of the doctoral school, if a violation of the rules on quality or professional ethics is found, including in relation to Plagiarism.

II. CEMU

According to art. 23 of the rules of organisation and functioning of the Council of Ethics and University management, approved by the Order of the Minister of National Education and Scientific Research Nr. 6085/2016 on the establishment of the Ethics and University Management Council and the approval of the regulation on the organisation and functioning of the Ethics and University Management Council, that body (hereinafter referred to as ' the Cemu ') shall rule on the university ethics disputes and examines cases relating to deviations from ethical and university management norms, following referrals or by self-referral, according to the law, after their subject was analyzed in the Faculty/University.

By Art. 24 para. (1) any physical or legal person may refer the matter to the CEMU in relation to non-compliance by a higher education institution or by a member of the university community, inter alia, of the obligations laid down in art. 170 of the Law No. 1/2011.

It is incumbent upon the Cemu to investigate the matters referred to it within 3 months of the date of receipt of the referral. Cemu decisions shall be forwarded to the parties through the Commission's Technical Secretary Department.

The Cemu shall reply to the Ministry, by means of a judgment, within one month from the date of referral, where it is requested to draw up a report assessing compliance with professional ethics standards in relation to doctoral activity, in accordance with the provisions of art. 170 of the Law No. 1/2011. The CEMU shall inform the Ministry of the complaints received and of the judgments adopted.

In conducting its analysis, the CEMU may hear persons directly or indirectly involved in the facts referred to, the sender of the referral, persons from the management of the institutions involved in the facts referred to or independent experts, with the keeping of the privacy.

III. CNECSDTI

According to art. 4 letters b) – e) of the rules of organisation and functioning of the National Council of Ethics of Scientific research, technological development and innovation, approved by the Order of the Ministry of Research and Innovation, the National Council of Ethics of Scientific Research, Technological Development and Innovation (hereinafter referred to as "cnecsdti") has the following tasks:

- Monitors the application and compliance with the legal provisions relating to the rules of ethics and deontology in research by the establishments and institutions of the national research, development and innovation system, as well as by the staff of research and development;
- Develops reports with analyses, opinions and recommendations on ethical issues raised by the evolution of science and knowledge and ethics and professional deontology in the research and development activity, which they submit for approval to the MCI Management;
- analyses cases relating to violations of good conduct rules, following complaints/appeals received or by self-referral;
- issues judgments on the cases which they analyse and where deviations have been found, appoint the person or natural and/or legal persons guilty of those deviations and determine the penalties to be applied, in accordance with the law.

In exercising of those tasks, regarding the doctoral theses, may propose the penalties provided for in article 170 of the Law No. 1/2011, if a violation of the rules on quality or professional ethics is found, including in respect of plagiarism, pursuant to art. 158 para. (4) of Law No. 1/2011.

At the same time, according to art. 324 of the Law No. 1/2011, for deviations from good conduct in the Investigation-Development of the staff from the higher education institutions, established and proven, this institution shall establish the application of one or more of the following penalties:

- Written warning;
- Withdrawal and/or correction of all works published in violation of the rules of good conduct;
- Withdrawal of the university teaching title or of the degree of research or degradation;
- Dismissal from the management position of the higher education institution;
- Disciplinary termination of the employment contract;
- Prohibiting, for a specified period, access to funding from public funds for research-development.[14]

## Conclusion

It is unequivocal that plagiarism makes the world of knowledge more fragile. In this context, it appears to be justified and commendable to the growing concern of the public for the reporting of such facts, particularly in the academic sphere.

[14] By way of example, by Decision no. 13 / 12.07.2018, CNECSDTI concluded that are met all the material and intentional elements that characterize guilty perpetrators of a work of plagiarism deviations and the making of results, applying to them the sanction of prohibition for a period of three years of the access to public funding for research and development and the suspension for a period of five years of the right to enter a competition for a higher position or for a management , guidance and control function position or as a member of the competition commissions. The judgment is published at http://cne.ancs.ro/wp-content/uploads/2018/10/Hotararea%20CNECSDTI%20%2013%20din%2012%2007%202018%20si%20Raportul%20final%20nr.13 .pdf, last visited on January 28, 2019.

The frequent disregard of the rules of academic conduct is sociologically anticipated in anomic societies, in transition such as the one in which our state was found until recently.

At present, however, in Romania, there is a sustained concern both at the legislative level for the prevention, discovery and sanctioning of plagiarism and regarding the participation of the general public in the reporting of infringements of the rules of conduct concerning the academic thesis on publicly presented doctoral theses.

In this respect, the use of software which estimates, in percentages, of the similarity of the texts in the work subject to analysis with the texts belonging to other authors is extremely useful for detecting violations of the rules of academic conduct. However, it must be pointed out that the results obtained in this way cannot replace the scientific assessments carried out by experts designated specifically to carry out qualitative analyses of scientific work.

Therefore, the verdicts appearing in public spaces strictly on the basis of such computer applications must be viewed with reserve, especially in areas where the results obtained thus are often invalidated by expertise. This is particularly the case of the legal area, which involves taking over legislative, administrative texts, conclusions from the case-law, but also a restrictive technical language that can, more easily, induce a false positive result of plagiarism.

In any case, for cases of plagiarism confirmed by the competent institutions, the system of sanctions proposed by Romanian law appears to be effective and in agreement with the principles imposed at European Union level for the recognition of diplomas, possible according to Article 53 of the Treaty on the functioning of the European Union.

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# THE PROTECTION OF OLFACTORY CREATIONS

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**Abstract**

*The olfactory works/creations, the perfumes that everyone likes are some of the oldest intellectual goods. Their creation involves science, imagination, talent. But in spite of the spectacular evolution of this category of creations, the huge number of consumers and their importance in everyday life, and despite the openness that intellectual property law has generally manifested towards intellectual creations, including the new ones (cinematography, computer programs and pharmaceutical and biotechnological inventions being the fastest received and more fully integrated into a protection system), olfactory creations have remained the Cinderella in this field. Perhaps also from the perfume manufacturers lack of interest. Creators, that is. Or maybe because the protection by secrecy is enough. We're trying to find out.*

**Keywords:** *olfactory works, perfumes, patents, copyright, intellectual rights, work secret,*

## 1. Introduction

**Is it necessary and possible to protect perfumesc by intellectual rights?** Doctrine and jurisprudence are not unitary in relation to the vocation of perfumes to be protected by intellectual rights (copyright, invention patents, design and / or model certificates or trademarks or work secrets). They were not even consistent. And it seems that perfumers particularly interested in financial success, are rarely interested in the system of protecting their creations and their exclusive rights, and rarely claim their violation. The secret, kept aloof, seems to provide the necessary and sufficient comfort as long as the secret remains secret. In essence, what would they need to create a perfume for which the patented protection is for only 20 years when the secret could provide them with much longer lasting protection, and stealing the recipe and producing the same perfume could be sanctioned by action in unfair competition? In addition, the perfumers' world is quite small, and the consumers that matter become a loyal clientele as long as they like the perfume. Conscious, intuitive, simply attracted, consumers will look for and choose quality perfumes, marked with well-known brands and produced by known perfumers and in which they trust.

But the inside of the perfume industry is populated only with honest people? We do not think so, even if the risk of counterfeiting a protected fragrance by a perfumer inside the profession is reduced. Large perfume manufacturers are few[1], are organized in associations (like writers, plastic artists, musicians, architects, etc. do), and a perfumer accused of counterfeiting a competitor's perfume risks losing not only the respect of competitors but also the clientele and exclude itself or be excluded from this industry. An unwritten code of honour that would make the protection of perfumes unnecessary by rules of law and recourse to justice. An idyllic vision and invalidated by what is happening around us.

The most expensive perfume, *Clive Christian's Imperial Majesty*, can be purchased for 251,000 dollars, packed in a Baccarat container with a gold frame and a 5-carat diamond. It is true that the content is worth only 15,000 dollars and contains a few hundred ingredients. The rest is the price of packaging, a "support" in which the fragrance is fixed, and which is usually not a simple package, it is itself a valuable work of art even it lacks content, but a work of a particular kind. Because this support is multiplied, even in the case of such perfume, it is an industrial product, the support loses its quality to be unique and original in the sense of copyright, and used as a container for a liquid product, it is not capable of be the external form of a three-dimensional product, as required by the law of industrial designs.

Perfumes released for the general public are subject to rules other than very expensive fragrances, but we do not believe that the latter are the target of counterfeiters, but rather products for the general public.

Until the nineteenth century, perfumes were created entirely on the basis of natural ingredients, obtained by pressing and then by distillation from plants or animal extracts (for example, musk). In the year 1000, Avicenna[2] (Ibn Sina) invented the process of distilling the fragrances of flowers, and it made it possible to produce large-scale modern perfume.

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[1] Producer Dove claims that there are around 900 qualified perfumers in the world, but the information cannot be verified.https://www.unilever.ro/whats-in-our-products/your-ingredient-questions-answered/fragrances.html

[2] Abu Ali Sina or Ibn Sina, known in the Western world under the Latin name of Avicenna (980-1037), Persian, was a physicist, astronomer, physician, philosopher, writer, inventor of the golden years of Islam. His medical work has been at the heart of the medical study for 500 years in the Orient but also in the West.

Expensive, however, because obtaining natural flavours involves the raw material, a lot (for one kilogram of royal jasmine flowers, for example, 10,000 flowers are needed and for one kilogram of gross jasmine essence, 350 kilograms of petals are necessary).

Synthetic aromas (invented and produced since 1874) have made it possible to produce perfumes at affordable prices for everyone. With today's possibilities and the flavours available for perfumers today, the production of a perfume bottle costs around 10 euros, but on the market, such bottle is sold for at least 10 times the production price. The perfume price therefore means the costs of production, the value of the container (not very high in the final price), the reputation of the manufacturer (its brand) and the perfume brand. Perhaps there is no industry (admitting that perfumery is just industry) where brands can influence so much the price of the product offered on the market. And for which brands themselves are so illicitly used.

Counterfeit perfumes are sold at prices three to five times lower than the original ones, those whose brands are illegally applied on their packaging[3], the gains from illicit activities with fragrances are not as high as in the case of drug trafficking, but also the risks to which perfume counterfeiters are exposing are much smaller. However, millions of consumers now use counterfeit perfumes, and Romania has become a transit and consumer territory for such products. Hazardous to health. And for that, it's only a way: buying perfume with a certain origin. I mean, from authorized distributors.

Counterfeiting, in the case of perfumes, does not interfere with the composition of the original perfume unless it deteriorates its image. No copyright or inventor's rights is violated by counterfeiting in this area, but by trademark right. Famous perfume trademarks are applied to fragrance packaging whose content does not usually have any connection with the original fragrance. That is why the action for damages will concern the counterfeiting of the trademark and not the counterfeiting of the perfume (smell) and the violation of the rights on it.

This may be a real cause of the lack of interest of perfumers for intellectual property protection of their products.

However, it is well known today that many essences and ingredients of those used in perfumery are allergenic or even injurious to health, and their use is subject to more and more severe rules from the **International Fragrance Association**. The list of allergenic and toxic products includes both natural and synthetic ingredients, and the list of prohibited or low-tolerant perfume products is on the rise. There are even natural allergens, such as the essences of the lichen Evernia prunastri (which grows on the oak or other tree bark) and the essences of ylan ylan jasmine. However, counterfeit fragrances are not subject to any control, and the risks to consumers are very high, some of which are unnoticeable in the short term from their use.

I have previously pointed out that in the doctrine and jurisprudence the problem of perfume protection is controversial, the positions expressed being most often at the extremes. We believe that perfumes are intellectual creations and that they are protectable by intellectual rights. As for perfume brands, they make this product category an immense favour, and in their case best suits the statement that in the absence of souls, things have trademarks.

## 2. The International Fragrance Association (IFRA) and its role in the perfume industry

Creators live with the feeling of belonging to a profession, but also with the need to associate in order to protect and promote their interests through collective actions. The organization does not make them "craftsmen", and they remain creators. Things are the same with parfums.

Perhaps the existence of the International Perfume Association and its (assumed) attributions support the idea that perfumery is a profession (for few, the number of qualified perfumers is, according to some sources 700, according to others 900, however none of them seems plausible), and that making new perfumes is simply a craft and not an art. The production of quality and safe to use perfumes is usually carried out in large production units, where only qualified personnel in this line of work conduct such activities, having the status of creative employees. Obviously, there are also independent creators. IFRA declares itself to be representative in the perfume industry, but its members are not creators - natural persons, but producers and producer associations.

The international association is constituted, as we have seen, also of national associations, however not all national associations are IFRA members. One of these (Fragrance Creators Association, formerly until 2018, International Fragrances Association of North America - IFRANA) represents, according to the information posted on its website[4], farmers, artists, researchers, inventors, scientists, perfumers which compose the fragrance community. People who, as stated on the association's website, "spend a few years creating beautiful smells and enhancing the beauty of life." Its purpose is consumer olfactory education, safety, sharing scientific information of interest. A documentary film released by IFRANA, entitled "The Story of Fragrances", that gives a look at the artistic and

[3] With a simple search on the sales sites is found that an Armani Sport Code perfume, it sells with 333 Lei in a shop that operates legally and with 133 Lei by the sellers of products, which can only be counterfeited at this price." Pedlars" selling on the street have perfume deals bearing famous brands with 50 Lei!

[4] https://www.fragrancecreators.org/about-us

scientific world behind fragrances, the effort made by manufacturers for the quality of perfumes and the most important goal of perfumers, keeping the consumers safe.

Associations such as the ones mentioned above are many in the world and their essential objectives are the same: consumer protection through quality products and the protection of the interests of perfume manufacturers.

The IFRA was established in 1973 and is headquartered in Geneva, with an operations centre in Brussels. The members ("regular members") are 8 multinational companies and 21 national associations, plus another 8 associate members from countries where there are no national parfums associations. IFRA keeps a register of all ingredients used in perfumery, in active formulas at the time of publication, and includes flavoured ingredients and functional ingredients or components, that is, those substances that are essential for fragrances such as antioxidants, diluents, solvents, preservatives, colours, etc. Each listed ingredient is rated for safety, but the responsibility for the safety of the ingredients used lies with the manufacturers.

IFRA has a research institute (RIFM) which is the scientific centre of the perfume industry (IFRA's annual budget for research is $ 8 million), it has standards for all products that are raw materials in perfumery but also for perfumes, those being published in IFRA Code of Practice, which is updated according to the association's procedures. The standard decision belongs to the experts. At the RIFM's proposal, the International Fragrances Association has forbidden or restricted the use of 186 substances in perfume making, and its members are bound to comply with these standards, their compliance being a condition of belonging to IFRA. The Association has a body of independent and renowned experts in areas such as dermatology, toxicology, pathology and environmental sciences which has the role to evaluate data on perfume ingredients and to ensure that their usage does not pose a risk to the consumer. In those cases where the assessment reveals risks, experts propose restricting or banning that product, either by issuing a standard or by restricting or banning a material. But IFRA standards are only mandatory for members of this association so that the risk of using allergenic or even toxic ingredients in the perfume industry is still high.

As far as perfume associations are concerned, their existence cannot influence the qualification of perfumes, the nature and the creative domain they belong to, the rights of the creators or the protection system. Since the world, perfumery has not yet occupied its deserved place among protected intellectual creations, and a system of protection tailored to their specifics is in the interest of both creators and consumers.

## 3. A bit of history ... fragrant

The history of fragrances, fascinating, challenging and a worthwhile research from a biblical and secular perspective, helps us to understand perfumes. Their place and role in our lives and the fact that they are intellectual creations.

### 3.1. Sacred Origin and Perfumes in the Old Testament

Perfumes are appreciated by (almost) everyone. Surely God likes them too, Who, when created everything, also created Havila country, where you can find gold ("good," the Bible says, strangely enough), onyx stone (semiprecious, easy to process, later appreciated even by crowned heads) and bdellium (a resin produced by an oriental palm), also He was the one who left to people "the craft of making flavours" and two special recipes of perfume[5], one liquid and the other solid. Recipes He had revealed to Moses, asking him to put them into the works but reserving their use for himself (in the Temple) and for the priests who were to serve in the Temple (Aaron and his children), but even for them only for religious purposes, on the altar of incense. The Temple and the Altar that Moses was also taught how to make them (a true architectural project describes the Bible in their case), where and how to be placed (in a tent to be built following God's plan precisely and in which the altar is to be placed) and on which the perfume should burn eternally and the smoke emanate to make the connection between man and God.

The ingredients and the recipe of this fragrance were revealed by God to Moses, which had to make it out of ***"the best spices"*** and which are specifically indicated: selected myrrh (500 shekels worth), spicy cinnamon (250 shekels), aromatic cane (250 shekels), cassia (500 shekels, the cassia being, apparently, the honeysuckle, but the name is also used for cinnamon) and a hin[6] of olive oil[7]. "Of them, God told Moses, you will make **a fragrant myrrh after the craft of the perfume makers;** *this will be the oil of the holy anointing (...) with it you will* ***anoint the tent of testimony*** *and* ***the ark of the testimony*** *and the* ***altar of burnt****,* ***Aaron and his sons*** *(...)* ***to serve Me as priests"*** *and "****human body will not be anointed with it, and in the image of its composition, do not make for yourself the same myrrh (...) the one who will do something like that, or the one who gives it out to whom he does not have to give, will be cut from his nation".*** *"*[8].

God gives Moses a second recipe for the product and process for incense (technically speaking, it is a

[5] *The Old Testament, Genesis*, 2.11. However, the Havila country is not identified, and no explanation has been found for the indication that gold is only found in this country.

[6] Liquid measuring unit equal to 5.7 liters.

[7] *Exodus*, Chap. 30, The Altar of Incense, 30.23 - 30.38

[8] *Exodus*, Chap. 30, The Altar of Incense, 30.23 - 30.38

solid fragrance), saying: *"get your spices: stacts [9], oniha[10], galbanum [11] and pure incense, all the same measure, and make of them by **the craft of aroma makers**, a mixture of incense, with addition of salt, clean and holy. Crush it fine and put it in front of the ark of the covenant, in the tent of tabernacle **(...) Incense so made is not to be used for you** (...) who will do such a mixture (...) that soul will be cut out of his kind."[12].*

As you can see, there are two products, one with an oily consistency, the second one, a solid product (but which does not make it less perfume), both well-smelling. The indications given to Moses are recipes / inventions of products and processes brought to the attention of the people and for which the Inventor of the recipe has given a limited right of use, i.e. a production and use license in order to ensure a permanent relationship between Him and man through intermingling the smell and smoke produced by the two perfumes. The smoke that has the meaning of the people's speaking to God, while the light (candle) has the meaning of God's speaking to his people. Thus, two inventions of perfume / perfume products have been conveyed to Moses, with the right to manufacture and to use perpetual but limited (to a social class, that of the priests and respectively for a place, that is, only in the Temple) which means that inventions can never fall into the public domain, which is not entirely in accordance with the law of inventions as conceived by people who have limited the duration of the inventor's exclusive right and have made it possible for the invention to fall under public domain where the usage is free.

The assertion sometimes made in the sense that God would have stopped people from using perfumes is contrary to the Bible. As I have shown, God has given Moses two recipes, asking him to make "**fragrant myrrh after the craft of the perfume makers**" and "***incense after the crafts of the same perfume makers***", that is, **after a known and cherished craft and which** if it would be contrary to God's wish (will) would certainly not have been recommended to be used to make the holy myrrh and incense. But the trade with flavours was, as the Old Testament reveals many times, ordinary and flourishing. The sale of Joseph, one of Jacob's 13 sons, by the brothers of some essence merchants who bought people also demonstrates how active the perfume essences trade was and how valuable the flavours were.

### 3.2. Fragrances in the New Testament

Our conclusion that God loves perfumes is also reinforced by the New Testament, which speaks of perfumes at two important moments of Jesus' life: Birth and Crucifixion.

According to Matthew (2.11), the Eastern Magi (whose number and occupation are not mentioned by the Evangelist) guided by the star, traced Mary and Joseph in the very Night Jesus Was Born and gave to Child Jesus, gold, myrrh and incense. The Magi are numbered and called, however, by a Gospel of the Armenian Church, and according to it they would have been: Melkon (King of Persia), Gaspar, King of India, and Baltazar, King of Arabia. Other sources, however, consider them Persians of Zoroastrian religion, astronomers and great priests and, undoubtedly, rich and entrusted with the events that were to come and which they were eager to honour. And their gifts also given as symbols: believers offering a portion of the wealth to the poor (gold), freshness, hope for eternal life, and for the miracle cure (myrrh) and people identifying themselves with the Church and with prayer (incense).

Declare saints of the Roman Catholic Church for their gesture of giving gold, myrrh and incense to Child Jesus, and being the first mortals who believed in the miraculous Birth and in Jesus, the Magi continue their relation with perfumes also in eternal life, because their relics are in the Dome of Cologne (the second high in Germany - 157 meters), built especially for this purpose between 1248-1473[13] on the site of another church and which became a place of pilgrimage [14], the city being visited in our century by over 6 million people each year.

How is it known and believed to be the genuine relics in the Dome of Cologne, some 3,500-4,000 kilometres from the place where they were ended their lives? This is related to the history and especially to the traditions of the Church.

According to the tradition of the Catholic Church, the relics of the Magi would have been discovered on Mount Victor by Empress Hellen [15] (Emperor Constantine's mother) during her pilgrimage to the Holy Land, a few years before she died, an occasion with which she discovered the Place of Nativity and the Holy Cross (along with those on which were crucified with Jesus, the two thieves). She would have brought the relics of the Magi to the Holy Church of

[9] Pliny the Elder mentions this ingredient in Natural History as used by Syrians in medicine and ... in perfumery. Obviously, the resin with this name must be produced by a plant, but we have not identified it. In his Natural History, Pliny the Elder describes several perfume recipes.

[10] Oniha or onihas, a plant unidentified by botanists and / or theologians, the term being out of use. It can only be a plant from which extracts of aromatic essences are used for the holy oil.

[11] Galbanum is probably an aromatic plant (ferrule galbaniflua), hard to identify, as well as other aromatic plants to which the Old Testament refers. The identified one grows in Iran, Afghanistan, India. Cut to the extremities, produces a milky juice that strengthens and takes the form of a gummed resin. It is not known in Romania

[12] *Exodus*, 30.34 – 30.38.

[13] The construction was completed 632 years after its inception, but today it is still working to repair the damage suffered during the last World War.

[14] Umberto Eco puts in the mouth of his Baudolino character the following statement: *"a relic how it is possible to change the destiny of a city, to make it a target of uninterrupted pilgrimage, to turn a parish into a sanctuary." U. Eco, op. cit.*

[15] Flavia Iulia Helena or Helena Augusta (248-329), often called the Empress Helena.

Constantinople, from where they would have been taken by the Crusaders to Milan and given to Bishop Eustorgius [16]. In 1162-1163, the city of Milan was defeated and almost destroyed by Emperor Frederic Barbarossa [17], the relics of the Three Magi being taken away from the church and transferred to Cologne in 1164, by the order of Emperor's counsellor, Archbishop Rainald von Dassel [18] of Koln- a town where the famous Dome was later built.

Marco Polo tells, however, that in 1270, in the city of Sabaa (south of Tehran), he saw three great, next to each other and beautiful tombs, in which the three Magi were buried: Baltazar, Melchior and Gaspar. *"Their bodies - said the famous traveller - are still unspoiled, with hair and whole beards.* „It's just that the history of Marco Polo's life says he would have started his journey that brought his celebrity in 1271! Well?

Are the relics of the Magi in the Cologne Cathedral some fakes? At the beginning of the second Christian millennium, trade with false sacraments (as well as with indulgences) was an ugly plague on the cheek of the Christian Church. It was ***"a vermin and, being a vermin, it was impossible to destroy it. When you were able to eradicate it in one place, it appeared in another. All the well-meaning priests and the popes denounced (falsifiers, n. a.) Fought against them, but without any result. Their pursuit was one of the most lucrative and hard to prove.*** *In 1274, Umberto de Romani, ex-general in the Order of the Dominicans, declared that* ***these sales exposed the Church in derision and demanded heresy. One of the first tasks of the Inquisition, said Pope Alexander IV, is the quenching of this scandalous trade."***[19].

We do not believe that there is any conflict between faith and science about the Magi and the place of their eternity, but only a mystery that we cannot unravel. In fact, it is said about the relics that *"it is faith that makes them true, not they prove faith"*[20]. And the Cologne does all it can to strengthen their authenticity: the city's coat of arms is made up of three wreaths of the Holy Magi and 11 tears of St. Ursula and her companions [21], who have been martyred in Cologne.

Cologne's connection with perfumes does not end at the famous Dom where the relics of the Magi are laid, because as we shall see later, Cologne City Hall also offered a place of honour on the front wall of the building that houses it, to a statue of a perfumer that brought glory to this old city, whose name comes from the Latin "colony", the fragrances it created here and a distinguishing sign that became generic (odicolon): Joseph Maria Farina, who founded the oldest perfume factory in operation in the world.

If Matthew told us in his Gospel about the gifts made by the Magi to Child Jesus, Mark tells us (14.3 - 14.9) that two days before Easter, while he was with his crowd in Bethany, at table in the house of Simon The Leprous, a woman (to whom Evangelist Mark, unlike Evangelist John, does not mention her name) came with an alabaster[22] bowl filled with ***"clean, nard myrrh of great importance".*** According to the Gospel of John the Apostle (12.1-12.3), the event took place 6 days before Easter on the day of entering Jerusalem before the beginning of the Passions, and the woman was Mary Magdalene, sister of Martha and Lazarus (as shown in The Gospel of John ***"And Mary was the one who anointed the Lord and wiped His feet with the hair of her head, whose brother Lazarus was ill (...)***"). And breaking the bowl poured the myrrh (perfume) over the head and feet of Jesus, wiping his feet with her hair, to the displeasure of some of the disciples who murmured against the woman, saying, ***"Why did this waste of myrrh?"(...) "this ointment could have sold for more than 300 dinars and give that money to the poor."*** But Jesus upbraided the murmurers by saying to them, according to the testimony of Evangelist Mark***: "Leave her. Why are you upsetting her? She has done a beautiful thing for Me" (...)*** and according to Evangelist Matthew ***"(...) That she, turning this ointment on My body, made it to My burial ",*** the event prefiguring the embalming that no one of those present did not understand. The most dissatisfied member of Jesus crowd, Mark tells us, none other than Judas Iscariot, who was also the keeper of the money bag of the group (from where he stole now and then for himself), went after this incident to the archbishops ("

[16] Umberto Eco claims that the relics would have been offered by the Basileus of the Emperor of the East. Umberto Eco, Baudolino, Polirom Publishing House, 2013. Work available in digital format on available in digital format on https://books.google.ro/books?id=kSdrDAAAQBAJ&pg=PT125&lpg=PT125&dq=descoperirea+moa%C8%99telor+magilor&source=bl&ots=nWpc0dgOaX&sig=ACfU3U1xbbJwdshqqURTaZOtyEYr4VlybQ&hl=ro&sa=X&ved=2ahUKEwi5q8296szhAhUFqIsKHQgPBqsQ6AEwBHoECAkQAQ#v=onepage&q=descoperirea%20moa%C8%99telor%20magilor&f=false

[17] Frederick I, also called Barbarossa (1122-1190), was anointed emperor of the Holy Roman Empire of the German Nation in 1155. He invaded Italy four times and was in conflict with the papacy, being excommunicated (in 1177) by Pope Alexander III. He had as counsellor and chancellor Archbishop Rainald von Dassel (1120-1167). He set up a crusade and went to the Holy Land with his army but died drowning at crossing the Goksu River in Anatolia. The attempt to keep his body in a barrel of vinegar was not successful, so he was buried in Antioch. The legend says he would not have died, and that he sleeps in a limestone cave in Germany, waiting for the right time to give his country the grandeur of the past. That's why Hitler gave his Russian invasion operation his name (Operation Barbarossa).

[18] Rainald von Dassel (1120-1167) was a close friend of Emperor Fredrick Barbarossa and archbishop of Cologne, a town in which he spent less than a year because of the missions he had besides his emperor. In the Dome of Cologne there is a statue of his body, without his arms and without the bottom of his body. R. von Dassel doubted the authenticity of the relics, placing their garments (which looked like ones of troubadours) to be changed with others like the ones of bishops, archimandrites or even popes.

[19] See A. Hyatt-Verrill, *Inquisition*, Mondero Publishing House, 1992, pp. 213-214.

[20] Umberto Eco, Baudolino.

[21] In number 11,000 and virgins, all of them being killed by the Hunts in 383.

[22] Variety of white, grey or black marble-like gypsum used to make ornamental objects. It was used to create perfume containers because it was porous, allowing the slow evaporation of the liquid to release the pleasant smell.

most important priests ") to sell Jesus. That is, *"a clean and very expensive"* perfume bottle (which could not be the same as that made for the incense altar and reserved for the use only by the priests) was also a cause of the sale of Jesus by Judas!

The Bible also mentions a situation similar to what is known as the *"Anointing of Bethany,"* the occurrence preceding the one above, while Jesus was in the house of a Pharisee when a sinful woman ***"knowing that He is sitting at the table in the house of the Pharisee, brought an alabaster with myrrh. And standing by the back near His feet, crying, began to wet His feet with tears and with the hair of her head she wiped the tears away. And kiss His feet and anoint them with a myrrh."***

### 3.3. Is the Bible against Fragrances?

If the Bible were against perfumes, if perfumes were evil things, then of course we would all have a problem, because we would sit outside of the holy teachings. And it would be an important argument for one part of the world to exclude them from protection or that we could not ignore in any case.

But as we have said, God has made all of them, including raw materials and perfume recipes for the use of the Church and the priests, and He has also given people the "craft" to do the others, and in His turn, Jesus received the gesture of perfuming Him (from head to toe) with a *"high-priced nard myrrh"* before being crucified, like Mary, His mother, who gladly received the gifts of the Magi in the name of Jesus, both moments symbolizing and being related to death and birth, end, and beginning. All of this tells us that the Bible is not against perfumes.

It is true, however, that some of the Fathers of the Christian Church have been hostile to perfumes and that even today, not all theologians seem to be in the admiration of perfumes that have passed the sacred area to become part of our everyday life. Let's recall two of the most hostile.

The first one is Tertullian of Carthage [23], a lawyer in his first youth and one of the most prolific authors of the Christian Church, in ***"De cultu feminarum"*** (About Women's clothing) criticized vestments dyeing and the women's use of makeup, under the word that it would violate the will of God. *„It cannot be legitimate, said Tertullian, which is achieved by violating this will. **What God did not make; he means he does not like it**. Do you think God could not have commanded the sheep to produce purple or sky-coloured wool? If he could and did not do, it means that he did not want it and what God did not want, we have no right to manufacture. What does not come from God, the author of nature, is not good for nature. It is not difficult to understand that these things (*dyed clothes and makeup, etc.*) come from the devil, which is a forger of nature"*[24]. We find, however, that Tertullian, who was a great lawyer before becoming a great theologian, contradicts himself the Bible that often speaks of the colours of the garments, blue and purple being the favourite colours in Bible writings. Tertullian was criticized even in his lifetime because he was excessive and paradoxical in his judgments.

The second is Saint John Chrysostom [25] who, two hundred years later, says more firmly compared to Tertullian that "you do not have to wear perfume, but virtue! Nothing is more unclean than a soul that has a body that wears a perfume. The scent of the body and of the garments is the sign of the inner spirit and impurity. When the devil rushes to ruin the soul and mourn it, then it fills in the body, with the help of perfumes, the dirt of its wickedness. "

It is hard to contradict this Church Teacher, but we are of the opinion that he has nevertheless accepted the use of natural fragrances, weak, to remove unpleasant odours, his interdiction was only towards "spiritual soldiers," i.e. priests. But as we have seen, God gave them (his priests) a perfume for them only.

Lux (the origin of the word is ***luxura***, which means in Latin, dissipation) in which the Romans lived did not partake of perfumes and their excessive use. Perhaps from here and from the condemnation of all that the Romans have done against Christians comes the hostility of some Church Fathers to perfumes. And it is hard to say how perfume fashion survived in the dark Middle Ages, dominated by the Christian Church, hostile to science, art, luxury and bathing (weird, because the Bible reminds us of foot washing several times, Jesus himself doing this gesture ) and criticism of all kinds of sins and vices (but whose development in the very heart of the Church could not prevent it, which generated the movement of Luther and Reformation), but it is certain that at the beginning of the Renaissance there were well-known perfumers and that then liquid perfumes appear, as we know them today, which could not happen on a virgin land. Since the 13th century, the art of perfumery has grown a lot, and we must not be very surprised about it, because alchemy and alchemists were then many and in vogue, even if they were ending up on the cleansing fires of all sins by the feared Inquisition.

Did Moses followers respect the divine will to use the ointment made according to the recipe revealed by God? It seems not, but I also didn't find arguments in the sense that the perfume, except for the priestly ointment, would have been another forbidden apple to men, the Bible giving us a lot of evidence to the contrary and making perfumes continue their march.

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[23] Quintus Septimius Florens Tertullianus, known mostly as Tertullian of Carthage (150 / 160-220), is the father of Western Christendom and founder of Western theology. He is the first theologian who used the word Trinitas to designate the Holy Trinity https://ro.orthodoxwiki.org/Tertulian

[24] Apud Mireille Buydens, *La propriété intellectuelle, Evolution historique et philosophique*, Bruylant, 2012, p. 67

[25] St. John Chrysostom (347-407), considered holy both in the Eastern Church and in the Western Church, worshiping him as the doctor of the Church. His theological work, preserved in its entirety, comprises 18 volumes. His critical Jewish works were used during the Second World War to persuade German Christians that Jews deserve to be exterminated.

And we have also identified a link over millennia between Biblical fragrances and perfumes that people use today.

Moses was married to the Ethiopian (black as coal) ***Sephora*** (or ***Tzipporah***), the precious daughter of some wandering pastors in the desert, who saved his life after he had killed an Egyptian who was wrongfully and cruelly beating a Jew. In Greek ***sephos*** means ***beauty***. And ***tzipporah*** means ***bird*** in Hebrew. These words are the result of a combined, inspired choice of perfume that led to the name of the famous perfume brand "***SEPHORA"***, which belongs today to the group Louis Vuitton Moet Hennessey (LVMH) that is selling more than 250 brands of perfumes and maintenance cosmetics. Promote these fragrances, women like to believe, as a token of appreciation for them, ignoring that, in reality, industry operates according to the rules of trade, and that in commerce products have no souls, but brands and if there is concern for feelings, it is just to attract and maintain customers for financial gain.

And we have learned that, by ignoring Tertullian, 20th century designers (Paul Poiret's debut) began dressing up women elegantly (and cheaper) using printed fabrics and adding to their garments also perfumes. After him, all great fashion houses combine the launch of new models of clothing, protected by intellectual rights, with new perfumes.

The origin of the perfumes is, as it can be seen, sacred, but it did not prevent their penetration into everyday life, so that they gradually lost from the aura of absolute holiness and closer to us, as we shall see, and from the naturalness in which there have existed for many millennia. But not from the idea of cleanliness, pleasure, attractiveness and courtesy when used wisely!

### 3.4. Fragrances of non-Christians

Perfumery has become an art and a science (we cannot determine precisely when) and a fabulous business, its transformation into industry, however, is also related to the lack of hygiene of crowned heads, some trying to cover their filth and odor by using large quantities of perfume and others were wearing them because they simply adore the pleasant smells.

Indeed, perfumes have been known for a long time and were also known by non-Jews and non-Christians. They knew and manufactured them, using it not only for religious purposes, the Sumerians (many of their perfume recipes were discovered in their "libraries", including Tapputi's name, the first perfumer of profession identified by historians), the Egyptians (who used the perfumes from birth to death[26] bathing in fragrant water as part of their habits), the Chinese, the Hindus, the Persians (who invented, through Avicenna, the process of extracting essences / essential oils from the flowers by distillation in the year 1000, then used through the world, and nowadays), Greeks, Romans, Arabs (Al Kindi is the author of "The book of the Chemistry of Perfume and Distillations" containing over 100 perfume recipes). The Arabs, unable to use alcohol, because of the interdiction have replaced it with oil and solid perfumes, their refinement in the creation of scents being unmatched.

The Greeks, Homer tells us, have been taught by the Olympian gods to make and use perfumes, and they are the first who made liquid perfume and have organized industrial production, setting up numerous workshops for this purpose (in Crete, for example, ruins were discovered a 4 millennia perfumery with a surface area of more than 4,000 sqm, but the perfume industry was well known and developed on other islands, the oldest perfume being discovered in the Pyrgos town of Cyprus[27]) which was hardly facing the demand. The same Greeks were engaging an intense perfume trade, although commerce, workers' work, and the work of artists, including perfumers, were not highly valued, to either the Greeks or the Romans, which, on the contrary, were considered dishonorable.[28]

The Greeks used for the perfume, among other plants, the **rosemary**[29], a Latin word composed of ***ros*** and ***marinus***, meaning the dew of the sea. The plant, which is aromatic and has both culinary and medicinal properties, was also called incense, because the Greeks burned her leaves as incense, considering it sacred and having some of the spices of Aphrodite and of the sea (in whose foam, the legend says that the goddess was born and emerged). Out of it was also made the crown worn by the grooms as a covenant of faith and fidelity, called the "incense ring", but also the crown that was placed on the statues of gods in order to thank them (a habit of Romans proven plagiarists of the Greeks in many ways, not only in the arts, they also used it for a while). The plant it is used for cooking and the tradition tells us that, women who use will always remain beautiful and have loyal partners.

In ancient Greek the name of **rosemary** was however ***livanos***, meaning **the incense tree**, a name that stems from the Semitic root of the word ***lvn*** or ***lbn,*** which means white, the explanation being that when burning, the incense gets milky white. This word ***lbn*** gave the name of Lebanon, the country whose mountains are brilliant white, are always covered with snow.

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[26] 3.300 years after Tutankhamun's tomb was open smell of perfume was still coming out.

[27] Stelian Tănase, *The history of perfume*, December 2nd 2012, article available on https://www.stelian-tanase.ro/istoria-parfumului/

[28] Cicero considered *„unworthy of a free and despicable man the earnings of all employees whose ability and value we do not pay; In these earnings the salary is itself the guarantee of servitude (...) All craftsmen are engaged in a despicable job, the workshop does not mean anything noble and the less acceptable are the occupations that serve the pleasures: butchers, cooks, fishermen;* ***add, if you like, perfumers, dancers and all gambling****. Instead, for jobs that involve more caution or from which an important service is expected, such as medicine, architecture, teaching knowledge of the nobles, these trades for the ranks they take advantage of - beautiful crafts (...) But of all companies that benefit from it, nothing is better than agriculture, nothing more productive, nothing more enjoyable, nothing more worthy of a man and a free man"*. Cicero, De Officiis, Book I: 42, 150-151.

[29] The scientific name of the plant with so many qualities is ***Rosmarinus officinalis***.

Everything was happening in Athens had to reach also in Rome (the Romans reproduced statues of Greek artists without shocking anyone and doing it because they did not consider themselves capable of doing something more beautiful) also the perfumes followed the rule and Rome became, in time, not only a city of power, but also a city of civilization and good taste, where elegance and beauty were of great value, and perfumes, some of which used in excess (birds, dogs and horses and they were also wearing perfume) could not be missing. Martialis[30] tell us (the father of the word "plagiarized" with the meaning it has today and denouncing as a plagiarist of his works of Fidentius), mocking the excessive use of perfume in his time, one of his epigrams entitled even ***„To a woman that wears too much perfume "***: *„Whenever you show up in to the world, you smell so good,/like you are carrying Cosmus Booth/Its heavy scent accompany you on the road,/Filling the atmosphere with waves of perfume./O, Gallia, I don't like your cheap manners:/If I shell perfume it my mutt would smell the same".* Note, of course, the reference to Cosmus (and his store), which indicates the origin of the term "cosmetics".

### 3.5. Perfume and … animals

By the way, perfuming dogs (and other animals), as seen, the idea to make them smell good is very old, and if we were to apply our famous Law no. 204/2006 regarding ethics in research, we find that, a famous perfumer is a plagiarist of ideas and should be punished if living in Romania. Thus, the famous perfumer South African Etienne de Swardt has joined the few and conquered his bosses from LVMH (Louis Vuiton Moet Henessy), Paris and the fashion world with his luxury fragrance for dogs created by him (one for cats was a failure). But the dogs, like horses or birds, as we have seen, are perfumed for a long time, so the idea of a dog perfume is not its own (it's not time for discussion and ideas, but it is worth remembering briefly: Swardt worked at Louis Vuiton, from whom the world was waiting for a perfume. He proposed to his bosses that it would be a "good joke" to make a perfume for dogs, but his bosses took the joke seriously, and he did it and became immediately famous. But the idea was known for two thousand years!). And it's beautiful what the famous, now, perfumer Swardt, graduate of Versailles school, apprentice at Givenchy say: ***I love poetry and the perfume is a poetry***.

Recently, **the porcine perfume** was created, a perfume created by an American scientist, John McGlone, from Texas Tech. In fact, it is a breakthrough that has identified practical applications. McGlone noticed that androsterone, a steroid acting as a pheromone produced by male pigs and contained in their fat and saliva, calms down dogs. Together with his colleagues it has done research and experiments and determined that the product is useful in calming down the noisy dogs, which can be extremely useful for noisy dog owners. And how in US anything new made under the sun is patentable, the product will be, certainly, patented in the near future.

Fragrances for animals, especially for pets and particularly for dogs, are a great success among people. However, it is unlikely, for a dog who has the odor more than a thousand times developed than the human smell to really appreciate the fragrances, it is well known that they do not like the smell of pepper, citrus and alcohol, forming part of the recipe of many perfumes.

### 3.6. The first "modern" perfume

History claims that in 1370 would have been created the first modern perfume at the request of Queen Isabella of Hungary, called Water of the Queen of Hungary, which it would have been used to seduce the King of Poland and marry him. The recipe is described in a work paper without a known author, printed in 1660 and the perfume is as real as possible: 30 ounces of alcohol and 20 ounces of rosemary essence. Only that, in the 14-th century that there was no Hungarian queen with this name[31] and no Polish king married to a Hungarian queen. Moreover, it also follows from the content of the recipe, that the named queen is the one who would have refused the marriage request from the Polish and that her product would have had also therapeutic virtues, that cannot be denied because the perfume has always had curative, protective and antiseptic qualities due to the alcohol content (also, in the Great Museum of Paris are exposed perfumes used against the plague). However, the legend is more beautiful than the historical truth[32].

However, it is undeniable that perfumes have been, are **and** will be used by women to conquer men and men to conquer women. And that for women, they were (maybe they still are) a "weapon". Even though fragrances have often had to endure also the ungrateful role of unpleasant odors mystificator generated by the lack of water and soap of some (including crowned heads) or of the stench in the urban agglomerations that made Queen Elisabeth I's visits to London to be preceded by perfuming the streets she was passing by on her way in order to save the Glorious and / or Good Queen Bes (as her subjects love to call her) who could not stand bad odors. Queen Elizabeth was also famous for her statement: ***"Whether it is needed or not I still wash myself once every three months"***. But compare

[30] Marcus Valerius Martialis, 40-104 d. Hr. is the author of 15 Epigrams books that identify the circumstances of Rome's life during Domitian, Nerva and Trajan. His epigrams have been translated into Romanian by Tudor Măinescu (1892-1977), who was **a judge** (1924-1948), satirical poet, epigram writer, fabulist, storyteller and translator.

[31] Still, there was a Hungarian woman, Isabella (1519-1559), married with Ioan I. Zapolia, king of Poland, but she lived during the 16th century and was regent in Transylvania.

[32] Some sources placed this fragrance on Queens Elizabeth of Hungary account. There was an Elisabeth of Hungary, descended from Andrew II, but she lived between 1207 and 1231. I COULD NOT identify a Queen Elizabeth of Hungary, who lived between 1305-1380, as claimed in some papers.

the Queen of England with Queen Isabella of Castile, who would have sworn not to wash herself until she would banish the Moors out of Spain (which it happened after many years of wars, only in 1492), while others say that she would have washed herself only twice in her lifetime: at birth and when she got married!

In history, men are no more different in terms of cleanliness. The Russian ambassador to Paris, for example, wrote about the King of the Sun (Louis the 14th [33]) that *„its majesty stinks like a wild animal"* and about one of his predecessors, Henry the 4th it is said that his ugly smell have been provoked the faint of Maria de Medici at their first encounter. Thus, it is explained the origin of the bride's flower bouquet: its need to cover the unpleasant smell of the groom.

In such an ugly smelling environment the development of perfumery was more than necessary and it became an art in France, sometimes a "weapon" of seduction or by case a deadly one and an industry. And not only that! Caterina de Medici[34], mother of three kings, a queen herself, famous for her Machiavellian nature and her passion for the poisons (cyanide with pleasant smell of almonds), with which her opponents were liquidated and produced by her perfumer from Florence, named Renato, is the one who opened the first perfume shop in Paris. Today, *PUR POISON* ("pure poison") is a famous perfume of Dior House, Pur Poison being a non-descriptive brand for content.

### 3.7. Perfumes with ... gloves and guillotine with perfume

The perfumes had their path and future assured even without the intervention of the ones that did not know the "craftsmanship of flavor makers". But the need to remove the unpleasant smells of gloves made of animal skin to make them more attractive has made the tanning industry in the seventeenth century to link with that of parfums (in 1656 they also set up a guild), which would radically change the destiny of the French city of Grasse de Provence. Thus, a craftsman from Grasse "came up with the idea" of impregnating gloves he produced with perfume, and then began to produce the flavors necessary to apply his idea, but they are authors who claim that the idea was put into practice in other lands, so the French in Grasse would be just copiers[35]. It is certain that his scented gloves have been very successful (Queen Maria Antoinette bought 18 pairs of gloves from Grasse weekly), so his recipe was quickly and by many copied, the production of perfumes in Grasse growing ever since. The growing was that great, so he took the lead in the gloves industry and turned the city of Grasse into the world capital of raw materials (flowers) and perfume production (more than 60 companies are based there) and later became the host of the International Museum of Perfumes, a museum that now has over 50,000 exhibits. The city also hosts two festivals: roses of May and of jasmine (in August).

The development of the perfume industry was also determined by the increasing demand of the consumer market as such that much later the perfume became an ingredient for detergents, soaps, cosmetics, etc.

During Louis, the 15th [36] lifetime his court was named due to the high consumption of erfumes, *"le cour parfumee"*. A royal court where the beautiful, smart, cultivated and good perfumes lover, the Pompadour marquise[37] occupied an important position, which is why she has gained a lot of enmity. However, it is hard to say that the beautiful courtesan would have been the one who, six years after her death, would have determined in 1770 the adoption in France of a law punishing women who abused perfume to seduce men. This story with the perfume as a men's bait, has a long history as we can see, on behalf which, as I have already shown, there is a lot fabulizing about.

It is not the only oddity of the French in terms of perfumes, which they loved very much, since during the Revolution they even created perfumes. One of these was called *"Parfum á la Guillotine"!* Of course, it was not created to drive away the stench of blood from Place de la Ville, where dozens of executions by guillotine took place accompanied by the ecstatic screams of the crowd. A *Parfum Sophistic Guillotine* (unisex) is still produced today, the basic ingredients being lichen, orange and bloody grapefruit.

### 3.8. Perfumes, Napoleon, Josephine and Queen Mary

Napoleon Bonaparte was a great perfume lover, he used high-quality perfumes (two-liter violets fragrance per week!) and loved, over the power of understanding of many of his contemporaries, a single woman, Josephine[38] and whom himself crowned her as a queen, forgiving her infidelities that made him enormously suffer and scandalizing even his close relatives. Even after the divorce, the Emperor loved Josephine (platonically, say his admirers), but she also loved Napoleon until her death (May 29, 1814).

Josephine was an elegant woman who, apart from the many vaporous dresses she regularly orders, loves the fragrance of musk, the smell of which is said to

[33] Ludwig the 14th, 1638-1715. Known as„ Ludwig the Great" or „The King of the Sun".

[34] Caterina de Medici, 1519-1589

[35] But Magda C. Ursache claims the fashion of scented gloves was brought to Paris by Caterina de Medici. In other words, gloves' scent was known in Italy long before being used by the Grasse tanners, and if that was true and the Italians had been patented, the French would have been just counterfeiters.

[36] Ludwig the 15th, 1710-1774. Also called "The Most Loved One" and "The Lazy King".

[37] Pompadour marquise (1721-1764), mistress of the King Ludwig the 15th.

[38] „My husband does not love me, he adores me, I think he will go insane", wrote Josephine in a missive from 1796 that was auctioned at 36,655 EUR. A collection of 50 letters and 400 documents of the Empress regarding the French Revolution were sold for 700,000 EUR.

persist today in her bedroom in the Malmaison Palace (today' being a museum at 15 km of Paris center) where, it is said that she died of Napoleon's longing. The emperor who was left without a crown and who, even before being exiled to the island of Elba, frequently visited the one he had divorced from state reasons and made long walks with her through the palace garden full of roses that were also her favorite flowers. Emperor Napoleon died on the cursed island where he was exiled with a small box containing two burning perfume pills (solid) by his head, Houbigant, one of his favorite perfumes.

Josephine's musk perfume, however, made many victims among the deer that produced the so expensive essence and which, in order to be harvested, was to be preceded by the killing of the animal, the species being threatened even today with extinction. The chance has revealed, as we shall see, the synthetic musk aroma, and that helped save the little deer producer of natural musk.

It is said - and certainly, it is not just a legend - that the French perfume industry has moved its weight center of gravity from Grasse to Paris and has developed vertiginously in the eighteenth century due to Napoleon's passion for perfumes. In a family of gloves producers, Grasse Francois Rance was born who when he decided to dedicate himself exclusively to perfumery (1795), quickly became known and became Napoleon's favorite perfumer for whom he created the perfumes "Le Vainqueur", "Triomphe" and "L'Eau de Austerlitz". Later, his descendants created perfumes for Napoleon the Third and his wife, among them „Heroique". Rance's descendants are the owners of Le Procope Restaurant, Paris's oldest restaurant [39] where famous characters such as La Fontaine, Hugo, Balzac, Voltaire, Diderot, Verlaine, Anatole France enjoyed the culinary delights and ... Napoleon Bonaparte, whose lieutenant hat (given by him) is a valuable showcase of the restaurant[40].

In 1752, Jean-François Houbigant was born in Paris, who, helped by the family to whom his parents were servants, studied (at Grasse [41]) the art of perfumery, ascending then, in a France where people were exaggerated to hide the odors generated by precarious hygiene. In 1775 he opened in Paris, on Rue Faubourg Saint Honore (an area in development and inhabited by aristocrats), a shop of gloves, perfumes and flowers, his small business prospering rapidly thanks to the products that conquered the world and became the famous perfume house (one of the oldest in the world and the first one who isolate coumarin[42] from the Tonka beans, a vanilla-like substance) „Houbigant"[43] and perfume provider for many royal homes, including for the Queen Mary of Romania.

The beautiful (the most beautiful queen of Europe, her many admirers were saying), the elegance ( by attitude and dress style combined with quality perfumes), intelligent, spiritual and diplomatic (conquered the world and all the important people she met, and there were many, working for the benefit of the country), loving beautiful (queen of arts called by others) Queen Mary, she adored quality perfumes.

In 1921 Queen Mary accepted to become the image of the perfume "Quelques Fleurs Royale" (the first multifloral fragrance created in the history of perfumes [44] in 1829 and still produced today) and *„Mon Budoir"* (created in 1912 and no longer produced since 1978) made by the Houbigant House. Queen Maria was the first crowned head who accepted an association of her name with *Pond's* cosmetics, that led to a sensational increase in sales.

Specialists say that the Queen's Peleș rooms would preserve the smell of *Mon Boudoir*, a perfume that the French want to recreate.

### 3.9. Odicolon, the first degenerate fragrance brand

In 1709, an Italian perfumer, Giovanni Maria Farina[45] (German version Johann Maria Farina, French version Jean Marie Farina) settled in Köln (Cologne in French), in Germany, where he open a perfume factory that still exists today (it is the oldest in the world and reached the eighth generation of perfumers). Here he created a delicate, fresh, light fragrance from a blend of Hesperides, Mediterranean flowers and aromatic plants that quickly became famous in the world and indisputably from the royal courts of the time (whose official supplier became) and whose creator, granting him German citizenship, as a gratitude to the city that embraced and adopted him and named him *Echt*

[39] It was founded in 1686 by the Sicilian Francesco Procopio Dei Coltelii. https://www.yelp.com/biz_photos/le-procope-paris-2?select=yG0ojwEcDBi1X

[40] Among many other pieces of historical and artistic value, there is also the farewell note of Queen Maria Antoaneta written by her shortly before being guillotined, on a napkin which still retains the traces of her tears.

[41] The information is not clear, on the site is written: „De nos jours, la composition de parfums Houbigant se fait toujours à Grasse, jardin mondial des parfums ou, il y a deux cent ans, Jean François Houbigant fit ses premières créations.https://www.google.com/search?ei=Zbq4XP6_KuukrgSA9qn4DA&q=de+nos+jour%2C+la+composition+des+parfums+Houbigant&oq=de+nos+jour%2C+la+composition+des+parfums+Houbigant&gs_l=psy-ab.3...22999.46240..48294...0.0..1.216.5147.19j29j1.....0....1..gws-wiz.....0j0i131j0i67j0i70i255j0i22i30j0i19j0i22i30i19j33i22i29i30j33i21j33i160.i_s3RWg3pv4

[42] Coumarin (C9H6O2) is a toxic, flavoring substance with vanilla-like odor, used in perfumery and cosmetics and forbidden in food. It was discovered in 1822 in Tonka beans, synthetically produced since 1868. Warfarin, a coumarin derivative, is used in medicine (anticoagulant) in the manufacture of fluorescent dyes and poisons for mice.

The brand has lost its former glory, sadly says Dominique Valentin, seeming to be forgotten by the great public. http://www.racinesenseine.fr/puteaux/pages/rose0008.html

[44] This fragrance is considered an important innovation in perfumery and then influences composition.

[45]Johann Maria Farina (1685-1766), learned the art of fragrance in Venice, in the studio of his uncle Carlos Gennari, a producer of perfumes for aristocrats.

*Kolnisch Wasser* (True Köln Water) or in the fashionable French of those times *„Eau de Cologne"*. As it is known today trademark degenerated (in Romania) in the word "odicolon", a word that, according to DEX, designates light perfumes. Neutral noun and it can be no other way because the perfume is **unisex.** Köln-ul also has become thanks to Farina's perfumes, world famous and as a sign of gratitude to Farina, he was awarded the title of the honorary citizen of the city and on the facade of Cologne City Hall one of the many statues (second floor, left) depicts the famous perfumer. The word "**colony**", pronounced with emphasis on the second "**o**" it means fragrant liquid, made of alcohol and various aromatic vegetable oils used in cosmetics. 100 years later, Napoleon Bonaparte was to be, without his will, the origin of another German perfume, bearing a mark consisting of figures: **4711.**

A winner, in just 19 days, against the Prussians at Jena and Auerstadt, Napoleon Bonaparte put an end to the Roman Empire of the German Nation (on October 27, 1806 he entered Berlin, bowing with respect in front of The Great Frederick funeral's monument[46]) and ordered that all the houses in the occupied territory be numbered. In Cologne, a house located on Glockengasse Street, belonging to a certain Carlo Francesco Farina (a character unrelated to Johann Maria Farina, the founder of the famous Farina fragrance house), received the number 4711. The German Wilhelm Mulhens, who was a modest perfumier, but with a special sense of business, bought from the owner of house number 4711 the right to use the name, the same as that of the famous Cologne perfumer, as a business name (trademark), taking advantage of the lack of laws protecting the distinctive signs and inventions in Prussia.

Buying the name of the owner of that house and taking advantage of the troubled times and the lack of legal prohibitions, Mulhens produced in his firm Farina perfumes under the name of the famous perfumier: Farina. Of course, you notice the conflict between brand and firm (trade name) or between the firm and the trademark and the priority violation of the first perfume producer, Farina and Eau de Cologne, but at the time of the events, the Paris Convention for the Protection of Industrial Property, brands and firms was not even a project.

However, in 1875 under the trademark law adopted in Germany (unified) only a year before, the sign ***4711*** with **a bell** and **other figurative signs** (green color) was registered as a perfume mark. Mulhens was not the only one who parasied Farina and the perfume that made him famous and the Cologne. *The Eau de Cologne* could have been counterfeited, sometimes counterfeited, sometimes tolerated or even encouraged by the Farina family (as we shall see) and anyway impossible to sanction in the absence of legal regulations, so that the name became generic and the brand has made history!

A descendant of the famous creator, named Jean Marie Joseph Farina, settled in Paris in 1806 and established his own company under the name of Farina, with the permission of his family in Cologne, creating a different perfume for another audience. The company he later sold to Roger & Gallet, who still produces another fragrance "Roger & Gallet Jean Marie Farina". And that's how we got to mess with the real Farina.

However, as I have said, also the name of Eau de Cologne comes from Cologne to which the true Germans call it Echt Kolnisch Wasser. True Cologne Water. To know: it was, is and will only be "colony water" produced in Cologne. Any other Cologne is likely to mislead the true origin of the product. But ***Eau de Cologne*** is a long history, degenerating into the **"odicolon"**, a word that, not only in Romanian language, has the meaning of a faint fragrance.

It is true that before a complete degeneration, a famous perfumer, Pierre-François Pascal Guerlain, also created a "related" perfume called ***Eau de Cologne Impériale***, for a good friend of the Romanians, the engraved Emperor Napoleon III[47], a perfume that brought notoriety to its creator, because it soon became the favorite of many houses of kings and emperors.

## 4. And yet ... is the fragrance a work of intellectual creation?

Asking this issue is only useful for the creative perfumer. For the one who works at random, for the one who copies or reproduces a recipe to another, it cannot be a creative activity generating opera, intellectual creation and protection by any intellectual right.

Fragrance is defined as a combination of aromatic essential oils or aromatic compounds, fixative agents and fragrance-friendly solvents! Or even shorter: a fragrance is an odor obtained by combining several elements. Which means that the perfume is defined by itself and that is why this definition cannot say much about perfumes! Sounds anosmic, does not have pepper

[46] Frederic the 2nd or The Great Frederic (1712-1786), surnamed royal warrior, was a friend of Voltaire. Art lover (he was a talented musician, philosopher, poet), a complete military (he won important victories and made Prussia a powerful and respected kingdom), misogyn (he was forced to participate in the execution of an officer with whom he was suspected of having an indecent relationship), builder of Sans Souci palace (without care) which is associated with the legend of the miller who responded to the aggressive royal offer, of buying his mill that "*the king may want my mill at any cost, but there are also judges in Berlin"*. In front of his funeral monument, Napoleon Bonaparte asked his generals to discover himself and said, *"If he were alive, we would not be here today."*

[47] Charles Louis Napoleon Bonaparte (1808-1873), the nephew brother of Napoleon Bonaparte, President of the Second Republic (1848-1852), became Napoleon III, Emperor of France (1852-1871). He had an adventurous life (he was sentenced to life imprisonment in 1840, escaped in 1846, returned to the country). It has made an important contribution to the industrialization of France and the modernization of Paris. Defeated in the Battle of Sedan on September 1, 1870, he became captive to the Germans and was released on March 19, 1871. He settled in Chislehurst, England where he died and was buried on January 9, 1873. Unforgiven by the French for losing the battle at Sedan is called the "Forgotten Emperor", being the only French monarch buried in foreign land.

and salt, has no charm, has no substance! It may be appropriate for exact science this definition, but not for the needs of intellectual property law. Which, as it is well known, operates, and not only in the field of copyright, with subjective and relative criteria even when it imposes a protection criterion such as the novelty that is only apparently objective. And this, because the novelty of the invention is an objective criterion only in relation to what we know and identified as a state of the art or a stage of skill, not with everything that really exists in the state of the art. And fragrances are a good example to prove that novelty is not as absolute as we often find it. Perfumes contain many elements, the most important being fragrances, essences or essential oils. For many years (thousands of years) the essence of flowers such as rose, lavender, lily of the valley, rosemary, lilac, violet, bergamot, iris, lily, jasmine etc., flowers of fruitful fruits such as lemon, orange, cherry, plants such as vanilla, patchouli (patchouli), mint, basil, safflower, acanthus, almond, coriander, cinnamon, pepper, vanilla, herbs with aromatic properties (oak mussels), by-products such as resins and incense (which was more precious than gold), or products of animals such as musk, amber, clover, castoreum - obtained from killed animals or painful procedures for animals, or hyraceum - fossilized badger excrements. Synthetic vanilla was invented in 1874 (vanillin[48]), and since then perfumes have entered into a new era, that of inventions, of multiple blends, but also of perfumes with allergenic potential or even worse.

Perfumes seem to us to a certain extent like words. Of words that do not build (like stones, for example) in a real, immediate, visible, palpable manner. Immaterial words that we use and set one after the other to say what we think in the original way are suggestions indirectly communicated. That's how the perfumes are. No solid substance (they still have a substance) and losing their materiality in the air where they are lost in a short time. We "get drunk" temporarily with their flavors! It inspires us! They give us a nice air! Or on the contrary. It brings or turns on the one who we wanted to meet on the way! Because fragrances create moods, they influence behaviors. Provides confidence, relaxation, pleasure, attraction, sympathy, goodwill, or rejection response. It is not only about the scent in case of fragrances. It's also our own way of reacting to smells, combinations of flavors when they are successful or, on the contrary. Something that is transmitted to our minds, something that, without knowing it, influences our attitude. Which makes a interlocutor a loser or a winner. Of the soul, mind, grace and heart! Fragrances appeal to smell (considered fainter as weaker than sight, hearing, and tactile sense) and are more persuasive than spoken or written words.

But the book does the same thing: it tells us what its author is able to tell us, and probably always less than he wants to tell us, to convey to us. Even now our words, as easily seen here, will not be able to tell everything about a perfume and describe a perfume.

A successful Parisian perfumer in Paris, Octavian Coifan, with a workshop across the Eiffel Tower, says that perfumery is the eighth art. It is correct to say that perfumery is an art, but Hegel[49], undecided how he used to be, and how are almost all the philosophers, in his *"Aesthetics Lectures"* (which also tells us that intellectual goods are an extension of human personality), divided the arts into only six categories[50], much later, some added three others, of which, unfortunately, perfumery is nowhere to be found. Her place in the arts is fully deserved, as Mr. Coifan says, who added that the perfume is a poem. A silent poem that addresses an important sense of smell. Fragrances have always been fascinated, being considered sacred products, the art of which masters were respected and almost frightened, and in antiquity they were seen as gods secrets holders[51], and later in the Middle Ages they became not only fragrant but and alchemists or connoisseurs of poisons and at risk of being considered heretics and then usable products from common people to crowned heads.

For about three centuries, since fragrance became a symbol of civilization and then an indispensable accessory, perfumers are seen as artists or as inventors, or at least as specialists who, when valuable, are also hunted by big houses productive, a true professional being very difficult to prepare and keep in a world where competition is particularly strong.

However, we believe, that no other activity of man is so subtle as the art, science, innovation of fragrancy and the entry, in 1874 (when the synthetic vanilla flavor was invented), in the era of synthetic perfumes only increases the inventive side of this fabulous domain! Perfumery continually creates: essences (which are no longer mere chance discoveries), ingredients, combinations of flavors, colors, and product presentation. Perfumers work a lot searching and researching, and some of them say that, even their sleep is haunted by essences, combinations or formulas, and that their encounters with nature are a

[48] The first to use vanilla in a perfume was Guerlain, in 1889, for the Jicky perfume, which is still produced today.

[49] Georg Wilhelm Hegel (1770-1831) is the main representative of the classic German philosophy. He learned the first Latin decline at the age of five. His favorite readings were, among other things, the Greek tragedies, preserving his preference for Greek language and culture all his life, translating Longin ("On the sublime"), Epictet ("The Handbook"), Sofocle ("Antigone"). His fundamental work "Spirit Phenomenology" was published in 1807. He was a graduate of Fichte at the philosophy department of the University of Berlin. He died of cholera. After his death, the disciples split up into the "Right Hegelians", who represented political conservatism, and "left Hegelians" or "Hegelian youths" who pronounced themselves for atheism and liberal democracy. Karl Marx belongs to this current.

[50] 1) architecture; 2) sculpture; 3) painting; 4) dance; 5) music; 6) poetry (literature) to which it was later added; 7) cinema (added in 1912) 9) Drawings (1946).

[51] Cicero was not sharing same opinion, but he put all the artists among those paid for their work for the benefit of others, and who was not worthy of the appreciation enjoyed by warriors, athletes, and those who worked their own land. Cicero, De Officiis, Book I: 42, 150-1

duty and an opportunity for olfactory indulgence in the first place and only then visual delight, that for them the street and crowds are full of smells, each betraying something of the personality of the bearer and of the person who created it and which they are trying to identify.

Quite similar to classical works (written, painted, played, filmed in the creator's own style), fragrances are also combinations of elements, some existing, others invented in particular, from which a product, a perfume is obtained. When the product is original, new it is the result of a creative process, and the perfumer is a creator, which is synonymous with an author or an inventor. What difference can be made between the author of an original book and the author of an original perfume? What difference could we make between the one who invented a molecule and made an innovative drug and the one who discovered a molecule with which it gets a new perfume? We do not see any, and we see no reason why the fragrance, when it's original or when it's an invention, is excluded from protection! Fragrances, said Charles Baudelaire, who was a great lover of such products,[52], *„ must express the emotions of our soul and our senses".*

Three protection systems are seen as possible for fragrances: copyright, patent, and manufacturing secret (or service). But also cumulation. Industrial designs and brands have a special role in perfumery. These give them an appearance of shape and ... soul.

## 5. Perfume protection by copyright

As I have already said, we do not see any impediment to the protection of perfumes by copyright. A protection with more specific rules, but copyright laws contain special rules for many categories of creations (computer programs are the best known, but they add to cinematographic works to photos and many more).

The "form" of intellectual creation must be widely understood as the way in which the work is expressed, it is exteriorized. The form of the musical work is in the score and includes the rhythm, the harmony, the melody, the form of expression of a mime is in his gestures, of a ballerina in the movements of her body, of a perfume in its smell, etc. The reluctance expressed with regard to protection of fragrances can be explained for non-perfumers, for those people who cannot perceive so many smells as the perfumers do (20,000 some may say, but who can count them? We believe that they are infinite!) Or for those who cannot explain in the case of perfumes neither the originality nor the novelty, nor the differences or similarities that can be seen by specialists, using similar concepts and criteria of evaluation identical with those used in the classical works, demonstrating - in the case of perfumers, the necessity of admitting and applying the criterion of originality with variable geometry. Because if we compare the infinite essences, smells and ingredients of words, their combination in a personal manner, the original cannot be but a creation of expression, form, which is protectable by copyright. And when a new aromatic molecule is invented, such molecule and the product made by combining it with other elements can undoubtedly be an invention. As well as the combination of known elements, it can represent an invention.

Making a perfume is not a simple skill as it sometimes people claim on no ground [53]. In such a vision, photographing or painting should also be just skill, and the result, excluded from protection. It is difficult to say what's more about perfume: learning, discoveries, science, knowledge of the chemical formulas of essences (there are about 3,000 synthetically produced flavors at this moment time, respectively organic compounds synthesized in laboratories) and ingredients, choices and combinations of essences and ingredients the imagination and the special sense of the creator, the personality of the one who combines them so successfully that the perfumer, in time, becomes legendary for his miraculous creations. Or, maybe his developed sense of olfaction that helps him to distinguish several times more odors than ordinary people (about 10,000 after some authors) and handles them, just as the writer wielder of words does in his art.

It cannot be generalized because not all perfumes are original at the time of their production, they are not the result of a creative activity. There are well known perfume recipes, or forgotten, abandoned, lost recipes and based on which good perfumes can be produced without intellectual activity by their producers. A perfume made after a known recipe does not imply creative activity and will not be protected by an intellectual right, such as the reproduction of works of art. Similarly, the banal smell (even if the law does not condition copyright protection, a writing, a drawing, a perfume when it is banal, cannot be a work in the sense of the copyright law and will not be protected).

In a new fragrance, in a good fragrance that attracts the audience we talk about observation, it is art in combining essences and ingredients, it is grace, soul, passion, personal touch, there is much and incontestable originality in a perfume, that is why perfume, even if it involves a little physical work (infinitely less than a plastic artist does or even a writer) it can only be an intellectual creation.

[52] She also wrote a poem "Perfume Exotique," which inspired Byredo (Ben Gorham) to create a perfume. The idea of the perfume was born after Ben Gorham visited his mother's hometown in India. He studied plastic arts, but meeting with a great perfumer, Pierre Wulf, made him change his way. Lacking perfumery studies, he is considered an outsider in the field and even an anomaly. Explaining his olfactory wishes, he creates helped by great perfumers (Olivia Giacobetti and Gerome Epinette). However, he is considered an authentic and personal artist in the world of fashion, art and perfumery.

[53] Cristophe Alleaume, Nicolas Craipeau, Propriété intellectuelle, Cours et travaux diriges, Lextenso éditions, Montchrestien, Paris, 2010, p. 5.

Octavian Coifan, mentioned before, says an important thing for qualifying perfume as a workpiece and the perfumer as a subject of copyright: *"Obtaining a pleasant smell does not make you a perfumer. It's just about the difference between an artist and the coloured pencil box that you give to a child. Art begins only when you master such fragrances. A kind of an art of illusion. As if the flower or landscape is under your nose."*

Flavours, odours used and obtained, proportions of mixtures, all demonstrate that demonstrate that works can "wear" the most diverse forms of expression, and the form is indifferent to the law when it recognizes or refuses to protect a creation of the original spirit which is genuine. Or, the same essences, the same ingredients used by two perfumers, may have different results, which are given by the personal nature of each perfumer in the way of usage and mixing, by the proportion of mixtures, the reactions that are caused by these mixtures, the final product being objectively and precisely identifiable.

The parfumier does not create a new form of expression, which already exists (as we have seen from the creation of the world), through its creation (the perfume), expressing his personality in a particular form, appropriable under the condition of originality, by copyright. The law does not condition copyright protection on the mode or form of creation, copyright being indifferent to the techniques used in order to create. The fact that pre-existing techniques ("the craft of aroma makers," says the Bible) does not make the obtained product non-appropriable. In a contrary interpretation, it would mean that plastic artists, musicians, writers, etc. who learn techniques to create, are not the authors of their works, and they cannot be protected, which obviously cannot be admitted. **Whatever** the techniques of realization and mode of expression, the law equally protects all works that fulfil the condition of originality. Seen as a fingerprint, as a manifestation of the author's personality in his creation (Article 7 of Law No. 8/1996).

According to art 7 of the Romanian Copyright Law, the original works of intellectual creation in the literary field, artistic or scientific field, regardless of the way of creation, the way or the form of expression and regardless of their value and destination, **are subject to copyright**, and the list is formulated as exemplary ("how are"), so if the perfumes are not on this list, doesn't mean that they are excluded. Values, on the contrary, implicit admission. The excluded achievements are limited in Art. 9 of the law and this text does not contain the perfume also.

There can therefore be no discrimination or exclusion depending on the creator's form of expression. Whatever form of expression, and smell is a form of expression [54], it is susceptible to appropriation (we prefer to call it protection), and in order to protect a work, only its (original) form is taken into account. The term "form" has to be understood in a broad sense: form is the way in which creation is expressed, exteriorized, and **there are no limitations regarding the way of expression, the form the work can take.**

The condition of the concrete form of expression is indifferent to the Romanian legislator, and the perfume has such a shape that makes the product identifiable objectively and sufficiently precise. The harmony, the rhythm and the melody line in music, the chain of words in which the ideas are written in a written work, the paths chosen to reach the results in computer programs, **the scent of a perfume**, are all (concrete and different) forms of expression. Form is not a secondary element of a protectable creation by copyright and the law has not "frozen" the form of the appropriable good by copyright. "It can make the only difference in things: so it happens with literature and music, where the elements used to create are limited in number: words, notes, smells"[55].

It is always stated and sometimes too vehemently that merit or value is indifferent to the recognition of intellectual creation nature. We do not all agree with this idea (nor us), because banality does not meet the condition of originality, and in the case of perfumes, this is even more obvious. We do not, however, believe that **the judge** can be absolutely indifferent to the value, because in its absence there is no "work" to talk about. Of course, a criterion of value induces the idea of subjective appreciation, but so do the things in examining the fulfilment of the originality condition. However, the banal is excluded by default from protection because it cannot be considered "work". Which means that we operate, however, with a value criterion, and that we keep it from saying or recognizing it.

**The destination of the work or the sense by which a work is perceived must be neutral to copyright**, a solution derived from the principle of unity of art. Designed for contemplation, leisure reading or study, viewing and / or auditioning or other uses with aesthetic or utilitarian effect, intellectual creations with original forms are equally protected, excluding those which, considering the destination, the law expressly excludes from protection. This is not the case with the fragrance, for which there is no exclusion from legal protection. In addition, since they are not expressly excluded from protection, fragrances are protected as some that fall into the category of those which, without being listed, are implicitly admitted.

As for the argument that works are generally intended to be perceived by the sense of seeing and hearing and that the other senses are inferior and lacking in the ability to perceive the works, it is false, the demonstration being simple to do: the written works are perfectly perceptible by the touch sense as soon as they are "written" in Braille, or by hearing, when recorded and presented in this way to the "reader" (the listener). But to claim that only perceptible works by hearing or vision are protected, it means adding to the

[54] N. Binctin in *Droit de la propriété intellectuelle*. L.G.D.J., 2010, p. 57.
[55] N. Binctin, p. 44.

law, because no provision of Law no. 8/1996 does not permit the conclusion in the sense of limiting protected works in relation to the sense of their perception.

Neither fixation, the possibility or the impossibility of attaching the perfume to the support cannot be a reason for exclusion. Firstly, because the product can be stuck in its container. True, it is a form of attachment different from other works. But fixing computer programs did not break previous barriers? And in addition to computer programs, in themselves, they cannot be perceived by humans directly, with no sense. To be perceived, it takes a machine, a computer that makes it only partially perceptible. And then, the law does not provide for such a condition. Even more, it recognizes protection even of unfinished works. In the French doctrine, referring to the jurisprudence of the courts, it was found that the protection of perfumes is not conditional on fixation, according to the old rule stating that intellectual goods are independent of their possible support as soon as the form is perceptible. Accordingly, Nicolas Binctin points out, *"a perfume is therefore capable of being a work of protectable creation"* on the basis of copyright laws. It is true that the Berne Convention (Article 2 (2)) provided that Member States could make the protection of works subject to their attachment to a support. It is a faculty of states, not an obligation, and the Romanian law and all EU countries, except for Germany, do not provide for such a solution. But even if it was provided, we believe that in case of perfumes the possible condition of attachment is fulfilled, its support being its container.

Of course, the perfume has a peculiarity. Looked at it does not say (pretty) much. Only after being smelled and used, it says what is all about, however the fact that the fragrance addresses to the sense of smell does not make it either imperceptible or unprotectable. The sense of smell it may be the least understood, but it is not less important than other senses except for those who do not want to see the truth. There are also many authors who designate fragrances as "olfactory works".

## 6. Jurisprudence - protection of tastes and fragrances

The Court of Justice of the European Union has been questioned about the possibility of protecting the taste of a food product by copyright, the facts being as follows: "Heskenkaas" is a food product containing cheese, cream and herbs, created in 2007 by a private farmer, the rights to this being divested in 2011 to the Dutch firm Levola Hengelo BV (Levola). On July 10, 2012, a patent for this product was granted. Another Dutch firm, Smilde Foods BV (Smilde), marketed in 2014 a product called "Witte Wievenkaas" of the same taste and distributed in stores in the Netherlands. Levola sued Smilde complaining that by placing on the market a product of the same taste it infringes his copyright on the taste of his product "Heskenkaas" and that the product "Witte Wievenkaas" constitutes a reproduction of this work, which is why he asked the Dutch court to ban the production and marketing of the "Witte Wievenkaas" product".

The first Dutch court rejected the request on the grounds that the Claimant did not specify which elements or combinations of elements of the 'Heskenkaas' taste would give the product an original, individual note without considering it necessary to analyse whether the 'Heskenkaas' taste was susceptible to protection by copyright. However, the court hearing the appeal has found it necessary to refer the CJEU on several questions, the first and most important being whether, under EU law, the taste of a food can be protected by copyright. In the reasoning of the request for referral, the Dutch appeal court also mentioned a judgment of the Supreme Court of the Netherlands rendered on June16, 2006 in which it was accepted that a perfume is protected by copyright[56].

Having to respond to the questions of the Dutch court, the CJEU rendered a Judgment on November 13, 2018[57] only on the possibility or the impossibility of protecting the taste of a food product, considering that in relation to that response, the others were no longer necessary and held that:

I. the taste of a food product could be protected by copyright under Directive 2001/29 only if such a taste could be classified as a 'work' within the meaning of that directive. And for an object to be classified as a "work" within the meaning of Directive 2001/29, two cumulative conditions must be met: a) the object to be original, that is, to constitute an intellectual creation proper to its author, and b) "work" within the meaning of Directive 2001/29 is limited to elements which are the expression of such intellectual creation. This necessarily implies that there is an expression of the subject-matter of protection under copyright which makes it identifiable in a sufficiently precise and objective manner, even if that expression is not necessarily permanent (comments 35 to 40).
II. Authorities and economic operators must be able to clearly and accurately identify protected objects in favour of third parties, in particular to other competitors. On the other hand, the need to remove any element of subjectivity, which is detrimental to legal certainty, in the process of identifying the protected object implies that the latter may be the object of a precise and objective expression (comment 41).
III. The possibility of precise and objective identification of taste is lacking in case of taste, and there is no means in the current state of

[56] See also Mireille Buydens, La propriété intellectuelle, Evolution historique et philosophique, Bruylant, 2012, p xxx

[57] Case C-310/17, Levola Hengelo BV vs Smilde Foods BV has been settled by CJUE rendering a Judgment on November 13, 2018p, available on http://curia.europa.eu/juris/liste.jsf?num=C-310/17.

technology to make this possible (comments 42 to 43).

IV. It must therefore be concluded that the taste of a food product cannot be classified as a 'work' within the meaning of Directive 2001/29 and that, in view of the need to interpret the concept of work in the Union uniformly, it must be concluded that Directive 2001/29 precludes national legislations from being interpreted as conferring on the taste of a food product protection under copyright (comment 44 and the operative part).

Apparently, there can be no connection between what the CJEU has decided to exclude from protection **tastes and fragrances protection**. In fact, the grounds of the judgment allow the conclusion that judgment rendered on November 13, 2018 of the CJEU does not contain any grounds for excluding copyright protection from perfumes. On the contrary.

Thus, first of all, it should be noted that both Levola and the Dutch court referred to the judgment of the Supreme Court of the Netherlands of June 16, 2006, which allowed, in principle, the possibility to recognize a copyright on a perfume and this argument was not contradicted by the CJEU. Secondly, in its judgment of November 13, 2018, the CJEU, in argument 40, refers to the possibility of protection even in the case where the expression is not permanent and then added that the possibility of precise and objective identification is lacking with regard to taste of food products in the current state of development of science and technology, which means that in the future such precise and objective identifications could be made, and the issue of protecting the tastes of food could be reconsidered.

In the case of perfumes, this problem does not arise, the state of the art permitting the precise and objective identification of at least the elements which make up a perfume and its smell.

On the other hand, in the case of fragrances, the problem of non-permanent expression is not an issue. In copyright, ephemeral creations are non-permanent but protectable, such as those made out of sand, ice, but the range of this type of creation is infinite and was never in question the exclusion from the protection of ephemeral creations. The perfume is not even such an ephemeral creation, even if used as intended, its smell disappears over time. In the case of perfumers, identical compositions will give identical scent and there is the possibility of reproducing these compositions at infinity (as in the case of written works).In the case of perfumes there is a connection between the product (liquid, solid, oily perfume) and the smell it generates and releases the composition. The same composition will generate the same smell, and the composition and smell produced are objective and precisely identifiable with the technical means we have.

Decision no. 116 of 2006 of the Supreme Court of the Netherlands is not singular. In a judgment of the Paris Court of Appeal rendered on January 26, 2006, it is stated that *"and in the case a perfume meets the patentability conditions, by addressing a technical issue, patent protection still does not exclude a protection on behalf of copyright"*[58]. The court's argument was a response to the counterfeiter's defence, which, considering the creation under its chemical aspect, claimed that the victim L'Oréal had not submit the patent on the composition of its perfumes, so it cannot plead a counterfeit. However, the court said, this approach is legitimate, but it is not exclusive. **The perfume may have multiple ownership regimes, claiming one not impeding the exercise of others.**

Nicolas Binctin also reveals the inexplicable inconsistency of the French courts, usually creative and open to the new. Especially in the field of intellectual property rights. Thus, he states that by a decision of 13 June 2006 and decisions of 1 July 2008 and 22 January 2009, the Court of Cassation, repeating the same wording, attempted to reinstate the consideration of the perfume as being a creative act, rejecting its assessment from the point of view of copyright. Twice the Court has stated that *"the smell of a perfume, which comes from the **mere implementation of a technique**, is not the creation of a form of expression that can benefit from the protection of works of creation*"[59]. The approach found by the Court, according to Binctin, is contrary to the legal regime of copyright, which is not interested in the method of production, but in the originality of the final result.

Our conclusion is that perfume is not just a chemical formula and is not primarily a chemical formula. Fragrance is a particular form of expression and, consequently, can be considered work protectable by copyright. When the perfumer creates a perfume, the chemical formula is not the one sought and invented by the creator, but the perfume, even if it requires a composition and a chemical formula. Human imagination.

## 7. Fragrances protection by patent

We believe that the fragrance, seen as a combination of chemical elements, can also be protected by the patent, even though, as we have seen before, ... a perfume is not just a chemical formula. However, the molecule of a new scented substance, which is part of a perfume composition, can be protected by patent. P.-Y. Gautier, not very determined, states that *"the protection of fragrances or dishes, the outcome of a laboratory research and expressed in its chemical form, comes rather from the Law on patents*"[60].

[58] Apud N. Binctin, op. cit. p. 57.
[59] *Ibidem*, pct. 54.
[60] *Ibidem.*

From what I said before going into this subchapter, making a perfume seems to resemble by some authors with mixing some substances after a *" craftsman of fragrances "* recipe and which does not necessarily have to be new to give a good perfume. A recipe that was old at the time of its use, was new once, it was original, as everything was new under the sun (all that man did for the first time on earth was new: from the stone carved knife, to the computer that has become an extension of our hands and minds). A situation that closely resembles with that of medicines, in which we have, on one hand, innovative medicines and, on the other hand, generic medicines, which are nothing else but originally innovative medicines, their composition coming into the public domain following the expiration of protection period.

Today, the perfume industry relies more on **synthetic chemicals (aromas)** and less on flowers or animal elements that were exclusively used to produce essences until the emergence / invention of synthetic flavours in 1874. The appearance of synthetic aromas in fragrance world, rather due to chance (but also penicillin is the result of a random discovery) and which resulted in the replacement of rare and expensive natural flavors with synthetic flavors that could be produced in any quantity and led to abandonment of many crops (of flowers) and many factories of natural essence, even in Grasse. In Grasse, for example, there were 2,200 flower crops in 1975, while in 1995 there were only 150 rose crops left and 20 jasmine crops (since then a they had a slight growth trend), perfume made of flowers being still popular, but much more expensive than synthetic ones. Fragrances with synthetic essences are cheaper. But more dangerous (and among natural flavors are some allergenic and / or toxic).

The year 1874 was marked by the invention of synthetic vanilla flavor (also called vanillin, although vanillin is the essential component of the vanilla extract having the chemical formula C8H8O3), much cheaper than natural vanilla[61] (the price of one kilogram of pods is 500 dollars, and one kilogram of vanilla over 11,000 US dollars) and took the place of the latter in food and beverages. But Synthetic Vanilla took the place of expensive natural vanilla into perfumery and made possible to produce much cheaper perfumes that became accessible to a much larger number of consumers. Undoubtedly, synthetic vanilla was an invention, but we did not find if was patented. The distinction between vanilla and vanillin: the first is a complex mixture of several hundred compounds, the second one is derived from phenol and is of great purity. In practice, the difference between the two is hard to make, but not impossible.

The natural mosque was (and is) the most expensive product used in perfumery. Obtained from a musk deer male gland[62], 160 bags are required to obtain one kilogram of musk, which made the species threatened with extinction, since 1979 it was put under protection by banning its hunting. But the mossy deer is still in danger due to poaching, on the market the price of one kilogram of musk is 45,000 dollars (much more precious than gold), which is the most expensive ingredient in perfumery. Musk is obtained, with musk-like sacrifices and other animals but of inferior quality to that produced by the musk deer, as well as by plants, the latter being valuable by its natural properties, but it is difficult to obtain (the crops are expensive, of long duration, reduced quantities).

In 1888, the German chemist Albert Baur, trying to obtain a stronger explosive than the nitrotoluene of Alfred Nobel, found that the product he experimented with (which generated a small explosion) emanated a pleasant smell of …musk which he named Nitromusk. But the product was chemically unstable and toxic and could not be used in perfumery. Continuing his research, Baur obtained nitric acid with 3-tert-butyltoluene **a musk-smelling product**, later known as the Baur musk. After six years of research, he obtained the white musk, product with an odour very close to that of the natural musk and which became indispensable in the perfume industry. Recently, however, it has been discovered that synthetic white musk is an allergen and carcinogen, but a replacement has not yet been found. On the other hand, many people do not detect this musk, so combinations of musk are used to make it identifiable.

The number of synthetic flavours has since grown continuously, and as with molecules in pharmaceutical field, there can be no impediment to their protection by patent if they meet the proper invention conditions (novelty, inventive activity and industrial applicability).

Are combinations of elements protectable?

In the case of new combinations of known products or combinations containing novel elements not known at the time of the invention, things are simple: the perfume is the result of a new chemical formula, derived from an inventive activity, and is patentable. The invention, however, consists of the chemical formula of the perfume, not in its smell, which is protected by copyright. Moreover, a new chemical formula for a perfume gives rise to a patent right

[61] Natural vanilla, isolated for the first time in 1810, is obtained from the pods of species of huge lianas (growing in the equatorial area), related to the orchid. The flavor has been discovered by chance because it is hidden in the pods and is released only after nine months of fermentation, using wool padded boxes for this process.

There are over 100 species of vanilla, but only three are used for their special flavor. The most valuable is Vanilia Bourbon. Its acquisition involves huge crops of lianas with long production cycles, where even pollination is done manually, natural pollination being made by a bee living in a small area, which is why liana could not be easily acclimated to other countries of the world, and fermentation takes place in special baskets in not less than 9 months

[62] Small animal (50-60 cm high and weighing 12-14 kg). The musk deer male has on the abdomen a protuberance of the size of a golf ball weighing 20-30 grams, half of which is the weight of the famous musk used in perfumery.

regardless of the quality of the smell, but if the smell is banal, it cannot be protected by copyright as well.

The combinations of known elements (molecules, essences, ingredients, fixatives, solvents) of compounds or chemical combinations that produce unexpected results different from those known may be inventions and can be protected by patents according to art. art. 47, paragraph 9 of GD no. 547/2008, approving the Regulation for the enforcement of Law no. 64/1991 on patents for invention. New uses of known substances may be inventions and within the meaning of art. 63 (2) lit. b) the European Patent Convention and Art. 43 (2) of the CBE Enforcement Regulation, which also speaks about **inventions having as object a way of usage of a product in our case of a molecule.** Also, Directive 98/44 / EC on the legal protection of biotechnological inventions, in comment no 28 of the reasoning, also states that **"a patent may be granted for any new application of a patented product" (of a new patented molecule).**

The doctrine also considers that **we are in the presence of a product invention** in the case when obtaining a **new practical use of the product**, previously unachieved and that in such cases we can speak of a **"new product"** even if it is not substantially, a new body[63]. In other words, in principle, the **new use of a product (molecules) can be a product invention** (perfume).

The protection of chemical formulas by patent is almost unanimously admitted. Even those who are opposed to the protection of perfume by copyright, accept the protection by patent or by work secret. Thus, F. Pollaud-Dulian states that *"the formula of a perfume comes from the industrial technique in the cosmetics sector (...). Their protection comes from patents and / or from unfair competition and not from copyright, because the **process or industrial product is the one that is trying to be protected** and not an arbitrary external form that would give an industrial product*"[64]

We find a contradiction in F. Pollaud-Dulian's argument: if the perfume is the result of an intellectual creation activity, it must be protected by an intellectual right as one that is not expressly excluded from protection. Protection as an invention is conditioned by the fulfilment of novelty conditions, inventive activity and industrial applicability, a patent cannot be granted if these conditions are not fulfilled cumulatively. Protection by copyright, of the fulfilment of the condition of originality. Is it then possible that a perfume to be an intellectual creation under the inventions regime but not to be considered the same under the copyright regime? We recall the general rule that states, under the umbrella of intellectual property rights there are products for the spirit, united by their common origin and separated by the protection regime.

However, we agree with the author quoted when he states that the process or product is the one for which protection is sought. We find here, even indirectly, the idea that the product can be protected by patent, both the product (the perfume) and the process of its realization (the recipe). And it is not unusual, the law of inventions allowing for patent protection of the product and the production process.

## 8. Is it better to protect fragrance by work secret?

Once created, whether it is a work protected by copyright or a patentable invention, the perfume recipe can become a work secret and kept as it is. With a benefit that can be higher than patent protection or even copyright. Fragrances are created on the market for hundreds of years and whose recipes are kept secret by the creators' successors or by their successors to rights.

The patenting of an invention is not obligatory, requiring the issuance of a patent for invention being a faculty for the person seeking a protection for the created invention, a title which, once released to the inventor or to the person entitled to the grant of the patent, renders opposable to third parties recognized / conferred by the patent, ensuring the protection of the exclusive right recognized by law. And it is possible that the number of inventions that even after the adoption of the patent protection system have not been patented, although they have contributed tremendously to the progress of mankind, exceed those that have been patented[65].

Patenting the invention is the necessary solution for the inventor (or his successor in title) who wishes to protect himself against unauthorized use of his invention by third parties, but also those who may reach the same result without knowing the pre-existing invention, thus ensuring their competitive advantage over those operating in the same field, an advantage which is even the economic value of the invention. This is because, it is well known, in the matter of intellectual property rights, the rule is that of recognizing the right in favor of the person who first submits the patent application. But patenting is also the means by which, assuring its competitive advantage as an effect of the exclusive exploitation right, the inventor and those who invest in research and development provide the return of the often huge investments.

If the person who created an invention, considering the benefits he/she would obtain, opts for protection by secret[66], this assuming protection by means of fact, the inventor (or its successor in title) will

[63] BR, op. cit. p. 88.

[64] Frederic Pollaud-Dulian, Le droit d`auteur, Economics,2005, p. 117.

[65] Tricky and plastic, in the article "Intellectual Property in Central Europe," published in Dilema Veche in December 2006, Adrian Mihalache says that "Fire was stolen from the gods of Prometheus, because Zeus did not have the prudence to patent it".

[66] This secret must be kept temporarily and if a patent is requested to be issued, this obligation being for the patent authority to keep it between the time of the invention and the date of its publication, the breach of this obligation being an offense (Article 59 of Law No 64 / 1991)

have to take the necessary measures to ensure that all essential data of the invention and which would allow the reproduction of the result, they remain confidential. The protection of the secret and the commercial secret of an invention depends, in efficiency and duration, on the quality of the means used to preserve the secret, the number of persons to whom the invention is objectively or subjectively revealed, the volume and quality of the information in the invention is made available, to those whose information is to be disclosed, their preparation, their good faith, the interest and value of the invention kept secret, the quality of competitors in the field of invention, etc.

Secret invention is particularly vulnerable to reverse engineering procedures[67] which allow for reduced or similar efforts to achieve similar products than those obtained by the application of the secret invention and which, in this way, loses its practical utility. Or the exclusivity conferred by the invention patent is not secured by way of fact. The exclusive right conferred by the patent and its erga omnes opposability allows the holder, during its term of validity, to be the only one able to use the invention or to authorize any exploitation of the invention and to oppose unauthorized use and to be paid damages for use unauthorized by him.

The preservation of the secret of the invention does not mean, however, that the owner is deprived of any means of defense, the procedural means at its disposal being the action in unfair competition, a kind of action in civil tort liability that sanctions the acts of competition contrary to honest commercial practices. But while in the case of keeping the secret of the invention, with the intent of appropriation as a commercial secret, there is only a general and abstract obligation of all not to prejudice others (in this case, the owner of the commercial secret = invention secret) by acts/ acts of unfair competition, patenting involves obtaining a title of protection conferring erga omnes opposing rights to the inventor (its successor in title) so that the patent owner will have at hand to obtain sanctioning the violation of his / her exclusive right, the most convenient and efficient way of action in counterfeiting.

There is only one exception to the optional nature of the patent. This is the case for pharmaceutical products for which manufacturers are required to make the composition known but also other products for the obligation to provide complete information in order to protect consumers.

In the case of perfumery products, such an obligation does not exist at this time, so the secret protection of the perfume production is fully possible. It is affordable, convenient and with a fairly high degree of safety for perfumes.

## 9. Perfumes protection as models or industrial designs

We have never thought that a liquid product could be protected as a design or a model. How could a liquid nevertheless fulfil the "condition of being a design or model" (Article 2 letter d) of Law no. 129/1992)? As regards the other two conditions (Article 6 of the Law on Models and Designs), namely, novelty and individuality if we were to assess them by taking into account the principle of "variable geometry" and that of "degree of freedom" in elaborating the design or model, we believe that they could be met if the fragrances were shaped.

The condition of ***"being a model or design"*** seems impossible to us only for liquid perfumes. This is because the liquids, which occupy an intermediate position between solids and gases, do not have their own shape and flow, thanks to the large particle mobility. Liquids, although they have volume, their shape depends on outside conditions. Without a stable outer form, they cannot in themselves constitute two-dimensional or three-dimensional shapes. Or the designs are defined by art. 2 lit. d) of Law no. 129/1992 regarding the models and designs as the exterior appearance of a product or part thereof, reproduced in two or three dimensions, resulting from the combination of the main characteristics, lines in particular **contours**, colours, **shapes**, texture and / or materials of the product itself and/or its ornamentation.

But fragrances can also be solid (as they may be in the form of gases) in which case the perfume, having a solid form, could be an industrial model. Or if there is such a possibility (for example, pills, sticks, candles, bath salts, soaps, etc.) and we see no impediment to giving the perfume a three-dimensional shape, we believe that the remaining issue here is the interest in protecting a perfume in this way and not to exclude all fragrances from industrial protection. Protectable as models will only be those that meet all the conditions for protection (it is a model, has novelty and has an individual character). Protecting the outer form of a (solid) perfume seems to be a weak and unexciting protection. The parfumier will want to protect the smell and the recipe, the product and the process, and copyright or patent protection seems to us a much more effective solution.

And yet, the models have had and still have a huge impact on liquid perfumes!

The (great) nephew of Napoleon Bonaparte, the famous perfumier Francois Coty[68], the founder of a

[67] Reverse engineering consists of the study of goods/ products/ man-made intellectual creations and the process of extracting knowledge from them. Helps to identify the solutions and operating principles of a device / good / creation by analyzing their structure, functions, operations. Involves disassembly or decomposition of the device or system and analysis of its operation in order to achieve similar products. In the case of scientific research, the natural phenomena are not goods / products / creations made by man.

[68] Joseph Marie Francois Spoturno, descendent of one of Napoleon's aunts, Isabela Bonaparte. After the conscription he arrived in Paris, where he was the secretary of a Corsican politician (Emmanuel Arene), then he studied perfumery in Grasse, returned to Paris, created the

successful company - *Coty Inc.* - was the first to understand that an attractive recipient will contribute to the commercial success of the perfume and then collaborated with ceramist and jeweller **René Lalique** who made the recipients and labels of his products, but also with other famous designers. And he is also the one who (born in 1874, that is, the year when the first synthetic essence – vanilla was invented) created fragrances with synthetic flavours, cheap and consequently accessible to those with low incomes. And who said: *"Give a woman the best product made, **wrap it in a perfect container, beautiful in its simplicity, but with impeccable taste, ask for a reasonable price for it and you will be assisting the birth of a business of a size that the world has never seen before."***

Perfume recipients can be industrial designs when they are not works protectable by copyright. And they can generate wars, like the case of the shape of the champagne stopper as a perfume recipient.

In the early 1990s, *Yves Saint Laurent* put on the market a fragrance called Champagne in a recipient that replicated the well-known stopper shape of the famous French sparkling wine and for which protection is ensured by indication of the Champagne region. Owners of the IGP Champagne right have reacted against such use, not because of the loss of customers (impossible for the products and the target customers, but because a third party took advantage of the notoriety that was gained long ago but very hard obtained and not easily maintained by sparkling wines with this name. Having to rule on the dispute submitted by the champagne producers the Paris Court of Appeal by decision of 15 December 1993, decided that *by adopting the name 'Champagne', protected by IGP, which enjoys a notorious exception in both France and abroad, to launch a new luxury perfume, choosing a presentation that reminds of the characteristic cork of the bottles of this wine and by using in the promotional arguments the image and the taste sensations of joy and celebration they evoke (the famous champagne, n.a.), the manufacturer of this perfume wanted to create an attractive effect borrowed from the prestige of the disputed name and, by a constitutive procedure of parasitic act, diverted the notoriety of which only champagne producers and sellers can use for marketing the wine entitled to this name"*[69]

Our conclusion is that there can be solid perfumes and for which protection as an industrial model is possible, but such protection is weak and of a reduced practical interest.

The containers in which fragrances are packaged may be works of art that can themselves be protected when they fulfil the condition of originality (the fact that they also have a practical application is not excluding them from protection), but they are often applied works of art and give, like any creations applicable in industry, charm and attractiveness to the product called perfume. Or the opportunity to make the perfume a visible and perceptible product and a commercial good as the canvas makes possible the creation of the painting and the opportunity to perceive the painting. And which containers, according to the old model of Raymond Loewy's famous Coca Cola bottle, can also be protected as three-dimensional brands.

## 10. In conclusion, why olfactory creations cannot be protected as brands?

From freshly mown grass fragrance for tennis balls, to rose perfume for tyres, from the scent No. 5 for Chanel perfumes to the bitter scent of beer for dart games, from the scent of plumeria flower for sewing threads up to the smell of cinnamon for advertising, all were attempts (some successful, others not) to record olfactory "marks" as brands. However, in the case of olfactory marks admitted for trademark, the protection was obtained for an (olfactory) mark registered as trademark, i.e. for the use of an odour in order to identify one merchant's products and / or services in relation to the services and / or products of the same kind of other merchants. The market knows such examples, but their success is reduced, because few people respond to such stimuli ... olfactory when they want to buy goods or services. The incentive rather concerns the possibility of identifying where a product or service known to the consumer is located and stores located in large shopping malls have adopted this custom (Massimo Dutti, Adidas, etc.) to make their presence felt, olfactory marks being used as a trade marks, not product. Recently, Anabelle Kaznov-Cofinet[70] has created eight different unisex fragrances of natural essences with two main categories, one with a touch of freshness, the second with a woody note, specially designed for the BMW 7 Series and inspired by this brand of cars. Perfumes that do not impregnate in passenger's clothing. The car maker and BMW perfume creator claim that fragrances, which are not impregnating in passenger clothing, give the luxury automobile an olfactory identity and an emotional

perfume *La Rose Jacqueminot*, which he tried to sell on the street without much success. Breaking a perfume bottle that slipped from his hand inside a shop drew attention to the smell of his perfume and soon brought his celebrity. He built near Paris ***"La Cité des parfums",*** a complex containing laboratories and factories producing his perfumes where 9,000 people were producing 100,000 bottles of perfume per day, and to meet the demand in the US market, created production centres in the US. He also unsuccessfully tried to enter politics and press business.

[69] Nicolas Binctin, N. Binctin in Droit de la propriété intellectuelle. L.G.D.J., 2010, p. 1233.

[70] Annabelle Kaznov-Coffinet has graduated ISIPCA (Institut supérieur international du parfum, de la cosmétique et de l'aromatique alimentaire and she was hired to create the BMW perfumes.

experience that enhances the user's well-being and even "improves the comfort of the new car"[71].

The brand's ability to enhance perfumes is huge and, as I have already said, there are few areas of goods and services production where brands have such an important role and are so counterfeited. Specifically to perfume brands is the fact that they must make a difference also between the perfumes of the same manufacturer. And for that they use a brand of the manufacturer and a brand of the perfume (same situation we also encounter in the case of automotive manufacturers).

The brand or brands for perfume and olfactory brands are, however, two different things. The ones for perfumes are marks that distinguish between perfumes and are not olfactory marks. We also believe that olfactory marks for perfumes could not be registered because such marks would be devoid of distinctive character, they would be constituted of common marks in perfumery and it would in fact represent the product's characteristics, the technical result that give substantial value of the product (which is why the olfactory brand No. 5 for Chanel's perfume No 5 itself was refused to be registered). But also because for a consumer would be difficult or even impossible to identify perfumes on the shelf by its own sense of smell.

Susceptibility to registration of olfactory brands (which has raised delicate issues, including the possibility of graphic representation of these "marks", the creation of a brand repository that lasts over time, the relativity of fragrance perception through the sense of smell - a possible threat to the security of registration, and , consequently for the security of legal relations) was for the first time clarified by the European Court of Justice by the means of a preliminary question formulated in 2002 by The Federal Patent Court in Germany (although previously when registering the freshly mown grass smell , the OHIM examiner / current EUIPO drew attention to some particularly interesting issues[72]).

On that occasion, the Court explained the condition of graphic representation "*in the sense that a mark may consist of a sign that cannot be visually perceived, provided that it can be represented graphically. This graphic representation must allow the sign to be represented visually by images, lines or characters in order to be accurately identified.* [73]"

The European Court held that the requirement of graphic representation was established in order to know as precisely as possible the object of protection conferred by registration to the trade mark proprietor, the registration of the mark in the public register in order to make it accessible to the authorities, the general public and the economic operators: *In order for the individuals accessing the registers to be able to precisely identify the nature of a trademark based on the registration, the graphic representation in the register must have a stand-alone status, easily accessible and comprehensible. In addition, in order to fulfil its registered trademark role, it must be perceived unequivocally and in the same way by everybody, so that the mark can be a guarantee for the indication of origin. In view of the duration of the registration of a trade mark and the fact that, as required by the Directive, it can be renewed for different periods, representation must be durable. Finally, brand representation must avoid any element of subjectivism in the process of identifying and perceiving the mark. Consequently, the means of graphic representation must be unequivocal and objective"*[74].

The comments were subsequently taken up in the Directive (EU) 2015/2436 of the European Parliament and of the Council on December 16, 2015 on the approximation of the laws of Member States regarding trademarks, in Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) 207/2009 on the Community trade mark and subsequently in Regulation 1017/1001 of the European Parliament and of the Council of 14 June 2017 on the Mark of the European Union, being known as the *"Sieckmann Criteria":* in the preamble of the mentioned legal acts is provided that EU legislation *"should authorize that a mark is to be represented in any appropriate form by means of generally available technology,* ***not necessarily by means of graphics, as long as the representation is clear, precise, autonomous, easily accessible, intelligible, durable and objective."***

If European legislation so permits the registration of such distinctive unconventional signs of trade, why cannot olfactory creations be protected as trademarks?

The answer is found on one hand in the functions of marks and on the other hand in the principle of the specialty of marks. It does not only apply to olfactory brands, but to all distinctive marks of trade activity. Thus, in a first aspect, the main function, both legal and economic of a trade mark is to distinguish between the goods and services of its own proprietor and the products and services of other competitors. Therefore, what is protected by the exclusive right of registration is not the product of the creative activity, the intellectual creation resulting in the registered trademark, but the relational tringle proprietor-brand-

[71] https://www.press.bmwgroup.com/romania/article/detail/T0240544RO/aromele-bmw-seria-7-detalii-pentru-o-experien%C5%A3%C4%83-unic%C4%83?language=ro

[72] "From my point of view, the examiner said, the mark was not represented graphically. What has been provided is a graphic representation of a description of what the brand means and not of the brand itself. And being a verbal communication of what the brand is, the extent of the mark protection purpose is not clear. For example, what is the difference between "the smell of freshly cut grass" of fresh grass or simply cut grass? "The decision of the Appeals Chamber of 11.02.1999 given in Case R 156 / 1998-2 . 4.

[73] Case C-273/00 of 12.12.2002 concerning the interpretation of Art. (2) of Directive 89/104 / EEC on the approximation of Member States laws relating to trade marks, concerning Ralph Sieckermann, comments 45 to 46.

[74] Idem.

product / service. In other words, the mark is protected by reference to the designated products / services and which the holder of the mark sells under that trade mark.

Under a second aspect, the principle of the trade mark's specialty implies that its use is limited to the goods and services for which it was registered and, implicitly, to the trade mark proprietor's field of activity: the right over the mark does not concern any creation or innovation, but exclusively what the holder has chosen to protect closely with a particular category of products and services.[75] And the principle of specialty has a profound significance for the trademark protection system: at the time of filing the application for registration, the conditions of distinctiveness, availability and even licit (for example, misleading brands) will be examined by reference to the products and services that the holder has chosen for his mark[76].

In conclusion, answering to the question in the title, we reaffirm that olfactory works cannot be protected by distinctive marks of trade activity (in this case marks) because what is protected by the registration of a mark is not the mark in itself regarded as an intellectual creation, but the exclusive character of the use of the mark by its proprietor for certain categories of goods and services for which it was registered. Exclusivity or monopoly over the mark helps the trademark owner to keep customer loyalty and distinguishes itself among its competitors. And even if the mark itself is made of a creation, whether it is a special graphic representation, a logo, a slogan, then it will be able to benefit from the protection conferred by copyright or, as the case may be, designs or models in the extent to which the conditions of protection are met. And with regard to the olfactory brands that represents stand-alone works, their protection would be conferred by the other rights, subject to the wording in the previous sections.

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[75] Frederic Pollaud-Dulian, *Propriete industrielle. La propriete industrielle*, Economica, Paris, 2011, p. 713.
[76] *Ibidem*, p. 714.

# THE AUTHOR(S) OF THE PHD THESIS AND HIS/THEIR MORAL RIGHTS. JOINT LIABILITY OF THE PHD CANDIDATE AND OF THE PHD SUPERVISOR FOR THE OBSERVANCE OF THE ETHICS AND DEONTOLOGY RULES

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**Abstract**

*In the first part, this study proposes an analysis of the phrase "Author(s) of the PhD thesis" by reference to the principle The real author of the PhD thesis and the moral rights of the author of a scientific work provided by Law no. 8/1996 on copyrights and related rights. We thought it was necessary to pay special attention to the right of informing the public about the work, in the light of the limitations provided by law in case of PhD theses, especially by the Law of National Education no. 1/2011, Law no. 288/2004 on organizing PhD academic studies and Government Decision no. 681/2011 for the approval of the Code of PhD academic studies. The analysis mainly refers to the guidance activity carried out by the PhD supervisor throughout the PhD study years, an obligation provided by Law no. 1/2011 and Government Decision no. 681/2011. Thus, in the first part of the study, we shall answer the question whether the guidance activity of the PhD supervisor is sufficient, so that he should become the author of the PhD thesis alongside the PhD candidate and benefit of the moral rights to the same extent as the latter.*

*In the second part of the study, we proposed ourselves to analyze the joint liability of the PhD candidate and of the PhD supervisor for the observance of the rules of ethics and deontology, by relating such to the guidance obligation of the PhD supervisor. We shall perform this analysis by reference to the said regulations, but also to Law no. 206/2004 on the proper conduct in research activity and Law no. 319/2003 on the status of the research-development staff.*

**Keywords:** *the author of the PhD thesis, the moral rights of the author of the work, the limitations of the right to inform the public about the author of the PhD thesis, the guidance activity of the PhD supervisor, the rules of ethics and deontology in the activity of scientific research, the joint liability of the PhD candidate and the PhD supervisor, the sanctions applicable for the infringement of the ethics and deontology rules.*

## 1. Introduction

In the first part, this study proposes an analysis of the collocation "The Author / Authors of the PhD Thesis" by reference to the Principle of the true author of the PhD thesis and to the moral rights of the author of a scientific work under Law no. 8/1996 on copyrights and related rights. I considered it was necessary to pay special attention to the right of informing the public about the work, in the light of the limitations provided by law in the case of PhD dissertations, especially by National Education Law no. 1/2011, Law no. 288/2004 on the organization of academic studies and Government Decision no. 681/2011 for the approval of the Code for Academic PhD Studies. The analysis mainly focuses on the guidance of the PhD supervisor during the years of performing the PhD studies, an obligation provided by National Education Law no. 1/2011 and by Government Decision no. 681/2011 for the approval of the Code for Academic PhD Studies. Thus, we shall answer the question whether the guidance activity of the PhD supervisor is sufficient for him/her to become the author of the PhD thesis besides the PhD candidate and to enjoy moral rights to the same extent as the latter.

In the second part of the study shall be analyzed the joint responsibility of the PhD candidate and PhD supervisor for the observance of the rules of ethics and deontology, referring to the PhD supervisor's guidance obligation. We shall analyze in relation to the mentioned regulations, but also to Law no. 206/2004 on proper conduct in the research activity and Law no. 319/2003 on the status of R&D staff.

## 2. Content

### 2.1. The author(s) of the PhD thesis and his/her/their moral rights

#### 2.1.1. True Author-Principle

According to art. 3 paragraph (1) from Law no. 8/1996 on copyrights and related rights[1], "*The individual(s), who created the work is/are the author*."

As it results from the legally quoted text, copyright is closely related to the person of the author, granting to him/her patrimonial and moral attributes. The principle governing copyright is that of the true creator of the work, which links the capacity of an author to the capacity of the subject matter of the copyright even when the author of the creation is not known. As mentioned by Professor Viorel Roș, " *Even when its author is not known, has not revealed his/her identity, it has an author and no one can assume the*

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[1] Republished, in the Official Journal of Romania, Part I, no. 489/14 June 2018;

*capacity of an author, no one can usurp the capacity of the author of the work accomplished by another, regardless if unknown, no one can claim for himself/herself the capacity of the author of a work that he/she has not created himself/herself*"[2] .

On the other hand, according to art. 4 paragraph (1) of the Law no. 8/1996, "*the person under whose name the work was made public shall be presumed to be the author until evidence to the contrary*".

**2.1.2. Is the PhD candidate the true author of the PhD thesis?**

Starting from the above principle, by reference to the theme analyzed in this study, appears the question "*Who is the true author of the PhD thesis*?"? "The PhD candidate? The PhD supervisor? Or both jointly? Although, apparently, the answer can be simple, relying on the provisions of art. 65 paragraph (5) of the Code of Academic PhD Studies which expressly provide that "*The PhD candidate is the author of the PhD thesis and assumes the accuracy of the data and information presented in the thesis, as well as of the opinions and demonstrations expressed in the thesis*", the questions has anyway its justification.

It is true that the PhD candidate is the one who researches, analyzes, creates and who finally drafts the PhD thesis, but what role does the "*guidance*" given by the PhD supervisor play? Is everything resumed to the fulfilment of certain legal obligations by the latter? Or does he/she have any contribution to the creative process of the PhD candidate?

We find legal provisions regarding the PhD supervisor's obligation to "*guide*" in several regulations. The first of these is Law no. 1 / 2011[3] of the national education, with subsequent modifications and completions, which at art. 162 par. (1) refering to the fact that " *the PhD candidate is working under the guidance (...) of a PhD supervisor*". To the same "guidance" refers the Code of Academic PhD Studies, approved by Government Decision no. 681/2011 with subsequent amendments and supplementations. Thus, the regulations refers both of a right of the PhD candidate - to benefit from the support, guidance and coordination of the PhD supervisor (Article 71 para. (1) lit. a), as well as an obligation of the PhD supervisor - to provide scientific, professional and deontological guidance of each PhD candidate (Article 72 para. (3) lit. a))[4].

According to the Explanatory Dictionary of the Romanian Language, 2nd supplemented and reviewed edition (2009), "guidance" means correction, steerage, routing. Therefore, the PhD supervisor has an obligation to guide the PhD candidate, but on his own chosen path, the one of his own creation. In other words, in our opinion, the PhD supervisor does not go ahead the PhD candidate, creating in his place and with him, creating together, but more, behind the PhD candidate, taking care not to turn on a wrong way.

In conclusion, although the contribution of the PhD supervisor is indisputable in the final form of the thesis, the creation itself belongs to the PhD candidate, who is the sole author of the thesis.

**2.1.3. Moral Rights of the Author(s) of the PhD Thesis**

I. Brief Considerations on Moral Rights and the Legal Nature thereof

Moral rights are those non-patrimonial personal rights, which the author of intellectual creation enjoys in this view, representing non-patrimonial prerogatives of non-patrimonial nature recognized to any author in regard to his/her work, irrespective whether it is protected in the field of copyright[5].

The Bern Convention of 1886 for the Protection of Literary and Artistic Works has been ruled by art. 6bis "*1. Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.*

*2. The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.*

*3. The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed"*[6].

Regarding the said provisions, it was noted in the specialized foreign literature "*art.6bis represents a*

[2] *Viorel Roș*, The Intellectual Property Law, vol.I, Copyright, Related Rights and Sui-generis Rights, Bucharest, C.H. Beck Publishing house, 2016, page 162

[3] Published in the Official Journal of Romania, Part I, no. 18/10 January 2011;

[4] We can find similar provisions in the Regulations for the organization and development of academic PhD studies; for example, art. 19 para. (2) lit. a) of the Regulations of the PhD School of the Nicolae Titulescu University: *The PhD supervisor has the following tasks: to ensure (...)to the PhD candidate who is under his/her direction or guidance, adequate scientific, professional and deontological guidance*; the Rules of the PhD School within the Police Academy Alexandru Ioan-Cuza also stipulate at art. 24 para. (1) lit.a): *The PhD supervisor has the following tasks: to ensure the scientific, professional and deontological guidance of each PhD candidate;*

[5] Alin Speriusi-Vlad, *The Patrimonial Effects of Moral Rights in the Field of Intellectual Property*, in "Revista Română de Dreptul Proprietății Intelectuale" (Romanian Magazine of Intellectual Property Law) no. 2/2017;

[6] Published Official Journal no. 158 from 1998 and ratified by Decree no. 626 from 8 December 1997 on the subject for ratification to the Parliament of the adhesion of Romania to the Bern Convention for the Protection of Literary and Artistic Works from 9 September 1886, in the form reviewed by the Act from Paris on 24 July 1971 and amended on 28 September 1979;

*minimal right under the imperative conventional regime, and in the absence of a national regulation, the author can directly invoke the provisions of art.6bis paragraph (1) of the Convention. The law of the State where protection is claimed is liable to state whether, after the death of the author, the heirs will be able to claim the moral right.*"[7]

Law no. 8/1996, art. 10, itemizes the following moral rights of the author: "a) the right to decide whether, how and when the work will be made known to the public; b) the right to claim recognition as the author of the work; c) the right to decide under what name the work will be made public; d) the right to claim the observance of the integrity of the work and to challenge any modification, as well as any prejudice upon the work, if it prejudices its honour or reputation; e) the right to withdraw the work, indemnifying, where appropriate, the holders of the usage rights, who have suffered damage as a result of the withdrawal".

As far as the legal nature of copyright is concerned, such are non-patrimonial rights, i.e. absolute, binding *erga omnes* rights.

Law no. 8/1996 does not contain such provisions, but the following legal characters can be deduced from its contents; thus, moral copyrights:

- are closely related to the person of the author: the author personally has and exerts the right to decide when and under what name the work will be brought to made public, how this will be done and the withdrawal of the disclosed work due to reasons that are left to the sovereign discretion of the author;
- are inalienable (Article 11 para. (2) from Law no/1996[8]) and indistinguishable, meaning such cannot be either alienated or traced;
- are of perpetual nature[9] (art. 11 para. (2) from Law no. 8/1996) and are not time-limited: the use of the work cannot affect the memory of the author and the work cannot be dissociated from its creator even after his/her demise. After the author's death, the exercise of the right to claim recognition of the author's capacity and the right to claim the observance of the integrity of the work and to challenge any alterations and prejudices impairing to the honour or reputation of the author are transmitted by inheritance. On the other hand, the lack of barring moral rights in time means that such may be exerted as long as the work remains in the memory of people and is subject to exploitation.

II. Right of disclosure (public disclosure); Are there limitations to this moral right in the case of PhD dissertations?

From among all moral rights provided by art. 10 from Law no. 6/1998, the one stipulated in letter a) - The right to decide whether, how and when the work will be brought to the attention of the public.

In the specialized literature, it was stated that the right to divulge the work enables " *the author of the work to decide: not to make the work public; to make the work public; when it will make the work public and how it will make the work public; to appeal to the coercive force of the state for the protection of this right*".[10] Starting from this opinion, without insisting on general issues, it has to be analyzed whether and to what extent the right to disclose the work is applicable to the subject analyzed in this study - the PhD thesis.

In a first view, we believe that the PhD dissertation cannot pose the problem of not making the work public, considering that the final goal of the PhD studies is to obtain the PhD title in a certain field, and in the absence of public support for the thesis, this goal cannot be achieved. Moreover, there is a legal provision limiting in time the maximum period until which the PhD candidate may defend the PhD thesis. In accordance with the provisions of art. 12 from Law no. 288/2004[11], on the organization of academic studies, with subsequent amendments and supplementations "*Academic PhD studies usually have a term of 3 years. In special situations, when the subject matter requires a longer period of study or experimentation, the term may be extended by 1-2 years, with the approval of the university senate, at the proposal of the PhD supervisor. The defence of the PhD thesis can be done within a maximum of 4 years as of the graduation of the academic PhD studies with the approval of the university senate and the PhD supervisor*." Therefore, the moment when the PhD is made public does not entirely belong to the decision of the PhD candidate, as he/she has a time limit provided by the law in which he/she must publicly defend the thesis and neither is it at the discretion of the PhD candidate "*how*" the PhD dissertation is made public, as this may be performed only in written form and by oral public support of the thesis.

In accordance with the provisions of art. 168 para. (9) from Law no. 1/2011 "*The PhD thesis is a public document. It is also written in digital format. In the field of arts, the PhD thesis may be accompanied by the recording on digital media of the original artistic creation. The PhD thesis and its annexes are published on a site managed by the Ministry of Education, Research, Youth and Sport, by observing the legislation applicable in the copyright field". From the analysis of the text of the law, it results that a public nature is rendered upon the PhD dissertation by publishing it ex officio on the said website. On the other hand, in the*

[7] Nordemann W., Vinck K. and Hertin P.-W, *Droit d'auteur international et droits voisins*..., Bruylant, p.88, quoted by Andre R. Bertrand, *Le droit d'auteur et le droits voisins*, Dalloz, Paris, 1999, p.259, quoted by Andreea Paula Seucan, Moral Rights and Patrimonial Copyrights, 2nd reviewed edition, Universul Juridic Publishing House, Bucharest 2015, page 24.

[8] Moral rights cannot be subject to renunciation or alienation;

[9] After the demise of the author, the exertion of the rights provided in art. 10 (a), (b) and (d) are transmitted by inheritance, under civil law, for an unlimited term;

[10] Teodor Bodoaşcă, Lucian Ioan Tarnu, *Intellectual Property Law, 3rd revised and supplemented edition*, Universul Juridic, Bucharest 2015, page 41;

[11] Published in the Official Journal of Romania, Part I, no. 614/7 July 2004;

*same phrase is inserted the collocation " by observing the legislation applicable in the copyright field*". However, we cannot omit observing the contradiction between the public nature of the PhD thesis explicitly stipulated by law and the moral right that the author of the thesis has, according to art. 10 letter a) from Law no. 8/1996.

A similar provision is also found in art. 66 par. (1) and (2) of the Code approved by Government Decision no. 681/2011, according to which *"(1) PhD theses and their annexes are public documents and are also written in digital format. In the field of arts, PhD theses can be accompanied by the recording on digital media of original artistic creation. The PhD dissertation and its annexes are published on a site managed by the Ministry of Education, Research, Youth and Sports, in compliance with applicable copyright laws. (2) The protection of the intellectual property rights on the PhD thesis shall be ensured in accordance with the provisions of the law*." Concurrently, special attention should be paid to paragraph (4) from art. 66 (inserted by the Government Decision no. 134/2016 for the amendment and supplementation of the Code of Academic PhD Studies approved by Government Decision 681/2011), according to which " *The structure and access to the "PhD file" will be regulated by a procedure developed by CNATDCU and approved by order of the Minister of national education and scientific research, in compliance with the legislation in force. This procedure will comply with the following rules: a) the abstract of the thesis is published on the website of the university or, as the case may be, of the Romanian Academy and may be publicly consulted after the issuance of the order for the appointment of the support commission; b) the printed version of the thesis may be consulted at the library of the university or, as the case may be, of the Romanian Academy at least 20 days before the date set for public defences thereof. The PhD thesis remains a public document at the university library or, as the case may be, of the Romanian Academy ; c) if the PhD candidate does not choose a distinct publication of the thesis or some chapters from it, the digital form of the thesis is made public and it can be freely accessed on the national platform after issuing the order to grant the PhD title; to the thesis will be granted a copyright protection license; d) if the PhD candidate chooses the distinct publication of the PhD thesis or of some chapters thereof, he/she shall receive a grace period of maximum 24 months for this publication; after the expiry of the grace period, if no notification has been received at IOSUD regarding the separate publication of the thesis, the digital document becomes freely accessible on the national platform, granting a copyright protection license; e) after the publication of the thesis or some chapters thereof, the author has the obligation to notify IOSUD of this fact and to submit the bibliographic reference and a link to the publication, which will then be made public on the national platform; f) after granting the PhD title, within maximum 30 days, IOSUD is under the obligation to send a printed copy of the PhD thesis to the National Library of Romania, where it can be accessed on request."*

From the analysis of the legally quoted text, we can safely claim that although the author of the PhD thesis apparently enjoys the moral right to disclose the work (with all its consequences), he/she is however subject to certain express limitations.

III. Some considerations about the other moral rights and their applicability in the analyzed situation

Besides the right to disclose the work, Art. 10 of Law no. 6/1998 provides additional four moral rights, but we believe that without a particular interest in the subject matter analyzed in this study:

- the right to claim recognition as the author of the work - lit.b); we shall not reiterate the arguments regarding the capacity of an author of the PhD thesis, since the law itself stipulates that the PhD candidate is the author of his/her creation. However, art. Article 4 (1) of Law no. 8/1996 establishes the presumption that the person under whose name the work was first made public is also the author of the work, therefore such capacity must be recognized to it and, therefore, all the rights rendered by the status of the author of the work. However, the public support of the PhD thesis cannot be performed under the name of another person, since the final goal of the PhD candidate is to obtain the PhD title following the public support of the thesis;
- the right to decide under what name the work will be made public - lit.c); This right refers to the fact that the artist has a discretionary right to make his name public or to use a pseudonym under which to present his work. Given the specific nature of the PhD thesis, it is obvious in my opinion that this right cannot be implemented in the particular situation that we are considering, having regard to the fact that the PhD title is to be given precisely to the person who has drafted and subsequently defended the thesis;
- the right to claim the observance of the integrity of the work and to challenge any alterations, as well as any prejudice to the work, if it damages its honour or reputation - lit.d);
- the right to withdraw the work, compensating, where appropriate, the holders of usage rights, who have been harmed by the exertion of the withdrawal - lit.e); from our point of view, I believe that the analysis of this moral right can raise an interesting question. What happens to the PhD thesis after the public support, given that it becomes public, and unless the PhD candidate chooses the distinct publication of the thesis or chooses but has not observed the 24-month deadline to perform this publication, "*the document becomes freely accessible*"- art. 66 par. (4) lit. d) from the Code of Academic PhD Studies. We consider that the author of the thesis may at any time exert this right, but obviously there can be no compensation, as long as the access to his work is free and it is difficult to prove an alleged prejudice.

**2.2. Joint liability of the PhD candidate and PhD supervisor for compliance with the ethics and deontology rules**

**2.2.1. Obligation of the PhD candidate and the PhD supervisor to observe the rules of ethics and deontology; Manners of infringing these rules (considerations regarding plagiarism and auto-plagiarism)**

We can find in the legislation sufficient references to the norms of ethics and deontology and implicitly to the obligation to observe them in the scientific research activity (as is the case with the activity carried out both by the PhD candidate and the PhD supervisor throughout the research in order to draft the thesis). What are the rules of ethics and deontology? A set of norms that we have to observe or, in other words, types of deviations from which we must refrain. We can find references to these rules in Law no. 206/2004[12] on good conduct in scientific research, technological development and innovation, with subsequent amendments and supplements, which unifies the rules of ethics and deonotology in Article 1, under the notion of good conduct, and provides that:" *Proper conduct in scientific research, technological development and innovation (...) activities is based on a set of rules of proper conduct and procedures to comply with them"*. Compliance with these rules is mandatory, especially since, at Art. 2^1 are provided the types of deviations from such rules.

Referring to the specific case stated in the title of the study, the obligation to observe the rules of ethics and deontology is provided by art. 20 par. (1) from the Code of Academic PhD Studies, according to which "*The PhD school together with the PhD supervisor are under the obligation to inform the PhD candidate about the scientific, professional and university ethics and to verify the observance thereof, including: a) Compliance with the ethical provisions on completion of PhD research; b) Observance of the deontological provisions in the elaboration of the PhD thesis.*"

As far as the PhD supervisor is concerned, we find the obligation expressly stipulated in art. 72 paragraph (3) letter k) of the same Code, according to which "*The PhD supervisor has the following tasks: a) to ensure the scientific, professional and deontological guidance of each PhD candidate*".

Perhaps the first impulse would be to ask why we don't find such an obligation expressly provided also for the PhD candidate. However, we find the answer in the very validity conditions of a PhD thesis as a creation of its author. The obligation of the PhD candidate to observe ethical and deontological norms when writing and elaborating the thesis.

In accordance with the provisions of art. 1 para. (4) from Law no. 206/2004 The observance of these norms by the categories of staff carrying out R&D activities, stipulated in Law no. 319/2003, as well as by other categories of staff, from the public or private sector, benefiting from public R&D funds, determine the good conduct in the R&D activity."

Although art. 6 from Law no. 319/2003 on the status of research and development staff [13] itemizes the following categories of staff:*"a) R&D staff; b) university teachers; c) auxiliary staff from the R&D activity; d) staff from the functional apparatus "*, who carry out R&D activities, we also include PhD candidates here.

In support of this statement are the provisions of art. 26 lit. a) from Law no. 319/2003, according to which ''*The professional development of the R&D personnel is mainly accomplished through the following forms: a) PhD thesis; (...)"*.

At the same time, Article 17 para. (5) lit. (e) from the Code for Academic PhD Studies provides that "The PhD School Regulation establishes mandatory criteria, procedures and standards regarding at least the following aspects: (...) e) methods of preventing fraud in scientific research, including plagiarism"[14].

Once established and identified in the law the obligation of both the PhD candidate and the PhD supervisor to observe the rules of ethics and deontology, should be mentioned the deviations from the norms of "*proper conduct in the scientific research activity*", as provided by art. 2 and 2^1 from Law no. 206/2004. Further the analysis of the two articles, we can delimit the following types of infringements that may be suspected of being committed by the PhD candidate and/or the PhD supervisor:

- the production of results or data and their presentation as experimental data, as data obtained by computer numerical calculations or simulations, or as data or results obtained by analytical calculations or deductive reasoning;
- falsification of experimental data, of data obtained by computer numerical calculations or simulations or data or results obtained by analytical calculations or deductive reasoning;
- plagiarism;
- self-plagiarism;
- the unauthorized publication or dissemination by the authors of unpublished results, hypotheses, theories or scientific methods.

Although, as can be noticed, there are several types of deviations from ethical and deontological norms, perhaps because of media pressure in recent years, the term *plagiarism* has become almost obsessively used. Nevertheless, we are convinced that many people use the word by inertia, or perhaps it is "*cool*" or so they have heard in the media. Unfortunately, in the last few years, most of us have become specialists in plagiarism, as it is easier to judge in areas where we do not even have a day of study. On

[12] Published in the Official Journal of Romania, Part I, no. 505/4 June 2004;
[13] Published In the Official Journal of Romania, Part I, no.530 from 23 July 2003
[14] As an example, the Regulation for organizing and carrying out PhD studies at the Nicolae Titulescu University, the Regulations of the PhD School of the Alexandru Ioan-Cuza Police Academy

the other hand, without going too far on this subject, it is unfair that, with the media pressure, suspicions were raised about certain PhD dissertations and, implicitly, certain PhD supervisors. And once the label of a plagiarist or PhD supervisor of a plagiarist is placed, it is difficult, if not almost impossible, to overthrow a guilty presumption with such an impact.[15]

Closing the parenthesis and returning to the subject under consideration, in line with the times we live, we proposed ourselves to analyze the first two ways of violating good conduct rules, probably because they are the most frequent ones.

PhD thesis, like any other creation, must be original, so that it does not come under suspicion of plagiarism. What can be anyway more beautiful, noblest than originality? We try to understand why many choose the complicated way of attempting (sometimes succeeding) to plagiarize others when it is so simple to be original. As a comparison, we see plagiarism as a lie, as it is easier to tell the truth, so you do not have to remember your own lies. What we do not understand is that originality makes us unique in a world and so dominated by too many "*copy-paste*" – users.

A definition of plagiarism is found in art. 4 para. (1) letter d) from Law no. 206/2004 as being "*exposure in a written work or oral communication, including in electronic form, of texts, phrases, ideas, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works, including in electronic form, without mentioning this and without referring to the original sources*".

The committing of the deed of plagiarism is regulated, according to art. 2^1 para. (2) from Law no. 206/2004 as a "*deviation from the rules of good conduct in scientific research*". On the other hand, art. 310 from Law no. 1/2011 provides that the committing of the plagiarism deed is "*serious violation of good conduct in scientific research and academic activity",* and Article 20 (3) of the Code of Academic PhD Studies regulates plagiarism *as "academic fraud, violation of university ethics or deviation from good conduct in scientific research*". The seriousness of the act is given, in particular, by the way in which it is committed, that it can only be with the intention of plagiarism, and negligence cannot be called into question. Thus, both the PhD candidate and the PhD supervisor may not invoke any attenuated circumstances, because you cannot copy "*by error*", as long as the final goal is the drafting and finalization of the thesis.

As regards self-plagiarism, such is defined by the same article, letter e) and represents "*the exposure to texts, phrases, demonstrations, data, hypotheses, theories in a written work or oral communication, inclusively in electronic format, results or scientific methods extracted from written works, inclusively in electronic format, of the same or the same authors, without mentioning this and without reference to the original sources*".

The High Court of Cassation and Justice noted very clearly in its practice, speaking of originality through lack of self-plagiarism, the fact that an original work is "*a creation of he/she who claims he/she is the author, and not a mere copy of a previous work*".[16]

The two mentioned deeds are only defined in Law no. 206/2004. In fact, we believe that this is also natural, since the normative act regulates conduct in the scientific research activity and plagiarism, which only means a lack of integrity in such activity. Plagiarism is nothing more than a theft of theories, words, phrases or even of another author's works. It is a stigma on the academic integrity that both the PhD candidate should have, but especially the PhD supervisor, who is guiding him/her during the PhD studies. More problematic is the situation of self-plagiarism when you have to copy yourself.

In doctrine, it is believed that " *Considering that the subject matter of Law no. 8/1996 is the protection of copyright and related rights, while the reason for the adoption of Law no. 319/2003, Law no. 2006/2004, Government Decision no. 681/2011 and Law no. 1/2011 is to ensure the development of the R&D activities itemized by law in order to develop scientific knowledge and to generate new knowledge, in compliance with the norms of good conduct, incompatible with the plagiarism and self-plagiarism, we are of the opinion that Law no. 206/2004 and Law no. 8/1996 are not in conflict*"[17].

**2.2.2. The principle of joint and several liability of the PhD candidate and PhD supervisor for infringing the ethics and deontology rules din rafting the PhD thesis**

The relevant legal texts in the analysis of this principle are the following:

- art. 20 para. (3) from the Code of Academic PhD Studies: "In case of possible academic frauds, violations of university ethics or deviations from good conduct in scientific research, including plagiarism, the PhD candidate and/or the PhD supervisor is/are liable in accordance with the law",
- art. 65 para. (5) from the same Code: " The thesis is an original work and it is mandatory to mention the source for any taken over material" and para. (7): "The PhD supervisor is jointly liable with the author of the thesis for the observance of the quality or professional ethics standards, including the assurance of the originality of the content, according to the provisions of art. 170 from Law no. 1/2011."

Further to the analysis of the mentioned legal texts results the existence of the principle of the joint liability of the PhD student and the PhD supervisor in

[15] It is just a personal opinion and the triggering factor of enrolling the undersigned at PhD school classes; because I am convinced that many of my colleagues have experienced the same frustration of not being able to change anything;

[16] Civil and Intellectual Property Section, Decision no. 6428 from 30 June 2006;

[17] Sonia Florea, in Plagiarism and the Infringing of Copyrights, Juridice.ro;

the situation of infringing the norms of ethics and deontology in drafting the PhD thesis.

Besides, this kind of liability results precisely from the obligations of both the PhD student and his/her PhD supervisor. Thus, the PhD supervisor is under the obligation to observe the rules of deontology in his/her guidance activity and, on the other hand, the PhD student is under the obligation to observe these rules in drafting the PhD thesis.

From the above it is clear that the first who is interested in observing the rules of ethics and deontology is precisely the PhD supervisor, as according to how he/she directs the PhD candidate depends whether he/she will suffer the rigors of the law for the non-observance thereof.

If, however, in the unlikely situation in which the PhD candidate violated the rules of ethics and deontology without the contribution of the phD supervisor, he/she (together with the guidance committee) has the possibility in accordance with the provisions of art. 67 para. (2) letter c) of the Code of Academic PhD Studies, to refuse the submission of the thesis for public support.

If the PhD supervisor (and implicitly the PhD candidate) fails to observe the rules of conduct in the process of guidance for the drafting of the thesis, the provisions of art. 68 para. (2) of the Code of Academic PhD Studies provides for the PhD Commission assessing the thesis, the obligation that " *If a member of the PhD Commission identifies in the assessment of the thesis both before and during public support serious violations of good conduct in scientific research and academic activity, including plagiarizing the results or publications of other authors, forging results or replacing the results with fictitious data, the member of the PhD Commission is under the obligation to take the following measures: a) to notify the ethics committee of the higher education institution where the PhD candidate is enrolled and the ethics committee of the institution where the manager is PhD supervisor is employed for the analysis and resolution of the case, including by expelling the PhD candidate, according to art. 306-310 and 318-322 from Law no. 1/2011 and the provisions of Law no. 206/2004 on good conduct in scientific research, technological development and innovation, with subsequent amendments and supplements; b) to notify the deviations of all members of the PhD committee and to propose the award "unsatisfactory".*

The finding of violation of deontological norms can be done by CNATDCU even under Art. 68 para. (6) of the Code of Academic PhD Studies according to which *"If the members of CNATDCU in an evaluation committee of a PhD thesis find that the professional ethics standards, have not been complied with in the thesis and/or the activities that led to its creation, inclusively the existence of plagiarism, they shall invalidate the PhD dissertation, inform about these findings the other members of the evaluation committee and notify the General Council of the CNATDCU for the analysis of the responsibility of the PhD supervisor or the PhD school and for the application of the provisions of art. 69 para. (5)."*

Last but not least, it is worth mentioning that any individual or legal entity may notify about potential violations of deontological norms in a PhD thesis, under the terms of art. 50 para. (2) of the Code of Academic PhD Studies.

**2.2.3. Sanctions applicable to the PhD candidate and/or the PhD supervisor for violating ethical and deontological rules; The legal nature of the liability for violating ethical and deontological rules; Consequences**

A first sanction for non-observance of the rules of ethics and deontology in the PhD thesis drafting is found in the provisions of art. 67 para. (3) of the Code of Academic PhD studies and consists in the refusal of the PhD Commission to issue the public support agreement of the thesis. As a result of this situation, the PhD Commission, in accordance with the provisions of art. 68 para. (4) of the Code *" In case of the "unsatisfactory" rating, (...) it specifies the content items to be remade or completed in the PhD thesis and calls for a new public support for the thesis. The second public defence of the thesis takes place in front of the same PhD Committee as in the first case. If the second public support session is awarded the "unsatisfactory" rating, the PhD title is not granted and the PhD candidate is expelled."*

Another sanction is provided by para. (6) of the same article, according to which "*If the members of the CNATDCU in an evaluation committee PhD thesis find that the professional ethics standards have not been complied with in the thesis and/or the activities that led to its completion, including plagiarism, they invalidate the PhD dissertation, inform about these findings the other members of the evaluation committee and notify the General Council of the CNATDCU for the analysis of the responsibility of the PhD supervisor or of the PhD school and for the application of the provisions of art. 69 para. (5).*" Thus, the content of art. 69 para. (5) of the Code provides that "*If the General Council of the CNATDCU decides that the quality standards or the professional ethics have not been observed, inclusively in regard to plagiarism, the president of CNATDCU proposes to the Ministry of National Education and Scientific Research one or more of the following measures: a) the withdrawal of the capacity of a PhD supervisor; b) the withdrawal of the PhD title; c) the withdrawal of the accreditation of the PhD school*", whereas (6) of the same article refers to the obligation of the Minister of Education "*to take the measures provided for in art. 170 from Law no. 1/2011, with subsequent amendments and supplements. The Ministry of National Education and Scientific Research informs all parties about the issued orders*".

Sanctions are also provided by the provisions of art. 170 from Law no. 1/2011 according to which"(1) In case of non-observance of the quality or professional ethics standards, the Ministry of National Education, on basis of external evaluation reports prepared, as the case may be,

by CNATDCU, CNCS, by the Ethics and University Management Council or by the National Council of Ethics for Scientific Research, Technological Development and Innovation, may take the following measures, alternatively or simultaneously: a) the withdrawal of the capacity of a PhD supervisor, b) the withdrawal of the PhD title, c) the withdrawal of the accreditation of the PhD school, which implies the withdrawal of the right of the PhD school to organize an admittance contest to select new PhD candidates. (2) The re-accreditation of the PhD school can be obtained after at least 5 years as of the loss of this capacity, only after resuming the accreditation process, according to art. 158. (3) The regaining of the title of a PhD supervisor may be obtained after at least 5 years as of the loss of this capacity, based on an IOSUD proposal, on basis of an internal evaluation report, the assessments of which are validated by an external evaluation carried out by CNATDCU . The positive results of these procedures are necessary for approval by the Ministry of National Education. (4) PhD leaders are evaluated once every 5 years. The evaluation procedures are established by the Ministry of National Education, at the proposal of CNATDCU."

From the corroboration of the said legal texts, it results that, in essence, we can speak of administrative responsibility, both in regard to the PhD candidate and the PhD supervisor. The administrative nature of liability also derives indirectly from the provisions of Article 69 para. (1) of the Code, according to which "*the PhD title is assigned by the order of the Minister of Education (...)*", the withdrawal of the title being made by the same type of administrative act, according to the principle of symmetry of the legal act. Further, like any administrative act, it can be challenged by administrative litigation, an additional argument in support of the theory of administrative responsibility of the PhD candidate for the violation of the deontology rules in drafting the PhD thesis.

The law does not provide the possibility of attracting the civil liability of the PhD candidate, but it is possible that in certain situations expressly stipulated in the PhD studies contract, such a situation should occur and then we are in the presence of contractual civil liability.

In regard to the responsibility of the PhD supervisor, it is clear from the quoted legal provisions that this is an administrative-disciplinary liability.

## 4. Conclusions

Starting from the idea that the PhD candidate is the only author of the PhD thesis, we reach the natural question, why the responsibility is a joint one, his/her liability and such of his/her PhD supervisor. It can be noticed that in his capacity of mentor of the thesis, the PhD supervisor is jointly liable with the PhD candidate, risking a sanction up to the withdrawal of this capacity, which he/she can recover only after 5 years. Unfortunately, in Romanian society, the label of a PhD supervisor who has warranted or may even contributed to the violation of ethical and deontological norms is very difficult to remove.

We believe that such a "*joint*" liability of the PhD supervisor with the PhD candidate for violating the ethics and deontology rules should be regulated in more detail or even reconfigured. We appreciate this in view of the fact that it is relatively easy to prove the intent of the PhD candidate to violate ethical and deontological norms (mainly by plagiarism/self- plagiarism). It is more difficult to prove the intention of the PhD supervisor for such purpose, of collaborating with the PhD candidate in infringing the ethical rules. We appreciate that we can claim at most negligence, correlated with a less severe administrative penalty (instead of the withdrawal of the capacity with the possibility of regaining it after at least 5 years). We also consider necessary, by *lex ferenda*, a delimitation of the accountability of the PhD candidate from that of the PhD supervisor, so that each one responds *pro rata* to his/her own default, and not jointly[18].

This type of approach would be maybe also imposed by the fact that the author of the PhD thesis is the PhD candidate, not the PhD supervisor, who – as we showed throughout the study – plays a guidance, coordination role, not one of creation. Therefore, if the rights are not the same, why is liability a joint one?

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[18] An example of this is the decision of the Ministry of National Education and Science (MENS) from 25 May 2016 establishing the national training framework and the methods leading to the award of the national PhD diploma in France, analyzed by Gheorghe Bocșan in " *The responsibility of the PhD candidate, of the PhD supervisor and of the members of the public support committee for PhD dissertations for violating the rules of deontology in drafting the thesis*", in "Revista Română de Dreptul Proprietății Intelectuale" (Romanian Magazine of Intellectual Property Law. The author notes that "*a difference between the French and the Romanian law in the field of the scientific leader (directeur de la them) is that he/she is not liable in any way for the content of the thesis; this is considered the product of the exclusive work of the PhD candidate, who has the full responsibility for the content*", page 28.

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# EVALUATION OF THE SERVICE QUALITY AND SATISFACTION IN THE TURKISH HIGHER EDUCATION IN TERMS OF INTERNATIONAL STUDENTS

**Nizamettin BAYYURT**[*]


## Abstract

*Purpose- The purpose of the study is to explore the service quality of Turkish higher education, the satisfaction level of international students and the critical SERVQUAL dimensions in terms of international students' satisfaction*

*Research Methodology- A questionnaire was designed and applied by using SERVQUAL model to collect data from international students. The survey was conducted with 198 international students from different nationality, sexes and ages.*

*Findings- The results reveal that international students are poorly satisfied in general. They find the service quality of higher education poor. They are at most satisfied in tangible and reliable sense from their universities while the least satisfied area is assurance. The significant SERVQUAL dimensions for satisfaction were reliability, empathy and tangibility. Responsiveness and assurance were not significant.*

*Research limitations- Survey was implemented via internet. Face to face interview might be beter to make sure respondents understand the questions correctly.*

*Practical implications- The number of international mobile students was reached 5 million in 2016 and is estimated that will exceed 7 million by 2020. The expenditures of foreign students is around 30 thousand US dollars annually on average. Economically, 7 million international students will create a $210 billion total market in 2020. The quality of education is the first element considered by foreign students in determining the country and university to study. Therefore, the service quality of higher education and the resultant satisfaction levels of international students must be determined consistently to attract international students.*

*Originality/Value- This study is one of the few studies regarding the service quality and satisfaction especially in the context of international students in the Turkish higher education.*


**Keywords:** *Higher Education, Service Quality, International Students, Satisfaction, Turkey*

**Jel Classification:** *I23, O14, I21, L8*

## Introduction

According to UNESCO Institute for Statistics, the number of international mobile students was 2.1 million in 2000, reached 3 million in 2005, 4.1 million in 2012 and 5 million in 2016. It is estimated that this number will exceed 7 million by 2020. Around one third of the international students in the world were studying in North America and one third in European countries. The first five countries that accept the most international students are USA, UK, France, Australia and Germany. Nearly half of international students are in English-speaking countries, including Canada and New Zealand (http://data.uis.unesco.org). Turkey is one of the major sources of countries that send students abroad.

In recent years Turkey has witnessed an enormous expansion in higher education. The capacities of universities have increased and consequently the enrollment rate in higher education has risen dramatically. Parallel to these important developments, the internationalization dimension of the Turkish universities could not be neglected. The number of international students in Turkey has increased recently. Students who come to study in a country provide economic and social benefits to that country. Foreign students spend on different items such as accommodation, health, nutrition, entertainment, and tuition fees. The expenditures can vary by countries and universities, but briefly the sum on average is around 30 thousand US dollars annually. Therefore, from an economic point of view, 7 million international students will create a total market of $210 billion in 2020.

According to the US Department of Commerce in 2000, the contribution of foreign students in higher education to the US economy increased to the fifth rank in the service sector (Stephenson, 2004).

Hosting international students makes significant contributions to a country not only economically but in many different ways. International students helps to improve the quality of education, increase international project partnerships, contributes to culture and art as well as the economy. After graduation when students return to their home country they create commercial partnerships and they become volunteer advertisers of host countries. The satisfaction of foreign students is important for these reasons. The quality of education is the first factor considered by foreign students in determining the country and university to study (Becker & Kolster, 2012). Therefore the service quality

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of higher education and the resultant satisfaction levels of international students must be determined consistently to attract international students. However, academic researches on service quality in the Turkish higher education and satisfaction are few. International students in those studies were ignored. Some of the researches in Turkish higher education are as follows:

Tayyar and Dilseker (2012), studied the effects of service quality and image on students satisfaction. Isık (2012) examined the relations between demographic features and students satisfaction. Cevher (2015) investigated the perception of quality considering the service quality factors. Rahim Uddin et al. (2017) investigate how students perceive the environment, quality, and services that they are offered at a Turkish university and how satisfied they are with them. Ozturk and Cankaya (2015) and Cevher (2016), determines the level of satisfaction of foreign students in a university. Kondakci (2011), examines the rationales of in-bounding student mobility in Turkey.

To improve the satisfaction level of international students their problems must be clearly determined and solved. Studies have shown that the most important problem experienced by foreign students is economical (Deressa and Beavers, 1988). But, all of the problems of international students are not economical. International students have experienced loneliness, psychological maladjustment, shyness, cultural shock and psychological problems (Biggs, 1999; Furnham, 1997). Yang (2006) in a qualitative study with 12 Chinese students in the UK, found out that socio-cultural adaptation was the most important problem of Chinese students. Mori (2000) and Sandhu (1995) found that cultural differences and being homesick are important sources of stress for foreign students. In addition, there are many studies in the literature showing that students' prejudices about foreign students complicate the situation and cultural cohesion (Yoon ve Portman, 2004; Winkelman, 1994).

Unlike the previous studies in the Turkish Higher Education this study focuses on international students. There are three aims of the present study: the first one is to determine the perceived service quality of the Turkish higher education of international students by using SERVQUAL model. The second one is to determine the satisfaction level of international students with the Turkish higher education and the third aim is to examine the critical dimensions of SERVQUAL model in terms of international students' satisfaction in the Turkish Higher Education.

## 1. Service Quality

Quality has recently become one of the most important factors in global competition. Intensifying global competition and the demand for better quality products by customers have made more companies aware that they need to provide quality products and services to compete successfully in the marketplace. Quality concept is as old as the production activity of human beings. It has been developed and expanded in time according to technological advancement, increase of consciousness of the consumer and increase in competition conditions. The concept of quality control is initially assumed as sense of eligibility of design and producing product considering standards that determined during the design phase. The objective of quality control has been detecting the quality of final products and preventing defective products before customers. Nowadays, the concept of quality control focuses on control of production process instead of control of products. In process control, the process is monitored during the production for making corrections by necessary interventions to prevent producing defective products. Quality control techniques have been developed in order to achieve the goals and aims of quality. Statistical quality control techniques which are collecting, monitoring, evaluating and commenting data are very important in measurement and evaluation of the product quality. Statistical quality control techniques differentiate of manufacturing and service sectors.

Advances in information, technology and communication with globalization, the importance of service sector has increased in time. Proportionally, as the level of development of countries rise up, the share of service sector also increases in economy. Service is defined as a valuable action, deed, or effort performed to satisfy a need or to fulfill a demand. It is not measured numerically. In service sectors such as fields of health, education, banking, insurance and etc., quality is assessed by perception of consumers. That's why different techniques have been developed for measuring the perception of the service quality.

Service differentiates from products in terms of 4 basic features which are accepted most commonly (Fitzsimmons and Fitzsimmons, 2004):

Intangibility: service cannot be seen, tasted, or touched in the same manner as we can sense tangible goods.

Inseparability: service is produced and consumed at the same time

Heterogeneity: since services are performances, frequently produced by human beings, no two services are precisely the same.

Perishability: service cannot be saved, stored, resold or returned

Researches have shown that customers perceive the quality from many different perspectives such as performance, features, reliability, durability, conformance, service ability, aesthetics etc. (Kenyon, G., & Sen, K., 2012) . Therefore, quality cannot be completely assessed from one dimension. Service quality is an area that many researchers, particularly academicians and industry practitioners have worked and payed attention on forming service quality measurement models. Some of the main and mostly accepted and implemented service quality models in the field of service quality measurement are listed below.

Gronroos model, technical and functional model (Gronroos, 1984), Gap model (Parasuraman et al., 1985), Service quality - SERVQUAL (Parasuraman, et al., 1988), Servperf (Cronin and Taylor, 1992), Hierarchical model (Dabholkar et al., 1996), E-service quality model (Santos, 2003), HedPerf model (Firdaus, 2005-2006), E-S-QUAL model (Parasuraman, 2005)

Among these models, service quality model of Parasuraman (1988) has served as a framework for researchers in service industry for many years. The SERVQUAL model has been popular among researchers and used by numerous researches in measuring service quality due to easy application and detached simple theory. The model can be worked out by both quantitative and qualitative method. Parasuraman et al. (1988) has identified five basic key factors of service quality which were adopted and implemented for most of services. These dimensions of service quality and their perspective components are defined as follows:

Tangibles: Representing the service physically, are defined as the appearance of physical facilities, equipment, staff appearance, and communication materials that are used to provide the service.

Reliability: Ability to perform the service dependably and accurately. This means that organization delivers on its promises regarding delivery, service provision, and problem solution (i.e. a firm performs the service right the first time and honors its promises over a period of time).

Responsiveness: Willingness to help customers and provide prompt service. It is defined as willingness or readiness of employees to help customers and to provide prompt service. This dimension emphasizes attentiveness and promptness in dealing with customer requests, questions, complaints, and problems.

Assurance: Employees' knowledge and courtesy and the ability of the firm and its employees to inspire trust and confidence.

Empathy: Treating customers as individuals is defined as caring, individualized attention that the firm provides to its customers. The customers need to feel understood by and important to, firms that provide service for them.

## 2. Foreign Students In Turkish Universities

In recent years, Turkey has witnessed an enormous expansion in higher education. The capacities of universities have been increased and consequently the rate of schooling in higher education has risen dramatically. In parallel with these important progresses, the internationalization dimension of the universities could not be neglected. According to the Turkish Higher Education Council (YOK), the number of foreign students in the Turkish universities was 7661 in 1990, 16 thousand in 2000, 43 thousand in 2012, 55 thousand in 2014 and reached 110 thousand in 2017 (https://istatistik.yok.gov.tr/). (https://istatistik.yok.gov.tr). However, Turkish universities which contain only 1,7 percent (by 2016, http://data.uis.unesco.org) of the international students that circulate all over the world, have not reached the desired level in terms of internationalization yet. But, Turkey's higher education has significant advantages in terms of internationalization to achieve the desired level. It has 206 higher educational institutions, over 163 thousand teaching staff serving 7,5 million university students. Turkey is the most attractive country in terms of the quality of education in the region. The major source countries sending their students to Turkish universities are Azerbaijan with around 15000 students, Syria with 15000, Turkmenistan with 10000, Iran with 6000, and Iraq with 5000. The potential that Turkey has in higher education can increase the number of international students in its universities.

## 3. The Methodology And Data Analysis

This study aims to determine the service quality and satisfaction level of international students in the Turkish universities and the critical factors of SERVQUAL dimension in the Turkish higher education in terms of international students' satisfaction. A questionnaire which was designed by using SERVQUAL dimensions by Oliveira (2009), was applied in this research to collect data from foreign students. In the survey, there are 25 questions (table 2) and they were exhibited via internet platform in two languages, English and Turkish to make foreign students to understand questions well.

The survey was conducted with 198 international students from different nationality, sexes and ages (table 1). 113 of the students were males, 85 were females. Survey includes 176 bachelor and 22 graduate students. 70 students in the survey were between 18 to 21 years old, 95 of them were 22-25 age group, 31 students were 26-30 range and 2 students were older than 31. The questionnaire was applied to the students via internet platform. A 5 point Likert scale is employed to measure students perceived quality on the service attributes, ranging from 1 (strongly disagree) to 5 (strongly agree).

Table 1: Demographic factors

| | | Frequency | Percent |
|---|---|---|---|
| Sex | Male | 113 | 57,1 |
| | Female | 85 | 42,9 |
| Program | Bachelor | 176 | 88,9 |
| | Graduate | 22 | 11,1 |
| Age | 18-21 | 70 | 35,4 |
| | 22-25 | 95 | 48,0 |
| | 26-30 | 31 | 15,7 |
| | 31+ | 2 | 1,0 |
| | Total | 198 | 100,0 |

## 4. The Results

The completed questionnaires were checked for accuracy before entering the data processing software. Based on the tests done on the five dimensions of SERVQUAL in many industries and countries indicate that they are reliable and valid (Brysland & Curry, 2001; Lee, Kim, & Ahn, 2011; Naik, Krishna, & Gantasala, 2010).

In the table 2 the applied SERVQUAL questionnaire to the students and the results can be found. The SERVQUAL scale uses 22 questions to measure the five dimensions of service quality: reliability, tangibility, assurance, empathy and responsibility and 3 questions to measure the satisfaction. Questions 1 to 4 refer to the tangibility dimension, which obtained an overall average of 3,46. The reliability dimension is analyzed in questions 5 to 9, which obtained an overall average of 3,46. Questions 10 to 13 of the questionnaire refer to the responsiveness dimension and its overall average was 3,40. Questions 14 to 17 in the adapted SERVQUAL scale refer to the assurance dimension, which obtained an overall average of 3,28. The next five questions, 18 to 22, refer to the empathy dimension, which obtained an overall average of 3,33. The final 3 questions refer to satisfaction and its overall average was 3,36. Tangibility and reliability dimensions have the highest scores on average while assurance has the lowest average score.

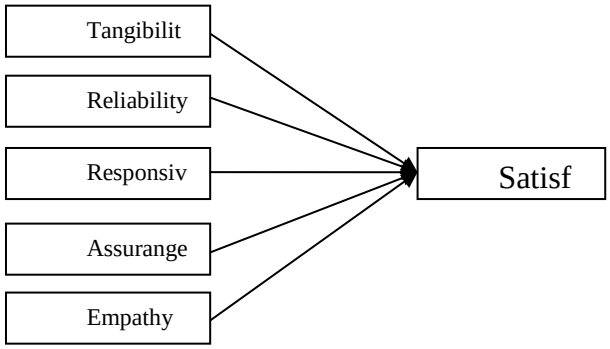


Figure 1: Theoretical model of study

According to the results of survey, foreign students are poorly satisfied with overall service quality of institutions. The mean scores of satisfaction and all SERVQUAL dimensions are under 4. While the area that foreign students are mostly satisfied with universities among others are that when something is promised by a certain time, it is always provided by staff, staff is well dressed and neat in appearance and the teaching staff respects lecture and exams schedules. International students are at least satisfied with the service of non academic faculty members such as faculty staff is friendly and polite, the behavior of faculty staff instills confidence in you and students are able to trust the faculty staff. Foreign students gave the lowest scores to the behavior of non academic staffs. Generally, they are mostly satisfied in tangible and reliable sense from their universities while the least satisfied area in their universities is behavior, trust sand friendship of staff.

Table 2: Descriptive statistics of SERVQUAL dimensions

| | | Mean | Std. Dev. |
|---|---|---|---|
| Tangibility | The faculty has modern and latest equipment | 3,39 | 1,165 |
| | The appearance of the physical facilities of the faculty is attractive | 3,47 | 1,237 |
| | Staff is well dressed and neat in appearance | 3,53 | 1,116 |
| | Library has the latest literature in your area of interest | 3,43 | 1,215 |
| Reliability | When something is promised by a certain time, it always is provided by staff | 3,57 | 1,034 |
| | When student have problem, staff is courteous, even if not able to help | 3,41 | 1,099 |
| | Courses are taught by highly knowledgeable professors | 3,45 | 1,133 |
| | The teaching staff respects lecture and exams schedules | 3,52 | 1,102 |
| | Faculty staff keeps accurate records | 3,33 | 1,046 |
| Responsiveness | Students are informed of schedules and changes in schedules in advance | 3,46 | 1,125 |
| | Service hours of learning facilities accommodate all students | 3,48 | 1,06 |
| | Faculty staff is always willing to help you | 3,3 | 1,007 |
| | Administrative staff are never too busy respond to student requests promptly | 3,35 | 1,083 |
| Assurance | The behavior of faculty staff instills confidence in you | 3,21 | 1,091 |
| | Students are able to trust the faculty staff | 3,21 | 1,083 |
| | Faculty staff is friendly and polite | 3,21 | 1,141 |
| | Teaching staff is dependable | 3,49 | 1,098 |
| Empathy | Faculty provided personal attention to every student | 3,3 | 1,121 |
| | Professors have convenient office-hours to advice student | 3,43 | 1,043 |
| | Staff member give students individual attention | 3,25 | 1,026 |
| | Faculty has students best interest as a major objective | 3,38 | 1,078 |
| | Faculty understands the special needs of students | 3,31 | 1,104 |
| Satisfaction | I am satisfied with my decision to attend this University | 3,47 | 1,084 |
| | If have a choice to do it all over again, I still will enroll in this University | 3,35 | 1,12 |
| | I am happy that I enrolled in this University | 3,26 | 1,157 |

The next aim of the study is to determine the critical factors of SERVQUAL dimensions for students' satisfaction in Turkish higher education. For this reason the following linear model was run.

Satisfaction = $\beta 0 + \beta 1$ Tangibility + $\beta 2$ Reliability + $\beta 3$ Responsiveness + $\beta 4$ Assurance + $\beta 5$ Empathy + u

The results show that (table 3) the model fits as the f-value = 30,13 and p-value <0,001. Moreover the R-square is 0,44 which translates that 44% variance of the dependent variable (international students satisfaction) can be explained by the 5 SERVQUAL dimensions. Multi collinearity statistics results from table 3 show that there are no serious multi collinearity among SERVQUAL dimensions VIF of all variables are within the acceptable level, VIF<5

Table 3: Effects of SERVQUAL dimension on student satisfaction

| | B | Std. Error | t | Sig. | VIF |
|---|---|---|---|---|---|
| (Constant) | ,361 | ,252 | 1,434 | ,153 | |
| Tangibility | ,138 | ,079 | 1,745 | ,083 | 2,095 |
| Reliability | ,342 | ,104 | 3,296 | ,001 | 2,565 |
| Responsiveness | ,043 | ,109 | ,398 | ,691 | 3,081 |
| Assurance | ,114 | ,097 | 1,180 | ,240 | 2,755 |
| Empaty | ,246 | ,093 | 2,630 | ,009 | 2,154 |

Dependent variable: Satisfaction, R-square=0,44 F=30,13 Sig=0,000

The most important SERVQUAL dimensions are reliability and empathy which are significant at 1% level. One unit increase in their values increases international student's satisfaction by 0,342 and 0,246 units respectively. The third significant SERVQUAL dimension is tangibility and it is significant at 10% level. Responsiveness and assurance seem not statistically significant at an acceptable level. For high level of international student's satisfaction university administrations must consider the 3 important dimensions at most.

## Conclusion

As a result of globalization, advances in information, technology and communication have resulted in a significant increase in service sector. The developments that have taken place in these areas have shown that the period we live in is called information age and in this age learning should be continuous and lifelong. One of the most important institutions in the information age is the educational institutions. From this point of view, the quality of the service that is provided by educational institutions becomes important. Therefore, studies have carried out on the measurement and development of the service quality in the educational sector has an important place in the service industry. As the result of this survey, the quality dimensions which are adopted from SERVQUAL, had taken medium scores from international students. Even the highest scores taken by reliability and tangibility of these institutions they are still low (3,46 both and under 4: agree or satisfied). International students gave the lowest scores to assurance dimension of service quality. International students satisfaction level is also low (overall average is 3,36 which is under 4: satisfied). The most important SERVQUAL dimensions which are affecting satisfaction are reliability, empathy and tangibility. Therefore university administrations should take care on these dimensions to improve satisfaction and attract foreign students. Responsiveness and assurance were not found significant for satisfaction at an acceptable level in this study.

International students spend on different items such as accommodation, health, nutrition, entertainment, and tuition fees. The expenditures can vary by countries and universities, but briefly the sum is around 30 thousand US dollars annually on average. Therefore, from an economic point of view, 7 million international students will create a total market of $210 billion in 2020. Turkey has 206 higher education institutions, 7,5 million university students and over 163 thousand teaching staff. Therefore, Turkey's higher education has significant advantages in terms of internationalization. However, it is seen that the Turkish universities, which contain only 1,7 percent (by 2016) of the international students circulating all over the world, have not reached the desired level in terms of internationalization yet and are the steps to be taken in this regard. Hosting international students has significant benefits for a country not only economically but in many different ways such as improvement the quality of education, increasing international project partnerships, contribution to culture, art, peace and commercial partnerships.

Since the quality of education is the key element that is considered by foreign students when determining the country and university to study (Becker & Kolster, 2012), the most important point that needs to be developed is to improve the quality of education and to increase the number of researches carried out in universities to increase the number of international students. Universities can increase their chances of competition in the globalized education area by obtaining quality certificates from international organizations. The number of undergraduate and graduate programs providing education in foreign languages for international students should also be increased. Education ministries and higher education councils should organize exchange programs with countries. Universities should provide sports, music, and talent scholarships as well as achievement grants for attracting qualified students. Dormitory facilities for international students should be increased. Foreign students should be provided expedite and ease with bureaucratic issues such as visas, residence permits and work permits. International student office websites should be well structured and kept up-to-date with all the information and documents required by the students in multi-language. Since foreign students usually face with nonacademic staffs in the universities such as student affairs to solve their problems, nonacademic staffs should also know foreign language. There must be psychological units in the universities for

international students to support them in case of their psychological problems.

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# DOMESTIC R&D INTENSITY, TECHNOLOGY TRANSFER AND GROWTH OF PRODUCTIVITY: AN EMPIRICAL INVESTIGATION OF TUNISIAN'S CASE

**Ahmed BELLAKHDHAR***

**Abstract**

*This paper aims to investigate the determinants of productivity growth in the Tunisian economy context over the period 1976 to 2010. Our theoretical model incorporates as key variables, domestic innovation, human capital, distance to technology frontier and external technology spillovers through import of high-tech products and foreign direct investments. Empirical results identify that the impact of domestic R&D intensity on the productivity growth is negative but not significant in all alternative regressions. The effect of import of technologically advanced products is positive and more enhanced by the distance to technology frontier but the effect of foreign direct investment is significantly negative. Our findings confirm also that human capital has a positive impact on technology accumulation in Tunisia but not highly significant. Its role is rather more important in the assimilation and absorption of foreign technology.*

**Keywords:** *Innovation, Human capital, External technology transfer, Absorptive capacity, Total factor productivity*

**JEL codes:** *C51, D24, F14, O33*

## 1. Introduction

Endogenous growth models emphasize innovation as the engine of growth. In the first generation endogenous growth models of Romer (1990), Grossman and Helpman (1991) and Aghion and Howitt (1992), TFP growth is positively related to the levels of R&D. This leads to an assumption of scale effects in ideas production, i.e., new ideas are proportional to the stock of knowledge. However, these models are not consistent with the evidence. In particular, Jones (1995) shows that the significantly increasing number of scientists and engineers engaged in R&D in the US since the 1950s has not been followed by a concomitant increase in the growth rate of TFP, thus refuting the first-generation R&D-based endogenous growth models. Consequently, endogenous growth theory has evolved into the two following second-generation theories: semi-endogenous growth models and Schumpeterian growth theory. The semi-endogenous models of Jones (1995), Kortum (1997) and Segerstrom (1998) abandon the scale effects in ideas production by assuming diminishing returns to the stock of R&D knowledge. Thus, R&D has to increase continuously to sustain a positive TFP growth. The Schumpeterian growth models of Aghion and Howitt (1998), Dinopoulos and Thompson (1998), Peretto (1998), Young (1998), Howitt (1999) and Peretto and Smulders (2002) maintain the assumption of constant returns to the stock of R&D knowledge. However, they assume that the effectiveness of R&D is diluted due to the proliferation of products as the economy expands. In other term, to ensure sustained TFP growth, R&D has to increase over time to counteract the increasing range and complexity of products that lowers the productivity effects of R&D activity. Endogenous growth theory has also increasingly focused on the roles of technology transfer and absorptive capacity in explaining productivity growth across countries (Eaton and Kortum, 1999; Howitt, 2000; Xu, 2000; Griffith et al., 2003, 2004; Kneller and Stevens, 2006; Madsen et al., 2009). Absorptive capacity captures the idea that the benefit of technological backwardness enjoyed by a laggard country can be enhanced if it has sufficient capability to exploit the technology developed in the frontier countries (Abromovitz, 1986).

Despite the rapid progress in the quality of studies and econometric techniques, the assessment of the effects of R&D productivity and spillovers through empirical analysis remains a controversial subject. To make the empirics of the theoretical model tractable, it is necessary to overcome a series of methodological and conceptual difficulties. In this paper, we first attempt to develop an endogenous model of technology accumulation that incorporates as crucial determinants, domestic innovation efforts, human capital, distance to technology frontier and the diffusion of foreign technology through import of high-tech products and foreign direct investment. Then, several alternative regressions are estimated and many graphical analyses are used to investigate the empirical effects of research intensity, human capital and technology transfer on productivity growth in Tunisia over the period 1976 to 2010.

The rest of the paper is structured as follows. The second section presents the theoretical model of technology accumulation and the regression equations to estimate. The third section reports empirical results

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with necessary interpretations. The last section concludes.

## 2. Technology accumulation model

The basic idea behind endogenous growth theories is that in the long run the main underlying determinant of economic growth is the long-run growth rate of total factor productivity (TFP), which in turn depends mainly on the rate of technological progress. Theoretical modeling and empirical investigations in this field have been the subject of an increasing attention in the literature to understand the differences between developed and undeveloped countries. There are two obvious candidates to explain the different levels of TFP across countries or across regions within countries. The more important one is the amount of research carried out in that region/country. A vast literature investigating the national sources of economic growth (e.g., Cameron, 2003) underlines the linkage between R&D expenditures TFP, and growth. The second one is human capital. A sufficient level of knowledge in the workforce is necessary to acquire and exploit technology. The literature analyzed a third important channel that can affect TFP. Since developing countries carry out little or, insignificant R&D activities, the degree of technological diffusion from countries close to the frontier is likely to be one of the key drivers to accelerate the TFP growth in those developing economies (Savvides and Zachariadis, 2005). Coe and Helpman (1995) stress the role of international trade in driving technological spillovers through the imitative process that determines the technological performance of countries that cannot sustain an endogenous technological growth process. Foreign Direct Investment (FDI) by the Multinational Corporations (MNCs) may be another channel for the international transmission of technology (Savvides and Zachariadis, 2005). Distance to the frontier also plays a particularly important role in the convergence debate. Countries that are more backward technologically may have greater potential for generating rapid growth than more advanced countries (Gerschenkron, 1952), essentially because backwardness reduces the costs of creating new and better products (Howitt, 2000). However, backwardness needs not automatically lead to growth since the increasing complexity of products requires large investments in knowledge in order to take advantage of the technology developed elsewhere (Aghion *et al*., 2005).

Based on these theoretical models and empirical findings, we propose to develop an endogenous model of productivity growth that incorporates as key variables, domestic innovation, human capital, distance to technology frontier and the transmission of foreign technology through import of high-tech products and foreign direct investments. Empirical findings identify that the theoretical specification of the technology accumulation function the most consistent with data takes the following general form:

$$\dot{A} = f(X, A) \times (S^f)^{\urcorner} \quad (1)$$

Where, $A$ is the level of TFP or, knowledge and $\dot{A}$ is the change in TFP. The function $f(X, \mathrm{A})$ indicates domestic innovation, $X$ indicates R&D input, measured by either the flow of R&D labor, or the flow of productivity adjusted R&D expenditure on labor or human capital and $S^f$ stands for the international technology transmission. The function $f$ takes the following general form $f(X, \mathrm{A}) = \lambda \left(\frac{X}{Q}\right)^{\sigma} A^{\varkappa}$, where, $\lambda$ is a parameter of research productivity, $\sigma$ is a duplication parameter ($0 < \sigma \leq 1$), $\varkappa$ is the return to knowledge and $Q$ is the product variety ($Q \propto L^{\beta}$ or $Q \propto Y^{\beta}$). $L$ is employment or population, $Y$ is the output and $\beta$ is a parameter indicating product proliferation. The ratio between $X$ and $Q$ is termed as research intensity. In literature different indicators are used to measure research intensity like, $\left(\frac{R}{Y}\right)$, $\left(\frac{L_R}{L}\right)$ or $\left(\frac{H_R}{L}\right)$, where $R$ indicates the real R&D expenditure, $L_R$ is the number of scientists and engineers engaged in R&D and $H_R = hL_R$, where, $h$ is the human capital level.

To develop the model of $S^f$, our approach is largely based on the studies of (Coe & Helpman, 1995, Lichtenbergh & Van Potteisberghe, 1998, Savvides and Zachariadis, 2005, Islam, 2010 and Madsen et al., 2013).These authors have tried to model the transfer of foreign technology via import of technologically advanced products and foreign direct investment.

International technology spillovers from import are measured by an import-ratio weighting scheme as follows:

$$S_i^{mf} = \sum_{j \neq i}^{n} \left(\frac{m_{ij}}{Y_j}\right) A_{sup} \quad (2)$$

Where, $i$ stands for the host country (*it's Tunisia in this study*), $n$ indexes Tunisia's import partners (*example l'EU-15 in our case*) and $m_{ij}$ is Tunisia's import of high-technology products from country $j$.

We indicate by $Y_{Leader}$ the output of the leader partner. This country is assumed to be close to the technology frontier and having the highest level of knowledge noted by $A_{sup}$ . at any period of time it's possible to express the output of a partner country as follow:

$Y_j = ב_j Y_{Leader}$, where $ב_j$ is a positive constant. So that, it's possible to define $S_i^{mf}$ by the following general form:

$$S_i^{mf} = (n/ב)\left(\frac{\sum_{j \neq i}^{n} \frac{m_{ij}}{n}}{Y_{Leader}}\right) A_{sup} = (n/ב)\left(\frac{M}{Y_{Leader}} A_{sup}\right) \quad (3)$$

Where, $(M/Y_{Leader})$ is ratio of the total average value of imports to the output of the leader. Technology transfer via foreign direct investment will be modeled

in the same way. International technology spillovers from foreign direct investment (FDI) are measured by an FDI-ratio weighting scheme as follows

$$S_i^{fdif} = \sum_{j \neq i}^{n} \left(\frac{fdi_{ij}}{K_j}\right) A_{sup} \approx (n/ב) \frac{FDI}{K_{Leader}} A_{sup} \approx (n/ב) \left(\frac{FDI}{Y_{Leader}} A_{sup}\right) \quad (4)$$

Where, $Y_j \propto K_j$ and $K_j$ is the physical capital in the country $j$. $FDI$ is the total average value of inward FDI flows from partners. We assume that the country $i$ has the technological level $A_i$ and all other variables are defined as before. Note that "distance to frontier" has been measured using the relative gap of Tunisia's TFP to the leader's one $(A_{sup} - A_i)$. This difference indicates the technological gap in terms of the number of varieties. Based on works of (Hammami & Menegaldo, 2001; Cecchini et al., 2008 ; Ang & Madsen, 2013), the integrated model describing the international technology transfer can be specified by the following general function:

$$S^f = \left(S_i^{mf}\right)^a \times \left(S_i^{fdif}\right)^b \quad (5)$$

Where, $a$ and $b$ are the elasticities of technology transfer via import and FDI, respectively. If we replace the different elements of Eq.5 by their expressions, we obtain the following model:

$$S^f \equiv (n/ב)^{ab} \left(\frac{M}{Y_i}\right)^a \times \left(\frac{FDI}{Y_i}\right)^b \left(\frac{A_{sup} - A}{A_{sup}}\right)^{ab} A^{ab} \quad (6)$$

If we replace $S^f$ and $f(X, A)$ by their expressions and the domestic R&D intensity by the ratio $\left(\frac{H_R}{L}\right)$, we obtain the following equation:

$$\dot{A} = \delta (n/ב)^{ab\gamma} \left(\frac{H_R}{L}\right)^{\theta} \left(\frac{M}{Y_i}\right)^{a\gamma} \left(\frac{FDI}{Y_i}\right)^{b\gamma} \left(\frac{A_{sup} - A}{A_{sup}}\right)^{ab\gamma} A^{\varkappa + ab\gamma} \quad (7)$$

If we replace the parameters $(a\gamma)$, $(b\gamma)$, $(ab\gamma)$ et $(\varkappa + ab\gamma)$ by $\epsilon$, $\tau$, $\gamma$ et $\emptyset$, respectively, we obtain the following integrated model of technology accumulation :

$$\dot{A} = \delta' \underbrace{\left(\frac{H_R}{L}\right)^{\theta}}_{\textbf{Domestic innovation}} \underbrace{\left(\frac{M}{Y}\right)^{\epsilon} \left(\frac{IDE}{Y}\right)^{\tau}}_{International\ technology\ spillovers} \underbrace{\left(\frac{A_{sup} - A}{A_{sup}}\right)^{\gamma}}_{\textbf{Distance to frontier}} \underbrace{A^{\emptyset}}_{Externality\ effect} \quad (8)$$

Where, $\delta' > 0$ is a parameter of research productivity. We assume that $0 \leq \theta < 1$ and $0 \leq \emptyset < 1$. Log-linear transformation of Eq.8 gives the empirical model as follows (Ha and Howitt, 2007):

$$g_A = \alpha_0 + \alpha_1 log\left(\frac{L_R}{L}\right) + \alpha_2 log h + \alpha_3 log\left(\frac{A_{sup} - A}{A_{sup}}\right) + \alpha_4 log\left(\frac{M}{Y}\right) + \alpha_5 log\left(\frac{IDE}{Y}\right) + \varepsilon \quad (9)$$

Where, $\varepsilon$ are identically and normally distributed shocks with zero mean and constant variance. In the above equation, TFP growth, or the left-hand term should be stationary (Ha and Howitt, 2007; Zachariadis, 2003), because in steady state, TFP growth should be constant. This model is estimated in the tunisian economy context over the period 1976 to 2010. This country is from the southern shores of the Mediterranean that has signed the bilateral partnership agreements with the EU-15. In order to upgrade its economic sectors, it's necessary to have certain choices to make, as well as reform and modernization efforts to deploy. Since the resources are limited, it needs to invest constantly in education and encourage enterprises and industrial support institutions to integrate innovation and R&D into their strategies. Besides modernizing and improving the competitive capacity of the national industrial system, other factors, such as foreign direct investment and trade liberalization, especially with Europe, contribute to the productivity growth in Tunisia.

## 3. Empirical results and interpretations

### 3.1. Data and measurement Issues

The basic dataset for this study combines variables from different sources. In order to calculate the TFP growth rate, we follow growth accounting decomposition procedure by considering an aggregate production function, where a country's real gross domestic product (GDP), $Y$ , is stated as : $Y = AK^{\alpha}H^{1-\alpha}$, where $K$ is real physical capital stock and $L$ is the total labor force. It is measured in log as follow: $log\ A = logy - \left(\frac{\alpha}{1-\alpha}\right) log\left(\frac{k}{y}\right) - log\ h$.Where $y$ is the output-worker ratio $(Y/L)$ and $k$ is the capital-worker ratio $(K/L)$. Capital's income share $(\alpha)$ is set to 0.30 following Gollin (2002). The ratio $(k/y)$ is constructed using from various issues; Penn World Table (PWT version 6.3) and World Bank. The individual worker's human capital $h$ is obtained from the estimation of a Macro-Mincer model integrating the number of years of schooling and the quality of education in nonlinear form. Average years of schooling in the population aged 15 and over and the ratio of public education expenditure to GDP as a proxy for quality of education are extracted from Barrow and Lee (2010) schooling dataset and Institute of Quantitative Studies (IQS), respectively. This study

treats human capital as affecting domestically produced technological innovation and firms' absorptive capacity of new knowledge.

The R&D intensity is measured by the proportion of scientists and engineers engaged in R&D to the total labor force (see Ha and Howitt,2007; Madsen, 2008; Madsen et al., 2009). It is parameterized by the variable$\left(\frac{L_R}{L} \approx u_R\right)$. Data on R&D activities and innovation in Tunisian firms (carried out by the Ministry of Scientific Research and Competences is obtained from the innovation survey conducted by the Ministry of Scientific Research and Competences and a various issues of the UNESCO Statistical Yearbook. The ratio of the import of technologically advanced products to GDP and the ratio of FDI inflow to GDP are is parameterized by the variables $MY$ and $FDIY$ respectively. Data are collected from WDI (2007), the IMF dataset and the Institute of Quantitative Studies. Distance to the frontier $(A_{sup} - A)/A_{sup}$ is measured by the TFP relative gap between the EU-15 and Tunisia. It's indicated by the variable $DTF$.

### 3.2. Estimation results

Estimation results are reported below in Table 1 (Appendix A). The impact of domestic R&D intensity ($logu_R$) on the productivity growth is negative (-0.069), but not significant at 5% significance level in all alternative regressions. These findings don't provide support for the Schumpeterian theory (Aghion & Howitt, 2009, Ang & Mabsen, 2012, Islam, 2010, Vandenbussche, Aghion & Meghir, 2006). There are several reasons for this surprising finding. Chellouf, Outtara and Dou (1999), for example, show that in Tunisia only a very limited effort was made to increase funding for scientific research. The innovation is negatively affected because there is no efficient cooperation between industrial firms and partners (universities, research centers, foreign corporations, etc.). In Tunisia, the economy is dominated by public sector, with an excessive control and a centralized authority. This leads to a fragmented strategy of the Research and Innovation value chain, biased by a sectorial approach. To gather all stakeholders and to produce a common ground for a coherent Innovation Agenda, it's necessary to support interface agencies involved with scientific research, to assist the R&D programs and initiatives implementation, to facilitate the Tech Transfer through collaborative projects (Hatem, 2007).

Figure 1 (Appendix B) shows a non significant relationship between R&D intensity and the average TFP growth rate over the period 1976-2010. Many raisons explain this result. One possible raison is that Tunisia allocated an insufficient amount of financial resources to the R&D, as suggested by the low estimated level of its expenditure of the GDP. In addition, the statistics on the researchers in Tunisia include a non-negligible proportion of student researchers with master and doctorate degree. It's important also to note that productive sector in Tunisia is dominated by very small enterprises with less than five employees, with little money to invest in an R&D department and more generally in the innovation activities.

Our estimations indentify that human capital has a positive impact on technology accumulation but not highly significant. One percentage point increase in the human capital creates a 0.05 percentage point increase in the average growth rate of the TFP. This finding does not strongly support the recent endeavour of the Tunisian government in improving the whole nation's education level. It can be explained by a mismatch between training and the needs of productive structures ("Education, Labor Market and Development: The Requirements of Adequacy", 1999). Tunisia has to deepen their efforts in innovation by improving the efficiency and adaptability of skilled workers as well as by adopting external know-how via more active technological collaborations with foreign partners, local laboratories, and universities.

By removing the non significant variable (R&D intensity) from the regression equation, the statistical significance of the explanatory variables was improved except for the human capital (column 2). A new interactive variable ($Loghu_R$) that combine between skill level and the number of scientists and engineers engaged in R&D was created. The results show that this interactive variable has a positive impact on productivity growth (0.031), but not significant. This confirms the Schumpeterian theory of endogenous growth that considers that the rate of technological progress depends positively on the intensity of domestic R&D corrected by the skill level.

The estimated coefficients of distance to frontier are positive and statistically significant at the 5% level in all alternative regressions. In other word, the further a country lies behind the technology frontier, the greater will be its potential to accelerate productivity growth. These results are consistent with the results of Griffith *et al.* (2003, 2004). Figure 2 (Appendix B) shows that the relationship between technical progress and the distance to frontier is positive but not linear. The productivity growth is negative for a reduced gap ($DTF \leq 73\%$). Beyond this value, TFP growth is found to be enhanced by the distance to technology frontier. For a large technology gap the productivity growth is not very important. This implies that catch-up will be more difficult, complex and very expensive for a high technological distance.

The estimated coefficients of import of technologically advanced products are highly significant in all columns. A one percentage point increase in this variable creates an increase in the average growth rate of the TFP by more than 0.5 percentage points. This finding confirms that this variable is an important channel for the international transmission of technology in Tunisia. It is in line with the results of (Baumol, 1993; Mansfield and Romeo, 1980), among others. The graphical analyses show that the relationship between technical progress and the

import of technology is not linear (see Figure 3). The productivity growth is very low for a reduced ratio $\left(\frac{M}{Y} \leq 25\%\right)$ and the positive impact on the accumulation of technology doesn't appear only beyond this value.

Estimations reveal some surprising results concerning the effects of the variable $FDIY$ on technology accumulation. Its coefficient is negative and significant thereby rejecting the idea that foreign direct investment constitutes incentives for innovation in Tunisia. One percentage point increase in the share of FDI creates a reduction of 0.11 percentage point in the average growth rate of the TFP. This result doesn't support the theory that consider FDI an important factor of building local technological capabilities for developing countries, and an important channel through which international diffusion of knowledge and technology takes place. Several reasons can explain this unexpected result. In Tunisia, the large share of FDI is concentrated in low value-added activities, including an external control of sourcing, and reliance on expatriates in managerial and technical positions. This is aggravated by the weak domestic absorptive capacity through a very limited effort to increase funding for scientific research and barriers in the domestic business climate.

The economic literature shows that developing countries need to focus more on the acquisition and assimilation of foreign technology through imitation and cooperation with multinational firms, given the high cost of creating new and better products (Howitt, 2000). In addition, technology transfer is not systematic (Sjöholm, 1999). It is closely related to the "absorptive capacity" (Blomström et al., 2000). For this purpose, we create multiplicative variables to measure the importance of the absorptive capacity in the technology spillovers. Some alternative regression will be estimated in the next section.

### 3.3. Technology spillovers and Absorptive capacity

Countries may differ in their effort and ability to understand and adopt new technologies compatible to their local condition which is popularly known as 'absorptive capacity' (Arrow, 1969). Abromovitz (1986) and Nelson and Phelps (1966) assume that absorptive capacity depends on the level of human capital, whereas Fagerberg (1994) and Griffith *et al*. (2003, 2004) assume that the absorptive capacity is a function of domestic innovation activities.

Tables 2 and 3 (Appendix A) summarize estimated results of TFP growth with absorptive capacity for Tunisia. Our empirical results (column1 in table 2) show a negative and significant relationship between the interactive term $(Logu_R \times LogFDIY)$ and the TFP growth rate. The second column shows that the human capital based absorptive capacity exhibit negative relation with productivity but not significant (-0.148). This implies a weak complementarity between the two factors to generate productivity gains. This result is contradictory to the empirical findings results that found positive and statistically significant relationship between human capital based absorptive capacity and TFP growth. It seems that this result is explained by the existence at the lack of learning capacity and concentrated FDI in low value added activities.

Interestingly, while incorporating interaction term between $FDIY$ and distance to frontier $(LogDTF \times LogFDIY)$ in the regression, the independent effect of FDI indicator becomes positive (0.13) but statistically non significant. The coefficient associated to the multiplicative variable is positive (0.967) and significant. This implies that, the further a country lies behind the technology frontier, the greater will be technology spillover from FDI. Figure 4 (Appendix B) shows that the real relationship between technical progress and the interactive term $(LogDTF \times LogFDIY)$ is positive but not linear. For a technological gap less than 74%, the correlation is positive. Beyond this threshold value, the correlation becomes negative.

Empirical evidences identify that knowledge spillovers through the channel of imports are not only important because they play an important role for growth in endogenous growth models but also because trade has often been highlighted as playing a key role in facilitating convergence (see for example Nelson and Wright, 1992 ). The idea behind this spillover hypothesis is that the variety and the quality of intermediate inputs are predominantly explained by R&D and, therefore, productivity is a positive function of R&D.

To test the degree of complementarity between the import of technologically advanced products and FDI to have technology transfer, we create the interactive variable

$((LogMY \times LogFDIY)$ (regression 4 in Table 2). The idea behind this spillover hypothesis is that the local absorptive capacity measured by the degree of openness of the country. The estimated coefficient is positive (0.48) but statistically non significant at the five percentage significance level. This result clearly explains the low technological potential of FDI inflows into Tunisia, which justifies the lack of interaction between the two variables. In other hand, technology spillovers from import of high-tech goods depend on domestic R&D intensity and the distance to technology frontier. For this raison two interactive variables

$(LogMY \times Logu_R$ and $LogMY \times LogDTF)$ are incorporated in the model (Table 3).

Our estimations show that the impact of $(logMY \times Logu_R)$ on the growth rate of TFP is negative but not significant. A positive and significant correlation is between productivity growth and the interactive variable $(LogMY \times LogDTF)$.We remark that by the introduction of this last multiplicative variable, the effect of human capital becomes more significant. The total marginal effect (independent and interactive) of imports of technologically advanced

goods on productivity growth is given by the coefficient $\alpha_{MY}$ formulated by the following relation $\alpha_{MY} = 0.696 + 0.415 \times LogDTF$, (regression 2). If we use the average value of $LogDTF$ calculated over the period 1976-2010 in this equation, we obtain a $\alpha_{MY}$ =0.57. This empirical value shows that the import of technologically advanced is a main vector of the transmission of foreign knowledge in Tunisia. Its effect is positive and more enhanced by the distance to technology frontier. The graphical representation of the relationship between TFP growth and $(LogMY \times LogDTF)$ is reported in the figure 5. This graph confirms the presence of a positive impact of the import of technology. This effect is important for a high technological gap but negative reduced distance.

## Conclusion

This paper aims to investigate the determinants of productivity growth productivity growth in the Tunisian economy context over the period 1976 to 2010. We first examine the effects of key determinants such as domestic innovation, skills, etc. on the productivity growth. We then attempt to show how these effects are moderated by liberalization as measured by the opening up to foreign investment and by import of technologically advanced products, especially from Europe.

Empirical results show that the impact of domestic R&D intensity on the productivity growth is negative but not significant in all alternative regressions. The effect of foreign direct investment is significantly negative. Its interactive effect with capital human on the productivity growth is also negative but not statistically significant. This implies the weak complementarity between the two factors to generate productivity gains. Apparently, Tunisia needs to have reached a certain level of development in education, technology, infrastructure before being able to benefit from a foreign presence in their markets. Our findings confirm that the import of technologically advanced products is an important channel for the international transmission of technology in Tunisia. Its effect on the knowledge accumulation is positive and more enhanced by the distance to technology frontier. Our results identify also that human capital has a positive but not significant impact on technology accumulation in Tunisia. Despite the high priority given by Tunisia to education and training young people, the capacity for innovation is still limited. The role of human capital is rather more significant in the assimilation and absorption of foreign technology.

An innovation strategy for Tunisia should therefore focus not only on creating technology, but also on technology adoption and adaptation. Tunisian firms have to deepen their efforts in innovation by improving the efficiency and adaptability of skilled workers as well as by adopting external know-how via more active technological collaborations with foreign partners, local laboratories, and universities.

# APPENDIX

## Appendix A: List of regression tables

**Table 1:** R&D Intensity, Distance, Foreign R&D capital and TFP Growth

Dependant Variable: Total Factor Productivity $\Delta \boldsymbol{Log}(\boldsymbol{A})$

| | (1) | (2) | (3) |
|---|---|---|---|
| $Logu_R$ | -0.069<br>(-0.95) | | |
| Logh | 0.059<br>(1.82) | 0.040<br>(1.65) | |
| $Loghu_R$ | | | 0.031<br>(1.61) |
| LogDTF | 1.53**<br>(2.55) | 1.479**<br>(3.56) | 0.94**<br>(2.45) |
| LogFDIY | -0.128**<br>(-4.03) | -0.127**<br>(-6.87) | -0.09**<br>(-5.32) |
| LogMY | 0.589**<br>(2.14) | 0.560**<br>(3.00) | 0.51**<br>(2.33) |
| _Cons | - 1.46<br>(-1.47) | -1.296<br>(-1.82) | -1.285<br>(-1.6) |
| Fisher | 211.69 | 97.03 | 74.04 |
| R-squared | 0.98 | 0.98 | 0.97 |

***Note:*** Figures in parentheses ( ) are t-values significant at 5% level (**).

**Table 2:** Foreign Direct Investment, Absorptive Capacity and TFP Growth

| Dependant Variable: Total Factor Productivity $\Delta Log(A)$ | | | | |
|---|---|---|---|---|
| | (1) | (2) | (3) | (4) |
| Logh | 0.045<br>(1.58) | | 0.084<br>(1.90) | 0.049<br>(1.1) |
| LogDTF | 1.635**<br>(4.92) | 1.538**<br>(2.46) | | 1.12**<br>(2.69) |
| LogFDIY | -0.198**<br>(-6.64) | -0.138**<br>(-4.08) | 0.130<br>(1.1) | -1.66<br>(-1.37) |
| LogMY | 0.509**<br>(2.31) | 0.563<br>(1.66) | 0.894**<br>(4.84) | |
| $Logu_R$ × LogFDIY | -0.070**<br>(-2.03) | | | |
| Logh× LogFDIY | | -0.148<br>(-1.14) | | |
| LogDTF × LogFDIY | | | 0.967**<br>(2.36) | |
| LogMY × LogFDIY | | | | 0.48<br>(1.31) |
| _Cons | - 1.094<br>(-1.38) | -1.281<br>(-1.02) | -2.81** (-<br>4.80) | 0.37**<br>(2.87) |
| Fisher | 331.92 | 36.36 | 143.44 | 26.60 |
| R-squared | 0.98 | 0.96 | 0.93 | 0.95 |

***Note:*** Figures in parentheses ( ) are t-values significant at 5% level (**).

**Table 3:** Imports of foreign technology, Absorptive Capacity and TFP Growth

| Variable dépendante: $\Delta Log(A)$ | | | |
|---|---|---|---|
| | (1) | (2) | (3) |
| $Logu_R$ | -0.056<br>(-1.08) | | |
| Logh | 0.052**<br>(2.47) | 0.040**<br>(3.41) | 0.042<br>(1.73) |
| LogFDIY | -0.123**<br>(-6.04) | -0.128**<br>(-6.81) | -0.121**<br>(-4.59) |
| LogDTF | | | 1.644**<br>(2.71) |
| LogMY | 0.693**<br>(4.86) | 0.696**<br>(.03) | 0.511<br>(1.79) |
| LogMY ×LogDTF | 0.492**<br>(3.84) | 0.415**<br>(4.55) | |
| LogMY × $Logu_R$ | | | -0.013<br>(-0.55) |
| _Cons | - 1.767**<br>(-3.23) | - 1.843**<br>(-3.44) | - 1.143<br>(-1.13) |
| Fisher | 268.46 | 37.64 | 334.85 |
| P-value | 0.03 | 0.00 | 0.00 |
| R-squared | 0.98 | 0.98 | 0.97 |

***Note:*** Figures in parentheses ( ) are t-values significant at 5% level (**).

# Appendix B : List of figures

**Figure 1:** Domestic R&D intensity versus TFP growth (1976 – 2010)

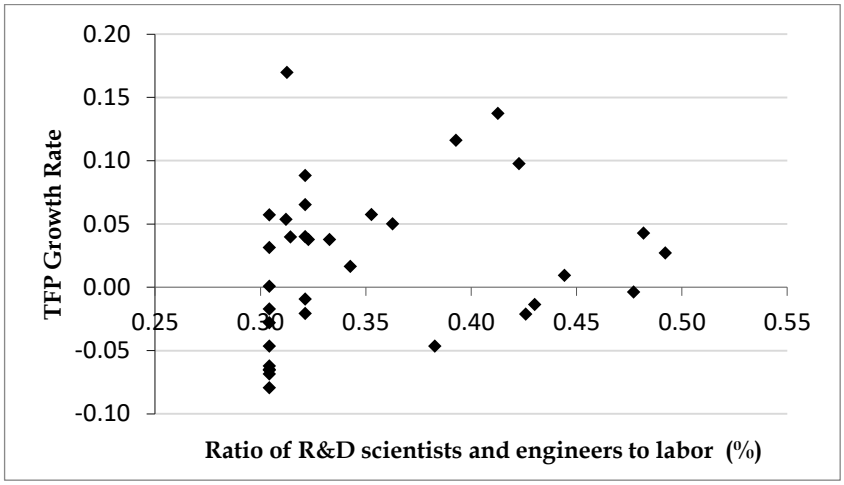



**Figure 2:** Distance to the frontier versus TFP growth (1976 – 2010)

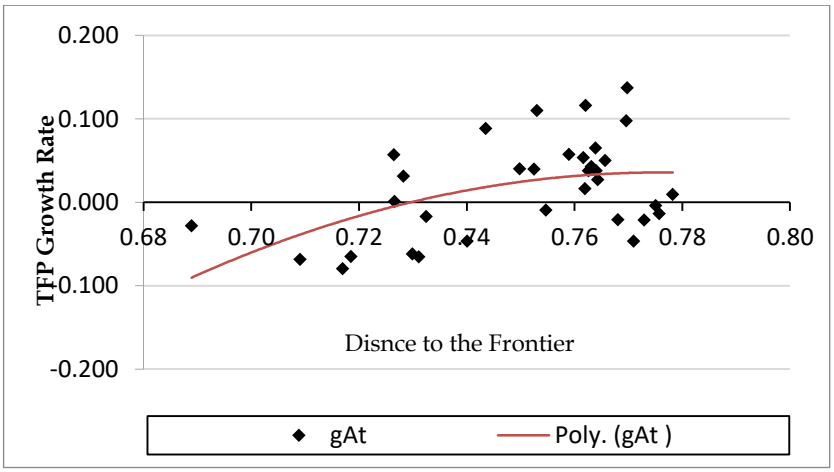



**Figure 3:** Import of foreign technology versus TFP growth (1976 – 2010)

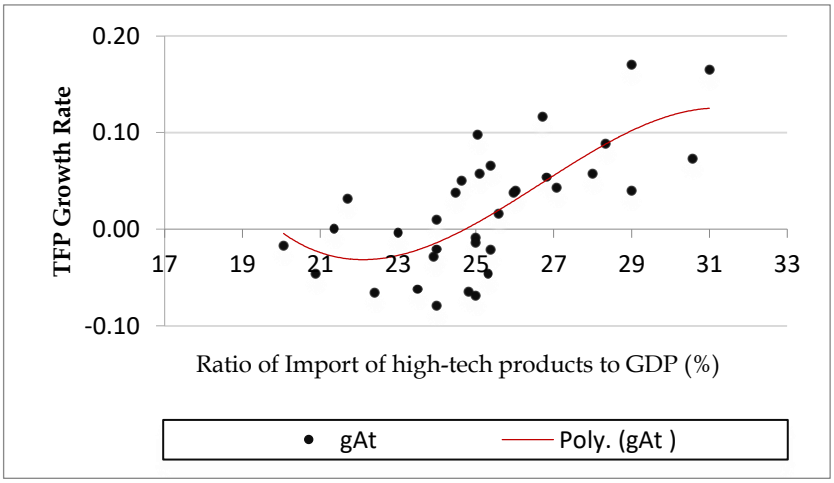


**Figure 4 :** Interactive variable $(LogDTF \times LogFDIY)$ versus TFP growth (1976 – 2010)

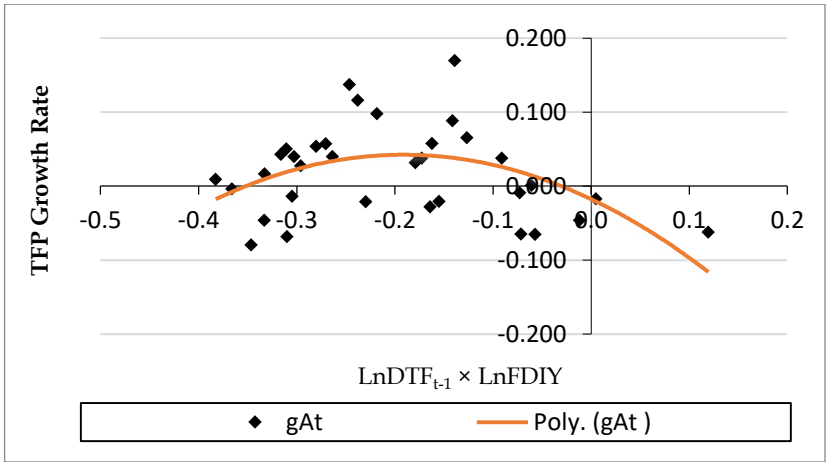
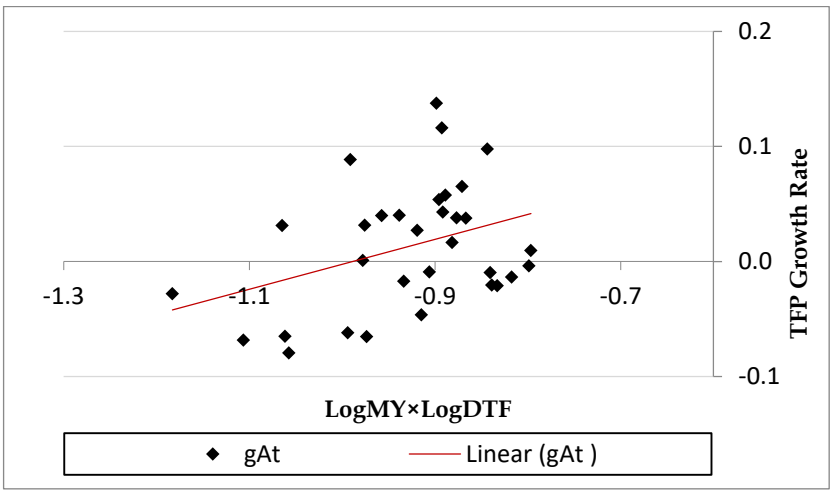



**Figure 5 :** Interactive variable $(LogDTF \times LogMY)$ versus TFP growth (1976 – 2010)

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# CULTURAL TOURISM IN CENTRAL REGION OF ROMANIA

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**Abstract**

*Romania has a multitude of natural and cultural attractions, with five of the European biogeographical regions and seven sites included in the UNESCO heritage, but it does not sufficiently exploit its touristic potential. This paper provides a statistical analysis of tourism in the Central Region of Romania with a focus on rural tourism and an analysis of the cultural potential. The aim is to identify new opportunities of the development of cultural tourism in the region. In order to highlight the rural tourism, there were selected only agrotouristic boarding houses in communes and villages. Having an extremely generous nature and a cultural heritage of great value, the areas analyzed in this study have a high and diversified touristic potential.*

**Keywords:** *cultural tourism, rural tourism, Romania, statistical analysi, local development*

## 1. Introduction

According to the UNWTO, "Cultural tourism is a type of tourism activity in which the visitor's essential motivation is to learn, discover, experience and consume the tangible and intangible cultural attractions/products in a tourism destination." (Twenty-second session of the UNWTO General Assembly in Chengdu, China, September 2017). Cultural tourism includes the following components: arts, architecture, historical and cultural heritage, culinary heritage, literature, music, creative industries, the living cultures, characterized by their lifestyles, value systems, beliefs and traditions (Twenty-second session of the UNWTO General Assembly in Chengdu, China, September 2017). On the other hand, the Association for Tourism and Leisure Education (*ATLAS*) (2010) defines cultural tourism as "the movement of people to cultural attractions that are far away from their place of residence, with the intent to collect information and new experiences in order to satisfy their cultural needs" (Tigu, G. et.al , 2014).

The most recent trends in European cultural tourism reveals that four out of ten tourists choose their destination based on its cultural offer. A survey performed by UNWTO on 38 countries provides an estimate of the cultural tourism market size. Thus, cultural tourists have a share of 35.8% out of the total number of tourists, representing 530 million cultural tourists in 2017 (UNWTO Report on Tourism and Culture Synergies, 2018).

The need for a more detailed analysis of Romania's tourism potential comes from the contradiction between the highly valuable cultural patrimony on the one hand and the modest economic performance of Romania's tourist activity on the other. Cultural traditions are often much better preserved in rural areas (Aleksieva, Stamov, 2005). Given that there is currently a tendency towards rural tourism, the importance of this type of tourist destination can be enhanced by promoting the cultural potential of rural areas. Creating a stronger link between culture and tourism can be a source of growth in economic performance and in the development level of tourist destination regions. "Culture and tourism have a symbiotic relationship. Arts and crafts, dances, rituals, and legends which are at risk of being forgotten by the younger generation may be revitalized when tourists show a keen interest in them. Monuments and cultural relics may be preserved by using funds generated by tourism. In fact, those monuments and relics which have been abandoned suffer decay from lack of visitation.", it is stated by World Tourism Organization (2001), in Cultural Heritage and Tourism Development, UNWTO, Madrid. This type of tourism is characterized by possibilities of involvement in locals' life, of participation in local specific events, and sometimes this kind of touristic products are combined with cultural tourism products. Rural tourism becomes most important especially to Western and Central European Countries, approximately 20% from all tourist trips in the European Union are made in rural areas (Mileva, 2004; Georgiev, 2010).

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A number of studies in the literature have outlined the cultural tourist profile: high socio-economic status, high educational level and above average financial possibilities. Thus, the study of Eusébio et al. (2012) analyzes the determinants of cultural holiday spending patterns. The results show – based on a 27 country-survey, from different continents – that the holiday spending are significantly positively influenced by: hotel accommodation, air travel, purchase of package holidays, income and age. Factors with a significant negative influence on the holiday spending of cultural tourists are: the size of the travel group and the length of stay. According to a UNWTO report on Tourism and Culture Synergies (2018), one in 10 tourists are motivated by cultural interests in the choice of tourist destination, while 4 out of 10 tourists have more general motives in choosing their tourist destination, but they also do cultural activities during holidays (UNWTO, 2018). According to a recent ATLAS survey, a large number of tourists who practice cultural tourism at international level are young, which is in contradiction with the results of other older studies, according to which most cultural tourists are older people. And 60% of cultural tourists are graduates of a higher education form (Richards G., 2018).

Figueroa et al. (2018) analyze how cultural factors influence the efficiency of tourist activity in destination countries, considering Chile case study. The results reveal that the cultural and natural attractions of a tourist destination can have a significant positive influence on the efficiency of that region, by increasing tourist flows and attracting foreign tourists. It is therefore necessary to effectively promote the cultural and natural potential of the region.

Peoples' destructive activity disturbs now, more than ever, the environment integrity, so sustainable tourism becomes more and more important. In this context, Díaz & Rodriguez, (2016) analyze the main factors of the sustainability of a destination country, as a key element in determining long-term competitiveness. Thus, the authors identify among these factors the cultural offer of a tourist destination, with the following components: historical patrimony, museums and cultural heritage. Research results show that the cultural offer of a tourist destination is directly and significantly correlated with its performance level, but not with the tourists' performance. The authors' explanation is that although the cultural patrimony has an invaluable value, adding value to the region, it is less familiar and known to tourists. Hence - the need to a more efficient promotion of the cultural side of a tourist destination, in order to increase its attractiveness in the tourists' eyes.

The key to sustainable tourism can even be given by tourists' focus on rural areas, where they can observe and participate in the lifestyle, traditions and habits of locals. These rural areas can become true cultural-cores which, although out of regular cultural routes, can act as a cultural network that can place rural areas on the European tourism map (Shishmanova, M.V. (2015).

## 2. Central region of Romania – a culturally favored region

The region under discussion is culturally favored, being the owner of a tremendous treasure of archaeological vestiges, historical monuments, architecture or art, as well as an invaluable patrimony that attests the evolution and continuity of work and life on these lands, the development of culture and the art of the Romanian people. Among the archaeological vestiges that witness the existence of various civilizations on this territory, we mention Sarmizegetusa Regia (the kingdom) which was the capital and most important military, religious and political center of the Dacian state before the wars with the Roman Empire or the Dacian Fortress Chapel located in Alba County and raised during the reign of Burebista. There are also a large number of localities in the region that still retain medieval features: houses with thick walls and roofs of olans, towers with entrance gates or fortress walls. The medieval fortresses, Sighişoara, Alba Iulia, Sibiu, Brasov, Făgăraş, Sebeş, the peasant castles Râşnov, Rupea, Slimnic, Feldioara etc., the Saxon fortified churches, Biertan, Prejmer, Viscri, Câlnic, Harman, medieval, Renaissance or Baroque castles , Bran, Lazarea, Criş, Balta Citadel, Brâncoveneşti, Avrig, Gorneşti, etc., make up a dense network of first-class tourist attractions in this area. Museums of history, art, ethnography, documentary libraries in Sibiu, Târgu Mureş, Braşov, Alba Iulia host interesting collections and objects of heritage. In fact, historical and architectural monuments, some of which are of great value, can be found throughout the region. In the analyzed areas there are also many prestigious traditional festivals, among which we mention: the Pentecostal Pilgrimage from Şumuleu-Ciuc, the Găina Mountain Girls' Fair, etc. Relatively small distances between cultural vestiges make it possible to create various thematic circles.

Romania has about one third of Europe's mineral water springs, many of which are located in the counties analyzed in this paper: Sovata, Covasna, Băile Tuşnad, Balvanyos, Borsec, Red Lake, Ocna Sibiului being just a few of them. Emphasizing the demographic aging process makes inclusion in touristic packages and this wellness and spa component a great opportunity for tourism development in the area.

Also, rural tourism, especially attractive for families with children or for those seeking a quiet and healthy environment, is a direct means of knowing authentic authentic civilization, being a direction that can be developed in the future not only of Romanian tourists but and foreigners interested in Romanian culture.

The cities of Brasov, Sibiu, Alba Iulia, Targu Mures, Sighisoara, Miercure-Ciuc, Sfantu-Gheorghe and Suceava are cities with a complex cultural heritage. Although the historical past of these cities is very rich and with a valuable architectural and cultural heritage, although these cities are extremely dynamic and economically important, but we will put particular

emphasis on the historical cultural heritage elements of the countryside.

The analyzed region is very rich in archaeological vestiges. Roșia Montană, a 2000-year-old town, is the oldest documented mining settlement in the country. The traces of gold exploitation of the Roman period have been excellently preserved to this day. The Chapel is a Dacian fortress, a site included in the UNESCO Heritage List, along with 5 other Dacian fortresses in the Orăștie Mountains. At Tilișca and Covasna there are ruins of Dacian fortresses. Cacica is a common one that existed in the old operation of salt from brine recrystallized (by boiling and evaporation) in Europe (evidenced by archaeological findings in 1989).

The fortified churches of Transylvania are part of the German heritage of Transylvania. They still have a strong "German" fingerprint. Urban structure, regular street tram, specific architectural style (houses with high walls) are preserved intact for hundreds of years. The churches in these villages, usually built in the highest area of the settlements, have fulfilled a double role in history: sacred and defense. Another element of uniqueness is their great density. There are about 150 churches spread over a rather narrow geographical area. 7 of them were included in UNESCO's patrimony: Biertan, Valea Viilor, Prejmer, Viscri, Saschiz, Câlnic, Dârju, considered by experts to be the most beautiful and representative.

Also, the fortified churches of Alma, Moşna, Dealu Frumos, Merghindeal, Iacobeni (located in the northern part of Sibiu County) are among the most important fortified churches in Transylvania, built between the 13th and 15th centuries, being listed in the national patrimony list architecture. The fortified church in Barsa Country, Harman, built between the 13th and 15th centuries, is a combination of Romantic and Gothic styles. The Church of Cisnadioara, "the most important monument of the Saxon ecclesiastical architecture", is the oldest romanian church in Romania, preserved in excellent conditions dating back to 1223. Due to its good acoustics, the church hosts concerts and theater performances.

An impressive number of medieval settlements, some of which have preserved vestiges of almost a millennium, remained in Transylvania. The most important medieval fortifications were built on hills with steep slopes or terraces, and they contained large enclosures surrounded by waves of earth or trenches. They were raised near the strategic routes and the large rivers like Mureş and Someş, important navigation channels of those times. The fortress Calnic (Kelling), listed on the UNESCO World Heritage List, is one of the oldest and most interesting architectural monuments in Romania. The fortress was built in XIII century (1269) by Count Chyl de Kelling, as his residence. The village of Viscri in the UNESCO World Heritage is renowned as one of the most beautiful Saxon peasant fortresses, which includes among its walls one of the few churches-Romanesque Hall of the XIII century in Transylvania, preserved to this day. Fagaras Fortress is one of the best-preserved fortresses in Romania, whose construction began in the 14th century. The fortress, provided with several bastions and surrounded by a ditch filled with water, played an important role in the defensive military system of Transylvania. Currently, the fortress shelters several cultural institutions, among which we mention the Făgăraş Country Museum. Rupea fortress, built on a basalt massif, on the site of an older fortification, was first certified in 1324. Since the end of the 17th century the fortress has begun to be abandoned by the inhabitants, which will gradually lead to ruin it. The city is currently undergoing a vast process of restoration and redevelopment. Feldioara fortress was built by the Teutonic knights who settled in Transylvania between 1211 and 1225, afterwards the Feldioara inhabitants enlarged and strengthened the original fortification, becoming one of the most powerful peasant fortresses in Transylvania. Râșnov Peasant Fortress, built by the inhabitants of the settlement in the 14th-15th centuries, became a filming platform for several historical production productions. The Slimnic peasant fortress, built in the 14th-15th centuries, has seen a tumultuous history with numerous sieges and devastations. In spite of the damages suffered, the fortress remains one of the most beautiful cities built and ruled by a peasant community.

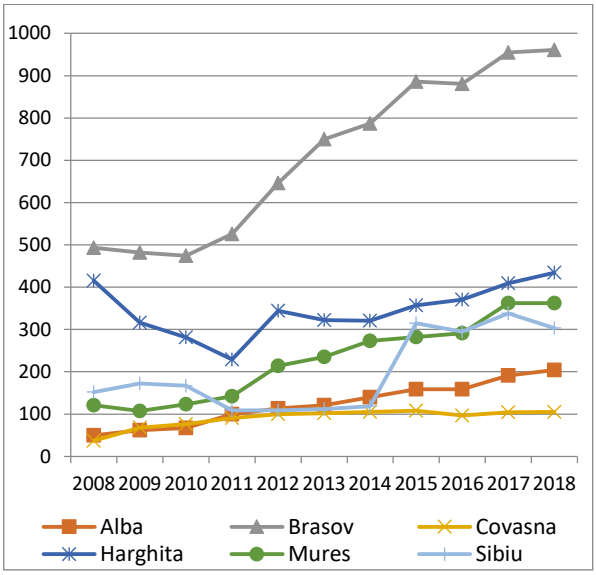
Moreover, Romania has numerous palaces or castles on its territory, over which time has been spent, and often forgetting. There are palaces in the central area of Romania, such as Bran Castle or Bruckental Palace, which enjoy a great media coverage, but there are also spectacular palaces that are less known to the general public but very well preserved. There are a lot of castels built in $14^{th}$-$16^{th}$ centuries: Kemeny Castle, Castle Lazarea, Castle Turnu Rosu, Castelul Bethlen Haller , Zalbala Castle Feudal Castle or castels built in $17^{th}$ -$18^{th}$ centuries: Bethlen Castle, Racoș, Gurghiu Castle, The Kemeny Castle All these palaces were, in their time, sumptuous residences, and the stories of those who built and inhabited them are true stories that should be known and publicized.

## 3. Tourism in Central Region of Romania

The material base of tourism in Central Region was 2818 accommodation units in 2018, accounting for 33% of the total tourist accommodation facilities in Romania. The density of accommodation units is 7.1 tourist accommodation structures per 100 sq. Km in Central Region, compared to 3.6 at national level. Braşov county has the highest density of tourist accommodation units (17.9), followed by Mureş County with 9.8 tourist accommodation units per 100 sq. Km. The lowest density of tourist accommodation units is found in Alba and Covasna counties with densities below the national average (3.3 and 2.8 tourist units per 100 sq. Km respectively). In the counties from Central Region 43% of the accommodation units are in agro-touristic houses. Among them, Braşov is

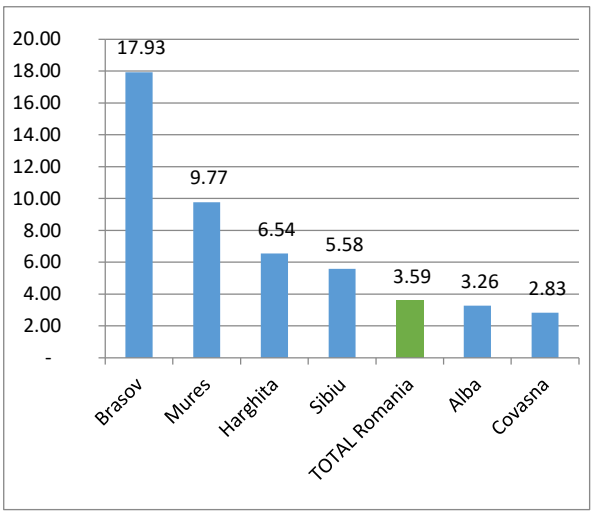
highlighted by increasing the number of tourist accommodation establishments, from 2008 to 2018, the number of these being doubled. Harghita and Sibiu are two counties in which the evolution has not been steadily increasing over the last 10 years but after a stagnation period in 2008-2010, there has been a decrease in the number of accommodation units followed by an increase in their number starting with 2014, more pronounced in Sibiu than in Harghita.

**Figure no. 1** Number of tourist accommodation units by counties, 2008-2018




**Source data:** Own representation based on National Institute of Statistics databases

**Figure no. 2** The density of tourist accommodation units per 100 sq. Km by counties, 2018

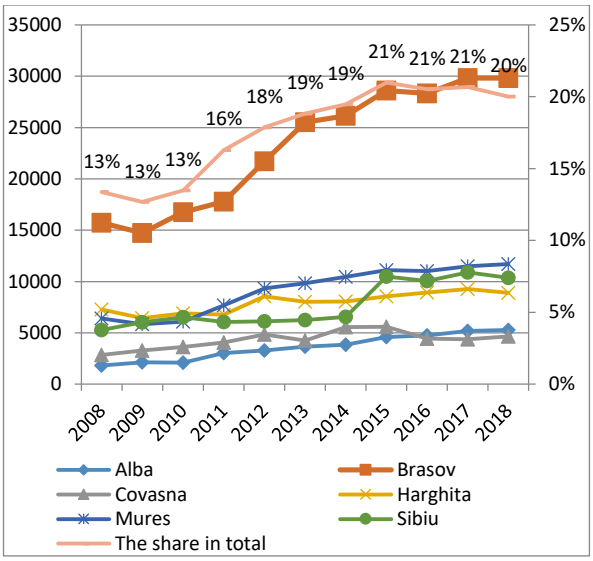



**Source data:** Own representation based on National Institute of Statistics databases

The existing accommodation capacity in 2018 in Central Region of Romania was 82848 seats (23.4% of the national accommodation capacity), which gives to the region an extremely important position in country tourism. The accommodation capacity is 79% higher than in 2008, with the highest increases in the counties: Alba by 189%, Sibiu by 97%, Braşov by 90% and Mureş by 83%. The county with the lowest increase in accommodation capacity is Harghita county with an increase in accommodation capacity of only 22% (compared to the national average of 20%).

The share of accommodation in boarding houses is 23.9% in counties from Central Region compared to a national average of 13.7%. The counties with the highest share of accommodation capacity in the boarding houses are: Alba (41%), and Harghita (36%). Mureş County has the lowest share of accommodation capacity in rural tourism, only 9.5%.

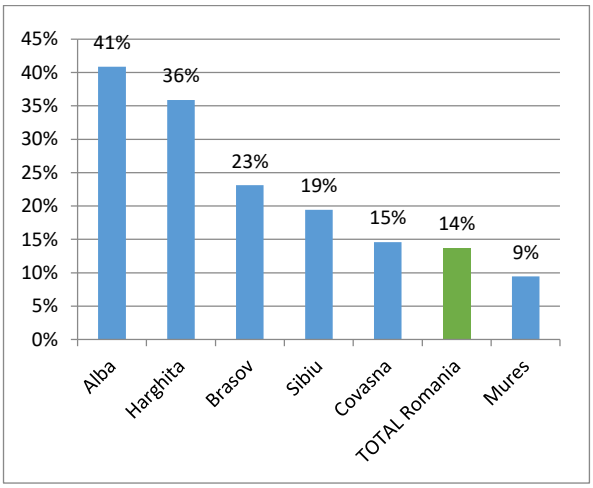
**Figure no. 3** Dynamics of accommodation capacity by counties, 2008-2018




**Note:** Share in total: the share of existing accommodation capacity in Central Region in national accommodation capacity

**Source data:** Own representation based on National Institute of Statistics databases

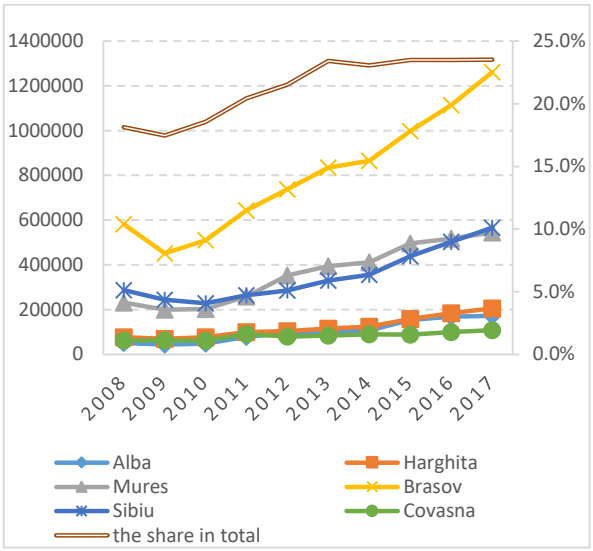
**Figure no. 4** The share of accommodation in boarding houses per county, 2018




**Source data:** Own representation based on National Institute of Statistics databases

The total number of tourists arriving in the tourist accommodation structures in the analyzed counties was constantly increasing during the period 2008-2017, from 1,520,582 in 2008 to 3,242,234 in 2017 tourist arrivals (an increase of 113% in 2017 compared to 2008). The importance of Central Region in the national tourism is demonstrated by the extremely large share of the total number of tourists arriving in the tourist accommodation establishments in this region compared to national level, which has been increasing in the last 10 years, from 17.5% in 2008 to 23.5% in 2017.

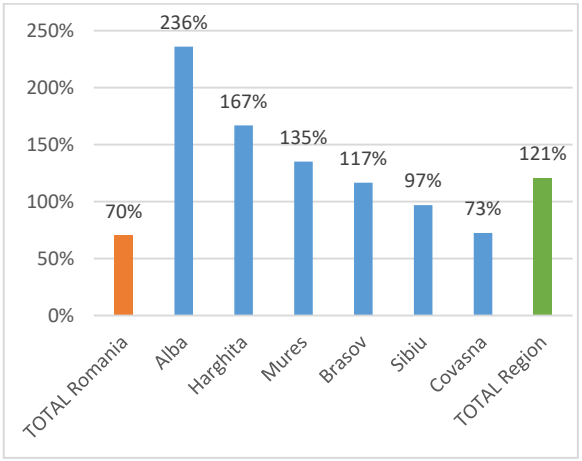
**Figure no. 5** Number of tourist's arrivals by county, 2008-2017




**Note:** Share in total: % of tourists' arrivals in the region in the total number of tourists in Romania

**Source data:** Own representation based on National Institute of Statistics databases

**Figure no. 6** The growth rate of the number of tourist's arrivals in the tourist accommodation establishments by counties, 2017




**Source data:** Own representation based on National Institute of Statistics databases

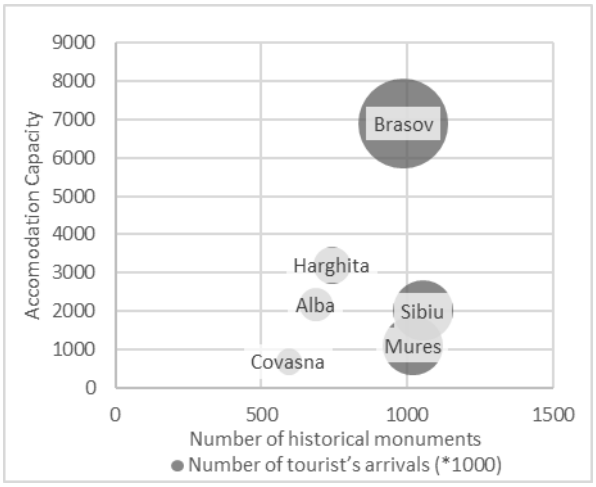
The county with the highest registered number of arrivals of tourists in 2008-2017 was Alba County, where the number of arrivals increased in the period 2008-2017 by 236%, followed by Harghita County, with an increase of 167%. Among the tourists arriving in the area, only 19% were foreigners compared to the national average of 23% in 2017. The counties with a percentage above the national average of the arrivals of foreign tourists are Sibiu with 29% and Harghita with 24% foreign tourists' arrivals in 2017. Covasna was the county with the lowest number of foreign tourists arrived in the total number of arrivals of tourists in the county in 2017. As to the type of accommodation structures, 13.7% of the total arrivals in 2017 took place in boarding houses. In Alba and Harghita the arrivals of tourists in agro-touristic hostels held a much higher share than the other counties. The main reason is that the capacity of accommodation in the agro-touristic pensions is much higher compared to the other counties.

## 4. The relationship between tourism and cultural potential of counties from Central Region

In order to study the relationship between tourism and cultural potential of each county from Central Region there are studied the Spearman correlation coefficients between the accommodation capacity, the number of tourist arrivals, the number of historical monuments and the number of museums (Figure no.7).

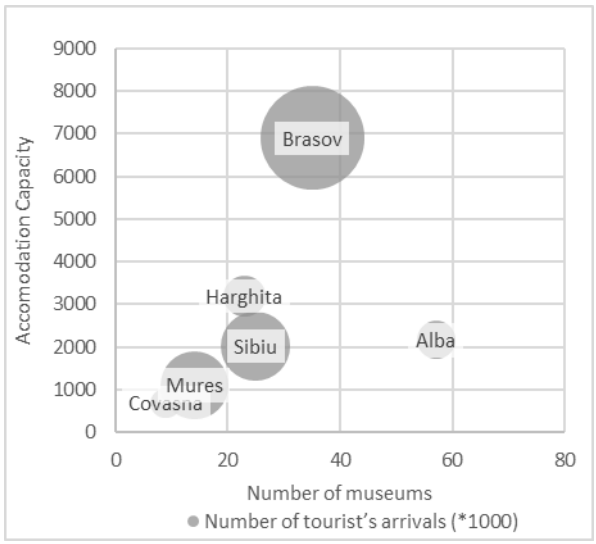
By representing the relationship between the accommodation capacity, the number of tourist arrivals and the number of historical monuments it could be observed that the counties with the highest number of historical monuments have the highest number of tourists. However, in Sibiu and Mures counties the accommodation capacity could be developed. In case of Harghita and Alba, both increasing accommodation capacity and the promotion of historical monuments through complex tourist programs should increase the number of tourists.

**Figure no. 7** The relationship between the accommodation capacity, the number of tourist arrivals and the number of historical monuments, 2017




**Source data:** Own representation based on National Institute of Statistics databases

**Figure no. 8** The relationship between the accommodation capacity, the number of tourist arrivals and the number of museums 2017




**Source data:** Own representation based on National Institute of Statistics databases

## 5. Conclusions

The study concludes that overall, the Central region has enormous touristic potential in terms of cultural patrimony. But the characteristics of every country in the region are given by the heterogeneity of some specific indicators: accommodation units, accommodation capacity, density of tourist accommodation units per 100 sq. Km, share of accommodation in boarding houses and number of tourist's arrivals.

By investigating the relationship between the accommodation capacity, the number of tourist arrivals and the number of historical monuments/the number of museums, the study underlines that the touristic potential of Central region of Romania could be improved by developing the network of accommodation units and by promoting the historical monuments and museums.

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# CONTRIBUTION OF EVA LEVERAGE TO THE TOTAL LEVERAGE EFFECT ON THE COMPANY

**Kristina Jančovičová BOGNÁROVÁ***

**Abstract**

*The concept of Economic Value Added (EVA) and Market Value Added (MVA) has opened up new insights into the leverage effect of fixed costs (operational leverage) and interest (financial leverage), and for determining what effects the changes in sales would have through leverage, not only on profits, but also on EVA and MVA. The paper also introduces the leverage effect of the cost of equity as a new concept and illustrates how it reacts in conjunction with operating leverage and financial leverage to determine the total overall leverage of the company. A spreadsheet model was developed using a given level of operating leverage and financial leverage. The relationship between profits (after interest and tax) and EVA was determined by using the cost of own capital (equity), and this fixed amount can therefore be described as a leverage factor for EVA. Furthermore, the EVA leverage factor was combined with the operating and financial leverage in order to illustrate how the expected percentage change in EVA and MVA can be predicted, given a certain percentage change in sales (or profits). The results of the model were than analysed to reach conclusions.*

**Keywords:** *Total degree of leverage (TDL), Degree of financial leverage (DFL), Degree of operating leverage (DOL), Market Value Added (MVA), Economic Value Added (EVA), EVA leverage, Weighted average cost of capital (WACC)*

## 1. Introduction

### 1.1. Introduction

In this article the theoretical concept of economic value added (EVA), market value added (MVA) and leverage will be discussed briefly. Thereafter we develop a spreadsheet model to extend the leverage analysis of profits to EVA and MVA. The leverage effect of the equity cost is also investigated.

The cost of equity will also have a leverage effect on the profits (and EVA and MVA) of the company, just like fixed costs and interest. We attempt to quantify this leverage effect and to use it, together with operating leverage and financial leverage factors, to determine the total leverage for the company. Then it would be possible to predict what effect any change in input will have on profits, EVA and MVA.

The objectives of this paper could be summed up in this way:

- To link leverage analysis and value analysis;
- To determine how changes in inputs will affect the shareholder value;
- To introduce the leverage effect of the equity cost;
- To determine its connection with operating leverage and financial leverage in the context of determining the total leverage.

The findings of this paper could be useful for managers at all levels in a company, but especially for financial managers. Existing shareholders and potential investors would also benefit from the findings, but the company data needed as inputs for the model would not be available to them.

## 2. The theoretical background

### 2.1. EVA and MVA

EVA is a performance measure that attempts to measure the true economic profit produced by a company. Such a metric is useful for investors who wish to determine how well a company has produced value for its investors, and it can be compared against the company's peers for a quick analysis of how well the company is operating in its industry. MVA is not a performance metric like EVA, but instead is a wealth metric, measuring the level of value a company has accumulated over time. In order to maximise the value for shareholders, companies should strive towards maximising MVA and not necessarily their total market value.

EVA is determined by calculating the difference between the cost of a company's capital and the return earned on capital invested, and multiplying it with the amount of capital invested in the company.

$$EVA_t = (r - WACC) * IC_{t-1}$$

where:

r = the return on the capital invested

WACC = the company's after-tax cost of capital

$IC_{t-1}$ = the invested capital at the beginning of period *t*

This mesure quantifies the surplus return earned by the company. In those cases where a company is able to earn a return that is higher than its cost of capital a positive value for EVA is calculated. A negative EVA value is calculated when the cost of capital exceeds the return on the invested capital.

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Alternatively, the measure can be calculated by comparing the net operating profit after tax with the total cost of capital invested.

$$EVA_t = NOPAT_t - Total\ cost\ of\ IC = = NOPAT_t - (WACC * IC_{t-1})$$

where:

$NOPAT_t$ = Net operating profit after taxes

If a company is able to earn NOPAT values in excess of its total cost of capital invested it generates a positive EVA figure. However, should NOPAT be insufficient to cover the company's total cost of capital, a negative value for EVA is calculated.

A company's total market value (MV) is equal to the sum of the market value of its equity and the market value of its debt. In theory, this amount is what can be taken out of the company when all shares are sold and debt is repaid at any given time. The MVA is the difference between the total market value of the company and the invested capital. The invested capital (IC) is the amount that is put into the company and is basically the fixed assets plus the net working capital.

$$MVA = MV\ of\ company - IC$$

From an investor's point of view, MVA is the best final measure of a company's performance.

The link between MVA and EVA is that theoretically, MVA is equal to the present value of all future EVA to be generated by the company.

$$MVA = present\ value\ of\ all\ future\ EVA$$

If the company is not operating at optimal levels of financial gearing, changing the proportion of debt relative to equity can lower the WACC, so that the capital structure is closer to optimal. This will also unlock value for the company as a whole, including the shareholders.

### 2.2. Leverage

Operating leverage (OL) is a measure of the degree to which a company incurs a combination of fixed and variable costs. The higher the degree of OL, the greater the potential danger from forecasting risk, where a relatively small error in forecasting sales can be magnified into large errors in cash flow projections.

Most of a company's costs are fixed costs that occur regardless of sales volume. As long as a company earns a substantial profit on each sale and sustains adequate sales volume, fixed costs are covered and profits are earned. Other company costs are variable costs incurred when sales occur. The company earns less profit on each sale, but needs a lower sales volume for covering fixed costs.

The percentage change in the earnings before interest and taxes (EBIT) relative to a given percentage change in sales is defined as operating leverage.

Degree of operating leverage (DOL) = % change in EBIT/% change in sales.

The equation can also be written as follows:

$$DOL = Contribution / EBIT$$

Financial leverage (FL) is the degree to which a company uses fixed-income securities such as debt and preferred equity. The more debt financing a company uses, the higher its financial leverage. A high degree of financial leverage means high interest payments, which negatively affect the company's bottom-line earnings per share.

The percentage change in earnings per share (EPS) due to a given percentage change in EBIT is known as financial leverage. Degree of financial everage (DFL) = % change in EPS / % change in EBIT. The following equation can also be used to calculate DFL:

$$DFL = EBIT / EBT$$

where

EBT = Earnings before tax

The total leverage is the outcome of the multiplication of operating leverage and financial leverage.

$$Degree\ of\ total\ leverage\ (DTL) = DOL\ x\ DFL$$

*or*

$$DTL = \%\ change\ in\ EPS / \%\ change\ in\ sales$$

If a company has a high amount of operating leverage and financial leverage, a small change in sales will lead to a large variability in EPS.

If the cost of equity is subtracted from profits (after interest and tax), the result is EVA. This amount (subtracted as cost of equity) is a fixed amount in the case when the capital structure and the cost of equity percentage remain unchanged. This fixed amount of the cost of equity also has a leverage effect that causes EVA to change more dramatically than profits when there are changes in the sales volume.

This EVA leverage effect is is calculated as follows:

$$Degree\ of\ EVA\ leverage = Earnings\ after\ interest\ and\ tax / EVA$$

## 3. Research method and model inputs

A spreadsheet model was developed in which we use a given level of operating leverage and financial leverage. The relationship between earnings (after interest and tax) and EVA was determined.

Furthermore, the EVA leverage factor was calculated and combined with the operating and financial leverage to illustrate how the expected percentage change in EVA and MVA can be predicted, given a certain percentage change in sales.

The results of the model were than analysed to reach conclusions and to allow some recommendations to be made.

The model inputs are as follows. It was assumed that a company has operational assets consisting of fixed assets and net current assets of 4 million. These are financed by 50 % equity capital and 50 % long-term debt. This is in our model an optimal (or average) capital structure with the lowest WACC of 15 %. The cost of equity at this level is 20 % and the after-tax cost of debt is 10 %.

A tax rate of 20 % and a return on assets before tax of 45 % (36 % after tax) are assumed. Furthermore, an asset turnover of 1 is assumed; meaning that the total assets of 4 million will yield sales of 4 million. The cost structure of variable costs of 40 % of sales and fixed costs of 600 000 per year is considered average.

The model inputs for the basic scenario (average level of fixed costs, optimal capital structure) are contained in Table 1.

Table 1 Model inputs

| Items | Amount or % |
|---|---|
| Total assets | 4 000 000 |
| Equity (50% of total capital) | 2 000 000 |
| Debt (50% of total capital) | 2 000 000 |
| Cost of equity | 20 % |
| Cost of debt | 10% |
| Weighted cost of equity | 10 % |
| Weighted cost of debt | 5% |
| WACC | 15 % |
| Tax rate | 20% |
| Interest rate before tax | 12,5% |
| Interest rate after tax | 10% |
| ROA (before interest and tax) | 50% |
| ROA (after tax) | 40% |
| Asset turnover (total sales / total assets) | 1 |
| Variable costs = 40% of sales | 1 600 000 |
| Fixed cost per year | 600 000 |

The model was based on the assumption that the asset turnover remains the same and that there is no inflation. Fixed costs therefore remain the same in total amount and variable costs remain the same percentage of sales.

## 4. Results and conclusions

In this section the earnings, EVA and MVA are calculated according to tha model inputs stated in Table 1. We proceed as follows:

*Contribution = sales – variable costs =*
*4 000 000 – 1 600 000 = 2 400 000*

When the fixed costs are subtracted from the contribution, the result is Earnings Before Interest and Tax (EBIT):

*EBIT = 2 400 000 – 600 000 = 1 800 000*

Next the interest is subtracted to give Earnings Before Tax (EBT):

*EBT = 1 800 000 – 250 000 = 1 550 000*

After subtracting the tax, the Earnings After Tax (EAT) remain:

*EAT = 1 550 000 – 310 000 = 1 240 000*

In order to calculate the EVA, the cost of equity capital is subtracted from EAT. The cost of equity is calculated as 20% × 2 000 000 = 400 000.

*EVA = 1 240 000 – 400 000 = 840 000*

An alternative calculation, using the WACC, is used to confirm the EVA.

*EVA = return spread x invested capital = (ROA – WACC) x invested capital =*
*(0,36 – 0,15) x 4 000 000 = 840 000*

The MVA is calculated in three ways, according to three different assumptions about future growth in EVA. $MVA_1$ is calculated as if there will be no future growth in EVA.

$MVA_1 = EVA / WACC =$
$840\,000 / 0.15 = 5\,600\,000$

$MVA_2$ assumes a constant future growth rate of 5% in EVA:

$MVA_2 = EVA \times (1 + g) / (WACC - g) =$
$(840\,000 \times 1{,}05) / (0{,}15\text{-}0{,}05) =$
$8\,820\,000$

$MVA_3$ assumes an abnormal growth rate in EVA of 15% for the first five years and a constant growth rate of 5% after that.

$$MVA_3 = 840\,000 \times (1{,}15) / 1{,}15 + 840\,000 \times (1{,}15)^2 / 1{,}15^2 + 840\,000 \times (1{,}15)^3 / 1{,}15^3 + 840\,000 \times (1{,}15)^4 / 1{,}15^4 + 840\,000 \times (1{,}15)^5 / 1{,}15^5 + [840\,000 \times (1{,}15)^5 \times (1{,}05) / (0{,}15 - 0{,}05)] / 1{,}15^5 =$$
$$8\,820\,000$$

As a check for the reasonableness of this calculation, the Market to Book ratio was calculated.

M / B ratio = market value of equity / book value of equity.

Calculation for $MVA_1$:

*Total market value = total assets + $MVA_1$ =*
*4 000 000 + 5 600 000 = 9 600 000*

*Market value of equity = total market value – debt*
*= 9 600 000 – 2 000 000 = 7 600 000*

*M/B ratio = 7 600 000 / 2 000 000 = 3,8*

Calculation for $MVA_2$ and $MVA_3$:

*Total market value = total assets + $MVA_2$ =*
*4 000 000 + 8 820 000= 12 820 000*

*Market value of equity = total market value – debt*
*= 12 820 000 – 2 000 000 = 10 820 000*

*M/B ratio = 10 820 000 / 2 000 000 = 5,41*

The ratios calculated for all three versions of MVA range from 3,8 to 5,41 and are considered reasonable. Another test for reasonableness is the MVA/EVA multiple. It ranges from 6,7 for $MVA_1$ to 10,5 for $MVA_{2,3}$. This is in line with the research findings of Stern Stewart, namely that "each $1 increase in EVA brings, on average, a $9,50 increase in MVA."

Table 2 Earnings, EVA and MVA

| Items | Amount |
|---|---|
| EBIT | 1 800 000 |
| EBT | 1 550 000 |
| EAT | 1 240 000 |
| EVA | 840 000 |
| $MVA_1$ (in case EVA remains same, that means no growth) | 5 600 000 |
| $MVA_2$ (constant EVA growth) | 8 820 000 |
| $MVA_3$ (abnormal growth of EVA) | 8 820 000 |
| Market to Book ratio for $MVA_1$ | 3,8 |
| Market to Book ratio for $MVA_2$ and $MVA_3$ | 5,41 |
| $MVA_1$ / EVA | 6,7 |
| $MVA_{2,3}$ / EVA | 10,5 |

Table 3 shows the calculation of the leverage factors for the basic scenario, where average levels of operating leverage and financial leverage are maintained.

Table 3 Calculation of leverage

| | |
|---|---|
| DOL = contribution / EBIT | 2 400 000 / 1 800 000 = 1,33 |
| DFL = EBIT / EBT | 1 800 000 / 1 550 000 = 1,16 |
| TDL = DOL x DFL | 1,33 x 1,16 = 1,54 |
| EVA leverage = EAT / EVA | 1 240 000 / 840 000 = 1,48 |
| Total leverage including EVA = TDL x EVA leverage | 1,54 x 1,48 = 2,28 |

This means that for every 1% change in sales, the EBIT changes by 1,33%, the EAT changes by 1,16%. For every 1% change in EAT, EVA will change by 1,48%. If this is combined with the TDL, than for every 1% change in sales, EVA (and MVA) changes by 2,28%.

In table 4 the effect of changes of -10% and +10% on sales was calculated to verify the correctness of the leverage factors for the basic scenario.

Table 4 The effect of changing amount of sales (in mil.)

| Items | Sales -10% | Current sales | Sales +10% |
|---|---|---|---|
| Sales | 3,6 | 4 | 4,4 |
| VC | 1,44 | 1,6 | 1,76 |
| Contribution | 2,16 | 2,4 | 2,64 |
| FC | 0,6 | 0,6 | 0,6 |
| EBIT | 1,56 | 1,8 | 2,04 |
| Interest | 0,25 | 0,25 | 0,25 |
| EBT | 1,31 | 1,55 | 1,79 |
| Tax | 0,262 | 0,31 | 0,358 |
| EAT | 1,048 | 1,24 | 1,432 |
| Cost of E | 0,4 | 0,4 | 0,4 |
| EVA | 0,648 | 0,84 | 1,032 |

Table 5 shows the relative changes of EBIT, EAT, EVA and MVA for every 10% change in sales.

Table 5 Changes in EBIT, EAT, EVA and MVA in case of a 10%-change in sales

| Item | Change by % |
|---|---|
| EBIT | 13,33 |
| EAT | 15,48 |
| EVA and MVA | 22,86 |

As we can see, results of Table 3 are in line with the results of Table 5.

In this paper the spreadsheet model was used to investigate the leverage effect of three items, namely fixed costs (DOL), interest on debt capitaI (DFL) and the cost of equity (EVA leverage).

It is recommended that companies make use of the suggested spreadsheet model in order to investigate and analyse the effects of changes in sales and other input items (such as selling prices, costs and the cost of capital) on the crucial performance measures of EVA and MVA. As illustrated, these changes in EVA and MVA represent a direct quantification of shareholder value creation. The techniques discussed can be applied in performance measurement, valuations, cost/volume/profit analysis, sensitivity analysis, value management and scenario planning. The techniques can even be used to develop a performance-based reward system for all employees of a company that creates value for its shareholders.

Further research could focus on the effect that other factors, such as changes in the financial structure and costs, would have on EVA and MVA.

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# A MULTI-CRITERIA DECISION-MAKING SYSTEM BASED ON A BUILD-UP ALGORITHM

**Felicia Alina CHIVULESCU***

**Abstract**

*The organization can be considered a real decision-making machine. Through the decision-making system problems are being addressed, searching for and proposing a solution and the steps to take which creates value for the organization and implicitly for its stakeholders. Whether it's about choosing the best resources, finding the best way to interact with customers, or taking the best position in front of a competitor, management has to decide. The current business environment imposes on organizations a high degree of rigor in developing strategies and a great complexity in substantiating managerial decisions in all areas of activity.*

*This paper presents a multi-criteria decision model based on a build-up algorithm. Thus, there are correlated methods that satisfy the necessity to include complexity and uncertainty in the decision-making process in order to achieve a high level of performance in the contemporary economic and social conditions.*

**Keywords:** *algorithm, decision, risk, sustainability.*

## 1. Introduction

Planning and developing activities, designing the structure and culture of an organization, providing anticipated responses to occurring environmental events, choosing a technology to deliver products and services, defining a strategy to maximize the value of staff knowledge and skills to achieve performance, are elements which presuppose taking decisions.

Any activity carried out within the organization involves decisions, even though they differ in complexity and importance. The organization can be considered a real decision-making machine. At all levels and in any department, people make decisions at all times, and their degree of optimality significantly determines the level of value created by the organization.

Today, the decision-making process has a high degree of complexity due to innovative models and technologies, applicable to the new economic environment, to some resources with a high degree of novelty and the influence of some insignificant external factors so far. Decisions include social, ecological and economic concerns, and are much more complex and interrelated than in the past (Gong et al., 2016).

Organizations and their decision support systems must adopt procedures that are capable of interacting with this complexity (Courtney, 2001). Success must be planned and evaluated according to the principles of two great theories: complexity theory and chaos theory. Globalization and sustainable development are concepts that require new rules that underpin contemporary performance.

Under the globalization conditions and the dissolution of international barriers, there is a growing focus on global change.

Therefore, the global business community is characterized by a permanent change in the economic, political and social environment, the de-escalation of trade barriers, integrated economic markets, global consumers, diversified preferences, technological innovation, globalized production and cultural management, and today's change is faster and dominated by uncertainty.

This paper concentrates on the results of the in-depth research in the theory and practice of economic management and modelling, and presents the hybrid model developed on the basis of the interdependencies between the elements of sustainability, mathematical optimization and computer programming.

The suggested approach is based on a multi-criteria decision model. As such are correlated methods that satisfy the necessity to include complexity and uncertainty in the evaluation and selection of optimal decisions in order to achieve a high level of performance in the contemporary economic and social conditions. The model presented in the paper is specific to the investment decision, but it can be adapted to any other decision-making category in the business environment.

## 2. Background

Classical methods of substantiating decisions have a great inconvenience, which reduces the actuality of their use in terms of a development based on the sustainability of the surrounding world: they include exclusively monetary factors. However, the evolution of decision systems indicates the analysis of a decision

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for all categories of benefits, opportunities, costs and risks (Liang & Li, 2008), starting with the financial ones, but using additional and specific aspects of environmental protection or community development.

In terms of decision to invest, most companies use the expected economic value of the business as a basis for substantiating it. The classic indicators used to make such an assessment are: the recovery term, the economic return, the internal rate of return and the net present value. Two widely used methods, both in the internal evaluation of the projects of some organizations but especially as an integrated part of the evaluation process carried out for the financial allocation of the Community funds, are those aimed at determining the recovery period and the calculation of the updated cash flow cumulative or net present value (referred to in key industry papers also as value added / net present (Stancu, 2007), or net current income (Vasilescu, 2006)). This is often added to the analysis of the internal rate of return. Also, in addition to these (Vasilescu, 2006), it is considered necessary the inclusion in the evaluation also of some efficiency indicators, such as: the ratio between the updated revenues and the updated costs, the economic efficiency or the recalculated specific expenditures.

In determining the value of the updated cash flow, are considered elements such as the "time value" of money, the inflation rate, and the rate of return accepted by the investment organization (hurdle rate or cut off rate - the minimum rate required by the profitability of the company in the investment decision, the proposals not exceeding this threshold being rejected). Thus, in obtaining net present value (NPV), the annual cash flow (Inputs - Outputs) is updated and accumulated. Usually, in the first years of the analysis, the value of the flows is negative due to the investment effort, as the investment objective is functional at full capacity, the forecasts reflect positive values. A positive cumulative annual flux (NPV) indicates the acceptance of the evaluated project as the expected gain exceeds the rate imposed by the business standards involved. Given the need to choose a variation from many possible choices, the variant with the highest NPV should be chosen because it involves the lowest level of risk (the risk of not exceeding the required rate of return).

$$VAN = -I + \sum_{t=1}^{n} \frac{F_t}{(1+a)^t}$$

$$VAN = \sum_{t=1}^{d+D} \left[V_t - (I_t + C_t)\right] \cdot \frac{1}{(1+a)^t}$$

$$VAN = \sum_{t=1}^{d+D} V_t \cdot \frac{1}{(1+a)^t} - \sum_{t=1}^{d+D} (I_t + C_t) \cdot \frac{1}{(1+a)^t}$$

Where:

$F_t$ = the expected net cash flow for the period t

n = number of periods

a - discount rate

t - the year in which you spend/receive income

$V_t$ - annual revenue

$I_t$ - the amount of the annual investment

$C_t$ - annual production costs

d - the duration of the investment

D - running time

Including the potential effect of the inflation or deflation rate in the equation, converts the discount term $(1 + a)^t$ into $(1 + a + i_t)^t$, where $i_t$ is the estimated inflation or deflation rate for the period t.

Two of the problems faced by evaluation, which require studies to define a performance methodology, aim to include indicators that consider respecting the dimensions of sustainable development, as well as choosing and substantiation of the discount rate in this context characterized by a new vision on the whole economy.

What is really important, but also very difficult, is to determine the rate imposed by the organization's standards in the selection of investment projects. Correct cash flow update requires an estimate of the appropriate discount rate. For many projects, the selected discount rate is the cost of the organization's capital, although it is often set too high, as a general risk tolerance.

The financial approach considers an investment a net gain if the promised internal rate of return proves to exceed the cost of the enterprise's capital (Schmidt, 2011). Each project must, however, be evaluated according to its own specificity and the imposed rate must take into account the risk class in which the rated project can be classified, not the whole business. For the case where the project is in competition with other alternative investments to obtain funding, the discount rate may be the opportunity cost of the capital (the rate of return to which the firm must give up if it invests in the project instead of investing in another alternative (ACCA , 2011)).

The causes of the risk and the possible changes that may influence the size of the discount rate should be carefully analysed, not randomly chosen. Any mistake in dimensioning it directly influences the investment decision. Therefore, the dimensioning of the factor used is one of the objectives of top-management. I believe that the existence of a concrete and complete model of calculation is a challenge in the field and a good opportunity to optimize the investment decision.

An increase in the discount rate implies a reduction in the predicted VAN, thus favouring the short-term selection of projects. The element that determines the recording of these results is the importance of the value of amounts according to the degree of removal of the period when they are obtained. In a long-term project, the costs recorded at the beginning are high in value, while revenues are delayed for several years, with lower and lower values. Implications may be far-reaching, for example (Mantel et al., 2011), the high interest rate levels of the 1970s, 1980s and 2000s in the US have imposed on organizations the focus on short-term projects and indifference to long-term investments as main sources of technological development, which has led to the

decline of US companies' competitiveness on the global market.

Moreover, the traditional approaches to substantiating the efficient allocation of capital in investment projects based on efficiency indicators imply implicitly throughout the life of the project the same business conditions as those underlying the investment decision.

However, market conditions change over time, and such changes could affect both future cash flows and estimated update rates, and thus the performance indicators of a project. A project that seems to be attractive today may not be so good at a later date when the business turns out to be no longer as favourable as predicted.

Therefore, in order to benefit from the investment opportunities offered by the national and especially international economic environment, in order to obtain the competitive advantage in a certain context, it is necessary to study the determinants of the respective context and the forecast of its evolution. The investment decision is strongly influenced by the specificity of the business environment in which the activity of the beneficiary organization is taking place and, implicitly, by the changes occurring or to occur at this level.

The macro-factors that influence the business environment and implicitly the investment decision are: legal system, economic conditions and cultural norms.

A country-specific business environment consists of all the factors that influence the benefits, costs and risks of running a business in that country. The size of the market, the purchasing power of the population or the expectations and needs of consumers are elements that need to be known in order to achieve organizational success. At present, they are characterized by ever more rapid and unpredictable changes.

An example in this regard is provided by Gomez-Mejia et al. (2005) on the situation of Argentina, which in the 1940s was among the states with the “healthiest” economy, and in the 21st century is not even among the top 40 countries, currently being characterized by political instability, poor economy and corruption. On the opposite side, we can discuss South Korea's evolution, which from a very poor third world country in the 1960s, it became one of the top 10 largest economies in the world and fourth in the world trade rankings after Japan, USA and Germany.

Managing a business implies also respecting the rules of the country in which you operate, these rules quickly becoming items with financial implications for the lead organization. Government taxes, holidays paid to employees, free days, double the Christmas salary, lack of infrastructure, or specific requirements for the quality of the products and raw materials used are different from one country to another and from one culture to another.

Carrying out an economic activity and, in particular, carrying out an investment, undoubtedly implies a certain level of risk. The risk differs significantly depending on the context in which reporting is made. However, in my opinion, in an environment characterized by complexity and uncertainty as the current one, risk is a positive element. Transforming uncertainty into risk is one of the greatest challenges, which decisively influences the performance of a decision. Risk cannot be avoided nor should such an approach be adopted; it is important to quantify it in order to substantiate decisions on a realistic basis.

In literature (Yean Yng Ling & To Phuong Hoang, 2010; Restrepo et al., 2012), risk is classified into three categories: political risk - specific to developing countries; indicates government changes, social disturbances, strikes, terrorism, or violent conflicts. This risk category is rated for each country by specialized agencies such as Bank of America World Information Services, Business Risk Management Intelligence BERI, Control Risks Information Services, Economist Intelligence Unit EIU, Euromoney, Institutional Investor, Standard and Poor's Rating Group, Moody's Investor Services (Ball et al., 2002); economic risk - captures elements that significantly influence the decision to invest, such as inflation rate, exchange rate or interest rate in a country; and legal risk.

The legal system of a country consists of rules defining what is allowed or illegal, the law enforcement process and procedures used to punish and redress offenses. The legal system of a nation reflects its culture, religion and traditions. A prime necessity in substantiating a business is law and compliance. The three major legal systems adopted by the countries of the world are: common law - in countries with historical or Anglo-Saxon influences, where the Court-based antecedents have an important role to play in interpreting the law (US and other 26 states); civil law - interpretations and sanctions are based on a complete set of rules that is part of a structured code (in about 70 countries, most in Europe and Japan); Muslim law - based on religious beliefs, regulates behaviour in about 27 Islamic countries (Gomez-Mejia et al., 2005).

The uncertainty of the economic environment is one of the factors that decisively influence the evolution of the business environment. The rate of inflation influences the evolution of an organization both by differentiation according to the host country and by the undergoing changes.

The exchange rate, another fluctuating macroeconomic indicator, also has implications for how to manage an investment. Considering an American company operating in Romania with a potential devaluation of the local currency (leu) in relation to the national currency of the country of origin of the organization (the dollar), it will receive less for the goods and services than was foreseen if the company perceives tariffs in the currency of the host country). In order to maintain the level of profit, the company must increase the price, which may lead to a reduction in future sales.

An example of this is provided by Darling & Nauss (1995) and addresses the effects of the exchange rate fluctuation on US companies in Mexico in 1995. The 40% reduction in the value of the Mexican currency against the dollar in January 1995 led to a decline in corporate income American presence on the Mexican market. Due to the price increases and demand reduction, industries such as cars, represented by companies such as Ford or General Motors, have experienced the influence of this indicator's variation. Another example may be tourism in France, whose profits dropped by 30% between 2002 and 2004, in which the value of the dollar diminished by 35% against the euro, which reduced the number of American tourists. Taxes are the third important economic factor that influence the activity of an organization. The variations in the tax policy are reflected in the value of each company's results. In Europe, income tax paid by companies varies from one country to another; so, in Bulgaria or Cyprus it is 10%, in Germany and France it reaches 30% (CWTFS, 2012). Another element that differs between countries is the licensing policy, which requires innovative firms to consider different copyright limitations and patent durations.

Culture is "collective programming of thinking that distinguishes members of one group from another, culture includes value systems, and values are the basis of culture" (Hofstede, 1984). Culture reflects specific characteristics of the social structure, religion, history of a region.

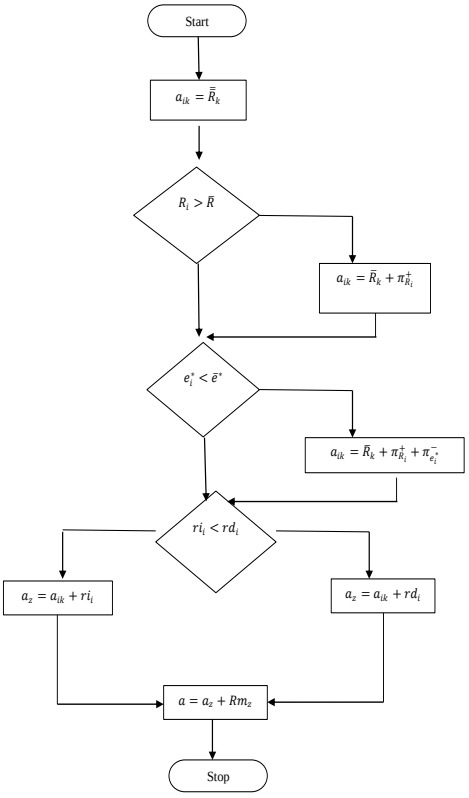
Internationalization requires organizations that attach great importance to performance, understanding and quick adaptation to cultural change. Cultural differences are grouped and categorized in five dimensions by Hofstede (2001): distance from power, individualism, avoidance of uncertainty, masculinity / femininity and long / short orientation.

## 3. The build-up algorithm

Decisions are significantly influenced by the forecasts on the evolution of the factors presented above, the design and the evaluation referring to the minimum level of profitability imposed by the conditions of the environment where the business is developed. In the context of sustainable development, efficiency and optimal decision-making acquire new dimensions characterized by increased complexity, which makes it even more difficult to quantify the level of a predicted risk based on which a correct justification and assessment can be made, indicating the decision generating the maximum performance level.

The key element for accurately planning and quantification the efficiency indicators is the rate or discount factor. Complying with the multi-dimensional reporting trends highlighted the need to quantify new investment risk factors. Thus, in order to determine the discount rate, a calculation model based on Build-up algorithms (Ibbotson, 2005) will be used further on.

Figure 1. The build-up algorithm




*Source:* author

The suggested model is described by the following formula:

$$a = \bar{R}_k + \pi^+_{R_i} + \pi^-_{e_i^*} + max(ri_i, rd_i) + Rm_z$$

Where:

a - discount rate;

$R_k$ - the average risk rate of the industry/area of activity k recorded at the level of the European Union;

$\pi^+_{R_i}$- the country risk premium against the risk rate of the European Union;

$\pi^-_{e_i^*}$ - the risk premium against the sustainable efficiency e* of country i;

$ri_i$- country inflation rate i;

$rd_i$ – interest rate in country i;

$Rm_z$ - organization z size risk.

In order to draw a clearer picture of this model, the calculation algorithm is highlighted by the logic scheme shown in the figure 1.

## 4. Discussions

The risk is the alternative the individuals are most often confronting with, the idea that it represents a permanence of the human activity in general being unanimously accepted. Under these conditions it can be said that the activities with a high safety degree almost do not exist anymore, the risk notion becoming complementary with the activity one. Thus, we live in a risk's world, as Louis de Broglie (French physician, Nobel laureate in Physiks in 1929) was affirming, we

have to chase the risk because it represents the key of all succeses. In this context, the risk received a very big importance in all domains, its assuming becoming a common practice in the internal and international business environment.

Under these conditions, taking into account the path irreversible entered by the bond between the results of the economic activity and of the social and political environment, the analists but also the subjects directly implied in the international economic flows assign an increased importance to the concept of country risk. Under the conditions of the economic globalization, for the realization of some international investment flows under rentability conditions, there is imposed the identification and management of the risks that might appear in the receiving economied due to the particular political-economical and social conditions under which each national economy handles.

Any activity performed in the global economic environment is influenced by a basis risk, named riskless rate. If everybody runs with the same speed, we can say that we are all stand still. This safe risk rate id registered in USA under the titles of a mature capital market. The medium rate $R_k$ has in its composition two risk categories: the general risk of the Euro zone and the medium risk of the k industry at the European Union's level. The general risk is determined as a risk premium to the global risk. According to the data bases built by teacher Damodaran (2013a), over time the risk premium of Euro in comparison with the basis rate is 0. It results thus that $R_k$ has in its composition the risk rate of the titles in USA and the risk of the industry k in the UE. To this risk rate there will be added the country risk premium, namely the supplementary risk of the country to the risk of the Euro zone. Because the sustainable development plays an important role in the contemporary conditions, the model also has in its composition a risk rate of sustainable efficiency. Its determination is realized as a risk premium of the country's efficiency in the context of the sustainable development reported to the medium efficiency of EU-27 (Dinu, 2013).

For the complete definition of the rate there will be also taken into account a discounting rate of the inflationary phenomenon. Although reference papers in the domain add up the values of the inflation rate and of the interest rate, the proposed model takes into account the maximum of the two ones. The interest rate should have the minimal value equal with the inflation rate for the justification of the deposit's benefits and thus the economical theory would indicate the inclusion in the model of the interest rate. The motivation regarding the choice of the maximum is based on the results obtained through the evolution's study and the correlation of the two rates at Romania's level, which highlight the registering of some inflation rates superior to the interest rate in certain periods.

At organizational level, the discount factor determined according to the proposed model relates to the company's size risk (Joshi & Anand, 2018). $Rm_z$, also named size rating of the company z is being chosen by framing the indicator's value $interestcoverage = \frac{EBIT}{dobânzi}$ in the corresponding class (Damodaran, 2013b).

Thus determined, the discount rate value assigns the proper importance to the multiple risk classes implied in the decision-making system within the actual economy's context.

## 5. Conclusions

The distrust of investors in the implementation of sustainable principles but also the lack of such an evaluation model so far are the main limits of its application in practice.

The complexity, the risk and the uncertainty of the business environment are not, however, totally assessed and quantified using the suggested model, and probably will never be. The main contribution considered aims at adjusting the discount rate with a new class of risk, the efficiency of the development of investments in the context of sustainable development. The limits of the proposed model and also the main directions for further research on this particularly important detail in planning and obtaining a business' success, can refer to issues such as those presented in the conclusion of this article.

Defining country and industry risk is based solely on data provided by Professor Damodaran. The justification for choosing these databases is the recognition of their quality and correctness at the level of the world scientific community, through numerous articles published by the author, as well as references to them in important journals in the field.

If, given the existence of complete and up-to-date data on the evolution of some macroeconomic indicators, country risk could be quantified based on a multiple regression model or PANEL data, the industry's risk requires a complex and difficult task-based study that depends on the business environment, through their component organizations and their representatives, who often threat the research with indifference and find no time to engage in such a project.

That is why, an element that should be included in the suggested model for determining the discount rate is the industry risk premium for each country. Such an analysis may represent the goal of an entire research program, which will customize for each country the risk for carrying out activities in a particular field in the context of sustainable development.

The main contribution and originality element, the Sustainable Efficiency Premium, is determined for each country. The model does not quantify the efficiency of making a sustainable investment at the level of a field of activity and does not take into account aspects specific to the importance and necessity of including elements of sustainable development in the evaluation of projects belonging to different domains. A study for identifying, for each industry, of the risk quantification models is suggested for further research.

The inclusion of additional risk categories, the addition of other countries, choosing other time frames to analyse and the customization for other decision-making classes represent also limitations of the proposed model, which may be regarded as ideas for future research.

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# DISTRIBUTED MULTI-AGENT SYSTEMS FOR SUPPORTING COLLABORATIVE NETWORKED ENVIRONMENT

**Adina-Georgeta CRETAN***

**Abstract**

*This paper proposes a distributed multi-agent system to model and support parallel and concurrent negotiations among organizations acting in the same industrial market. The complexity of the approach is given by the dynamic environment in which multi-attribute and multi-participant negotiations take place. The metaphor Interaction Abstract Machines (IAMs) is used to model the parallelism and the non-deterministic aspects of the negotiation processes that occur in Collaborative Networked Environment.*

**Keywords:** *Automated negotiation, web services, collaborative networked environment, computing platform, multi-agent systems.*

## 1. Introduction

The advent of the Internet and more recently the cloud-computing trend have led to the development of various forms of virtual collaboration in which the organizations are trying to exploit the facilities of the network to achieve higher utilization of their resources. We try to provide support to these collaboration activities and we propose negotiation as a fundamental mechanism for such collaborations.

The concept of "Virtual Enterprise (VE)" or "Network of Enterprises" has emerged to identify the situation when several independent companies decided to collaborate and establish a virtual organization with the goal of increasing their profits. Camarinha-Matos defines the concept of VE as follows: "A *Virtual Enterprise (VE)* is a temporary alliance of enterprises that come together to share skills and resources in order to better respond to business opportunities and whose cooperation is supported by computer networks"[1].

In this paper we present how organizations participate and control the status of the negotiations and how the negotiation processes are managed.

The starting point in the development of this work was the goal to support small and medium enterprises that are not able or are not willing to perform alone a large contract since in this situation the association in a virtual alliance provides the opportunity to subcontract the tasks of the contract to other partners within the alliance. To achieve this goal, research was dedicated to the development of a model to coordinate the negotiations that take place within an inter-organizational alliance. Our research was focused on the topics of virtual alliances, automation of the negotiations and of coordination aimed to provide the mechanisms for coordinating the negotiations that take place among autonomous enterprises that are grouped in a virtual alliance.

Assuming that the nature of the roles that may be played in a negotiation are similar in multiple approaches, the number of participants involved at the same time in the same negotiation is considerably different.

Depending on the number of participants involved in a negotiation, we may distinguish various negotiation types: *bilateral negotiation (one-to-one)*; *one-to-many negotiation; many-to-many negotiation*.

Taking into account the complexity of the negotiations modeled by multi-agent system, we can state that to conduct in an efficient fashion one or many negotiations that involve a large number of participants and to properly account for all negotiation dimensions, it is necessary to develop a coordination process that is defined outside of the specific constraints of a given decision mechanism or communication protocol.

The negotiation process was exemplified by scenarios tight together by a virtual alliance of the autonomous gas stations. Typically, these are competing companies. However, to satisfy the demands that go beyond the vicinity of a single gas station and to better accommodate the market requirements, they must enter in an alliance and must cooperate to achieve common tasks. The type of alliance that we use to define their association emphasizes that each participant to this alliance is completely autonomous i.e., it is responsible of its own amount of work and the management of its resources. The manager of a gas station wants to have a complete decision-making power over the administration of his contracts, resources, budget and clients. At the same time, the manager attempts to cooperate with other gas stations to accomplish the global task at hand only through a minimal exchange of information. This exchange is

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[1] Camarinha-Matos L.M. and Afsarmanesh H.,(2004), *Collaborative Networked Organizations,* Kluwer Academic Publisher Boston

minimal in the sense that the manager is in charge and has the ability to select the information exchanged.

When a purchasing request reaches a gas station, the manager analyses it to understand if it can be accepted, taking into account job schedules and resources availability. If the manager accepts the purchasing request, he may decide to perform the job locally or to partially subcontract it, given the gas station resource availability and technical capabilities. If the manager decides to subcontract a job, he starts a negotiation within the collaborative infrastructure with selected participants. ***In case*** that the negotiation results in an agreement, a contract is settled between the subcontractor and the contractor gas station, which defines the business process ***outsourcing*** jobs and a set of obligation relations among participants[2].

The gas station alliance scenario shows a typical example of the SME virtual alliances where partner organizations may be in competition with each other, but may want to cooperate in order to be globally more responsive to market demand.

The collaborative infrastructure, that we describe, should flexibly support negotiation processes respecting the autonomy of the partners.

We are starting with a presentation in Section 2 of a formal interaction model to manage multiple concurrent negotiations by using the metaphor Interaction Abstract Machines (IAMs). Section 3 presents an example of the proposed interaction model using the IAMs metaphor. Then, we are briefly describing in Section 4 the collaborative negotiation architecture. Finally, Section 5 concludes this paper.

## 2. Building the Negotiation Model

In this section we propose a formal model to settle and to manage the coordination rules of one or more negotiations, which can take place in parallel. We will introduce the metaphor of Interaction Abstract Machines (IAMs) to describe the negotiation model. We introduce the Program Formula to define the methods used to manage the parallel evolution of multiple negotiations.

### 2.1. The Metaphor Interaction Abstract Machines (IAMs)

The metaphor Interaction Abstract Machines (IAMs) will be used to facilitate modeling of the evolution of a *multi-attribute, multi-participant, multi-phase negotiation*. In IAMs, a system consists of different *entities* and each entity is characterized by a state that is represented as a set of *resources* [4]. It may evolve according to different laws of the following form, also called "*methods*":

A1@…@An <>- B1@…@Bm

A method is executed if the state of the entity contains all resources from the left side (called the "*head*") and, in this case, the entity may perform a transition to a new state where the old resources *(A1,…,An)* are replaced by the resources *(B1,…,Bm)* on the right side (called the "*body*"). All other resources of the entity that do not participate in the execution of the method are present in the new state.

The operators used in a method are:

- the operator @ assembles together resources that are present in the same state of an entity;
- the operator <>- indicates the transition to a new state of an entity;
- the operator & is used in the body of a method to connect several sets of resources;
- the symbol "T" is used to indicate an empty body.
- In IAMs, an entity has the following characteristics:
- if there are two methods whose heads consist of two sets of distinct resources, then the methods may be executed in parallel;
- if two methods share common resources, then a single method may be executed and the selection procedure is made in a non-deterministic manner.

In IAMs, the methods may model four types of transition that may occur to an entity: *transformation*, *cloning*, *destruction* and *communication*. Through the methods of type *transformation* the state of an entity is simply transformed in a new state. If the state of the entity contains all the resources of the head of a transformation method, the entity performs a transition to a new state where the head resources are replaced by the body resources of the method. Through the methods of type *cloning* an entity is cloned in a finite number of entities that have the same state. If the state of the entity contains all the resources of a head of a cloning method and if the body of the method contains several sets of distinct resources, then the entity is cloned several times, as determined by the number of distinct sets, and each of the resulting clones suffers a transformation by replacing the head of the method with the corresponding body. In the case of a *destruction* of the state, the entity disappears. If the state of the entity contains all the resources of the head of a transformation method and, if the body of the method is the resource T, then the entity disappears.

In IAMs, the *communication* among various entities is of type broadcasting and it is represented by the symbol "^". This symbol is used to the heads of the methods to predefine the resources involved in the broadcasting. These resources are inserted in the current entity and broadcasted to all the entities existent in the system, with the exception of the current entity. This mechanism of communication thus executes two synchronous operations:

- *transformation*: if all resources that are not pre-defined at the head of the method enter in collision, then the pre-defined resources are inserted in the entity and are immediately consumed through the application of

[2] Singh M.P., (1997) *Commitments among autonomous agents in information-rich environments*. In Proceedings of the 8th European Workshop on Modelling Autonomous Agents in a Multi-Agent World (MAAMAW), pp. 141–155

the method;

- *communication:* insertion of the copies of the pre-defined resources in all entities that are present in the system at that time instance.

### 2.2. Modelling the Negotiation Process

According to our approach regarding the negotiation, the participants to a negotiation may *propose* offers and each participant may decide in an autonomous manner to stop a negotiation either by *accepting* or by *rejecting* the offer received. Also, depending on its role in a negotiation, a participant may *invite* new participants to the negotiation. To model this type of negotiation, we will make use of the previously defined particles and we will propose the methods to manage the evolution of these particles.

As we have seen, a characteristic of negotiation is its multi-node image, which allows parallel development of several phases of negotiation. A possibility to continue a negotiation is to create a new phase of negotiation from an existing one. In this regard, the Figure 1 presents the possible evolutions of a ph0 phase of negotiation described by the *atom (s,ph0).*

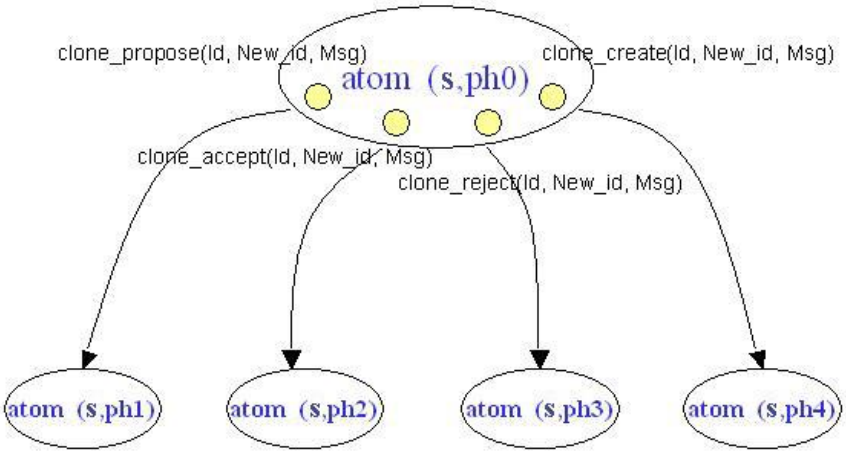



**Fig. 1.** Evolution of negotiation process by cloning an atom

In accordance with the aspects of negotiation for which changes are made, three new negotiation phases are possible:

- evolution of negotiated attributes and / or of their value from *atom(s,ph0)* to *atom(s,ph1)*: a participant sends a new proposal thus achieving either the *contraction* of the negotiation attributes, or their *extension*, by the introduction of new attributes to negotiate;
- evolution of the negotiation status perceived by one of the sequences sharing the new negotiation phase: one of the participants accepts - *atom(s,ph2)* - or refuses a proposal - *atom(s,ph3);*
- evolution of participants and of dependences among negotiations by the evolution of the number of sequences sharing the same negotiation phase: a sequence can invite a new sequence to share a new phase of negotiation *atom(s,ph4)*.

Through the use of the metaphor IAMs, the evolutions of the negotiation phases correspond to the evolutions at the atoms level. The evolution may be regarded as a process consisting of two stages: a *cloning* operation of the atom existent in the initial stage and a *transformation* operation within the cloned atom to allow for the new negotiation phase.

The *cloning* operation is expressed by a set of methods involving the particles *event* and these methods are used to facilitate the evolution of the negotiation.

We propose the following methods associated to the particles *event* to model the cloning of an atom where new message particles are introduced:

- The method *Propose* is associated to the particle event *clone_propose(Id, New_id, Msg)* and models the introduction of a new proposal (*clone_propose*), made by one of the participants to the negotiation.

This method is expressed:

*name(Id) @ enable @ clone_propose(Id, New_ id, Msg)<>- (enable @ name(Id)) & (freeze @ name(New_ id) @ propose(Rname, Content))*

The atom identified by the particle *name(Id)* is cloned. The new proposal contained in the particle *propose(Rname, Content)* will be introduced in the new atom *name(New_id).*

- The method *Accept* is associated to the event particle *clone_accept(Id, New_id, Msg)* and models the case when one of the participants has sent a message of acceptance of an older proposal (*clone_accept*).

This method is expressed:

*name(Id) @ enable @ clone_accept(Id, New_ Id, Msg) <>- (enable @ name(Id)) & (freeze @ name(New_ Id) @ accept(Rname))*

The atom identified by the *name(Id)* is cloned. The acceptance message contained in the particle *accept(Rname)* will be introduced in the new atom *name (New_id).*

- The method *Reject* is associated to the event particle *clone_reject(Id, New_id, Msg)* and models the

denial of an older proposal (*clone_reject*) made by one of the participants.

This method is expressed:

*name(Id) @ enable @ clone_reject(Id, New_ Id, Msg) <>- (enable @ name(Id)) & (freeze @ name(New_ Id) @ reject(Rname))*

The atom identified by the particle *name(Id)* is cloned. The refusal message contained in the particle *reject(Rname)* will be introduced in the new atom *name(New_ id).*

- The method *Create* is associated to the event particle *clone_create(Id, New_id, Msg).* This method models the invitation of a new sequence (*clone_create*) made by one of the participants for sharing the newly created negotiation phase.

This method is expressed:

*name(Id) @ enable @ clone_create(Id, New_Id, Msg) @ <>- (enable @name(Id)) & (freeze @ name(New_Id) @ create(Rname, Type))*

The atom identified by the particle *name(Id)* is cloned, and a particle *create(Rname, Type)* is introduced in the new atom *name(New_ id)* that will further generate the occurrence of a new representation particle for the new sequence participating in the negotiation.

These methods are described in a generic way. Thus, new particles may be added depending on how the current sequence builds negotiation graphs.

By these methods of the event particles, the duplication of an atom has been modeled, in which new message particles are introduced (Figure 2). In the new atom, the representation particles for the current negotiation phase remain identical with those of the first atom.

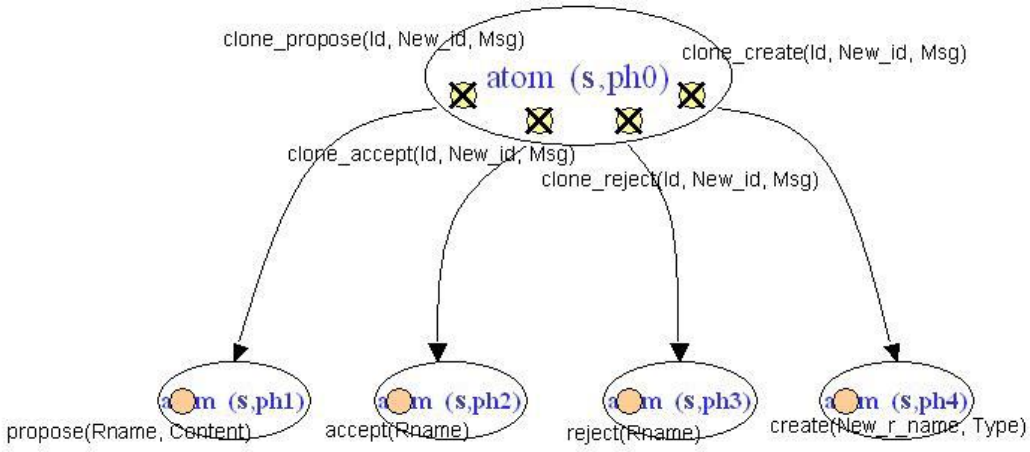



**Fig. 2.** Evolution of negotiation process by transformation of an atom state

According to our approach, the evolution of the negotiation process takes place by changing or creating a new negotiation phase. This phase can evolve according to: *i)* status; *ii)* attributes negotiated; *iii)* number of sequences participant in the negotiation, as in the following:

- The sequence of the statutes is the following: *i)* the sequence *s* finds itself in the *initiated* state at the creation of a first atom and of a first phase of negotiation; *ii)* the sequence *s* switches to the *undefined* state at the moment of emission or reception of a message; *iii)* if a participant accepts or declines a proposal, the *s* associated sequence may pass to a *success* or *failure* statute.
- Referring to the negotiated attributes (*Issues*), the different messages contribute to the evolution of the multitude of attributes and their values.
- The introduction of a new sequence in the current negotiation is modeled by inserting a new particle of representation on the current negotiation phase, which models the instant image of a new sequence on the current phase of negotiation.

In order to model these evolutions at the level of a negotiation phase, the message-type particles described above have been defined. The *message* particles participate in the transformation methods, which change the negotiation phase of an atom by replacing the representation particles of the negotiation sequences involved in the creation or in the reception of the exchanged messages.

In the following, we propose the basic forms of the *transformation* methods. Depending on the particular constraints of the negotiation, other transformation methods and other particles can be defined for modeling the foreseen constraints.

- The *transformation* method associated to a *propose(Rname, Content)* particle contributes to the local evolution of a negotiation phase regarding the status and the attributes negotiated. This evolution takes place by replacing, in the existing atom, all representation particles that are involved (depending on the method) with the new particles that have the status changed to *undefined*. Further, the set of the negotiated attributes (*Issues*) contains the new proposal expressed in the *Content* of the message particle.

*freeze @ localr(Rname1, S1, I1) @ extr(Rname, S2, I1) @ propose(Rname, Content)<>- enable@ localr(Rname1, undefined, I) @ extr(Rname, undefined, I)*

The atom changes the state by consuming the *propose()* particle as well as two representation particles to create new representation particles that describe the new proposal received.

- The transformation method associated to an *accept(Rname)* particle leads to the local evolution of a negotiation phase in terms of status. Evolution is achieved by replacing, within the corresponding atom, the representation particles involved, with the new particles whose status has been changed from *initiated* or *undefined* into *success* :

*freeze @ localr(Rname1, S1, I1) @ extr(Rname, S2, I1) @ accept(Rname) <>- localr(Rname1, success, I1) @ extr(Rname, success, I1)*

The atom changes the state by consuming the *accept()* particle and two representation particles to create the new representation particles whose status is changed in *success*.

- The transformation method associated to a *reject(Rname)* particle. This method is similar to the *accept(Rname)* particle, except for the fact that the evolution of the negotiation phase is achieved by changing the status of the representation particles concerned from *initiated* or *undefined* into *failure* :

*freeze @ localr(Rname1, S1, I1) @ extr(Rname, S2, I1) @ reject(Rname) <>- localr(Rname1, fail, I1) @ extr(Rname, fail, I1)*

The atom changes the state by consuming the *accept()* particle and two representation particles to create the new representation particles which have changed the status into *failure*.

- The transformation method associated to a *create(New_r_name, Type)* particle contributes to the evolution of a negotiation phase in terms of number of sequences that participate to this negotiation phase. This evolution is achieved by introducing, in the corresponding atom, a new representation particle:

*freeze @ create(Rname, type) <>- extr(Rname, init, ∅) @ enable*

As this sequence is just invited in the negotiation, its status is *initiated* and its set of the negotiated attributes is the empty set.

Thus, the negotiation phases and the evolution of these phases have been described using representation particles, event particles and message particles.

Given the fact that IAMs metaphor achieves a non-deterministic execution of the methods, we have introduced the c*ontrol* particles (see section 3.3) in order to counter this disadvantage and achieve a coherent execution of a negotiation process.

The evolution of all negotiation atoms and the negotiation phases take place in parallel.

To model the coordination of the execution of the negotiation process within a sequence, we used the communication mechanism among the existing negotiations. This type of particles that are part of the communication process among different negotiation atoms communicate to all negotiation atoms a certain result.

In the negotiation processes, the messages hold meta-information regarding the content of the messages that describe the proposals in terms of the value of different attributes of the negotiation object. We assume that all the negotiation participants use the same language and ontology.

Next section presents an example of modeling a negotiation composed of a set of negotiation sequences.

## 3. Example - modeling the negotiation process using the IAMs metaphor

In this example, a simple negotiation scenario will be presented, whose negotiation process corresponds to an exchange of proposals leading to an agreement.

In the proposed scenario, we consider a carpentry workshop of the p1 participant. The participant p1 decides to outsource a job (the assembling for 10K LM at a cost less than 2€/LM, within less than 5 days) to another carpentry workshop of a p2 participant.

The negotiation N that occurs between p1 and p2 is a bilateral negotiation.

It is described by two sequences: $N(t) = \{s_1, s_2\}$ with $s_1 \in$ sequences$(t,p_1)$, $s_2 \in$ sequences$(t,p2)$ and role(t,p1,N)=initiator, role(t,p2,N)=guest.

The scenario modeled subsequently takes place in three distinct steps:

- **step1**: after a first proposal made by participant p1 to participant p2, the participant p2 decides to send a new proposal;
- **step2**: the participants decide to agree on the second proposal;
- **step3**: the agreement is established and the negotiation stops.

Modeling takes place as it follows:

Step 1

Figure 3.a) shows the $s_1$, $view(s_1)= (p_1,N,R_1)$ negotiation sequence with an a1 atom corresponding to a negotiation phase described by two representative particles, a local one and an external one, and two control particles, (*enable* and *name(a1)*). This atom can be considered as being the proposal made by p1 to p2 at the beginning of the negotiation.

Going on with the scenario, there is assumed that within the *a1* atom of the $s_1$ negotiation sequence, the *clone_propose(a1, a2, cost=18K delay=3)* event was introduced in order to announce a new proposal.

By using the *Propose* method, the $s_1$ negotiation sequence will contain two atoms (see Figure 3.b)): a1 atom that has changed by consuming the *clone_propose* particle and an a2 new atom, which is the a1 clone (representation particles not involved in the method remain unchanged in the two atoms). The expression of this method is:

*name(Id) @ enable @ clone_propose(Id, New_ id, Msg)<>- (enable @ name(Id)) & ( freeze @ name(New_ id) @ propose(Rname, Content))*

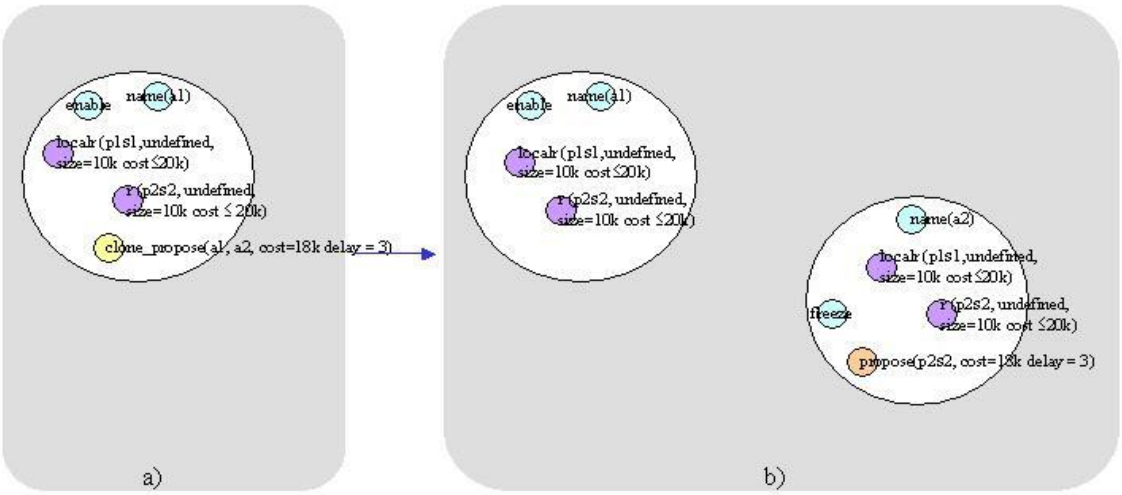



**Fig. 3.** a) – Proposal of p1 to p2 contained in a1atom, b) – Transformation of a1 atom in a2

From now on, the negotiation is described through the two negotiation atoms, in which the negotiation process can evolve independently.

The following methods will help us to model the fact that the (*name*, *freeze*, *propose*) new particles introduced in the a2 atom will make that the negotiation phase attached to this atom have a different evolution in comparison to that of a1 atom.

For the *propose* particle, the following method will be used:

*freeze @ localr(Rname1, St1, I1) @ extr(Rname2, St2, I1) @ propose(Rname2, Content)<>- enable@ localr(Rname1, undefined, I) @ extr(Rname2, undefined, I)*

This method exchanges the representation particles, which preserve the old values of the attributes, with the new representation particles that describe the new proposals received.

Thus, to move from an *extr(p2s2, undefined, size=10K cost≤20K)* representation particle, and from a *propose(p2s2, cost=18K delay=3)* message particle to an *extr(p2s2, undefined, size=10K cost=18K delay=3)* representation particle, the existence of a computational-type particle called *construct(I1,Content,I)* has been supposed, which calculates this transformation (see Figure 3.c)).

The expression of this method is:

*freeze @ localr(Rname1, St1, I1) @ extr(Rname2, St2, I1) @ propose(Rname2, Content) @ {construct(I1,Content,I)} <>- enable @ localr(Rname1, undefined, I) @ extr(Rname2, undefined, I)*

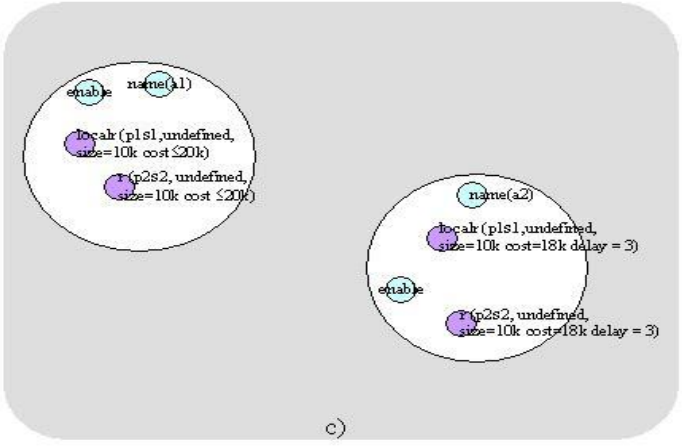



**Fig. 3. c)** Evolution of a1 and a2 atoms

Step 2

Further, we assume that p1 participant examines the two proposals and decides to accept the second proposal. Acceptance is modeled as follows:

i) the atom containing the proposals to be accepted is duplicated by *Accept* method associated to an event *clone_accept()* particle;

*name(Id) @ enable @ clone_accept(Id, New_ Id, Msg) <>- (enable @ name(Id)) & ( freeze @ name(New_ Id) @ accept(Rname))*

ii) the clone atom evolves by consuming the *accept()* message particle;

*freeze @ localr(Rname1, St1, I1) @ extr(Rname, St2, I1) @ accept(Rname) <>- localr(Rname1, success, I1) @ extr(Rname, success, I1)*

Thus, in Figure 3.d) the s1 negotiation sequence of a p1 participant is composed of three negotiation phases. The third a3 atom contains a negotiation phase in which *success* is the negotiation status.

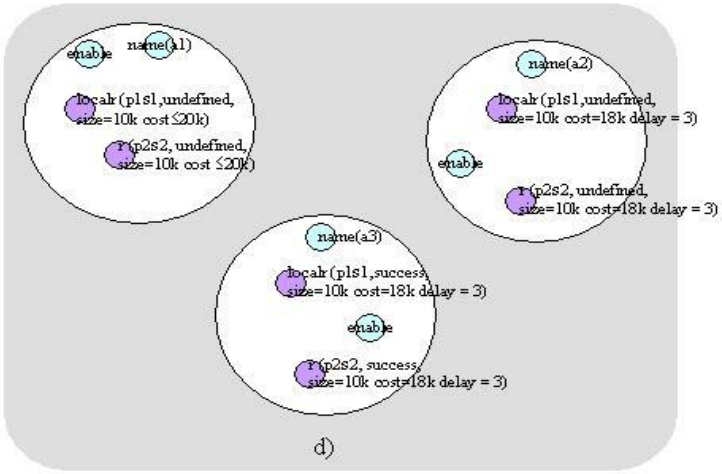



**Fig. 3.d)** Negotiation phases of the s1 sequence of a p1 participant

Step 3

The a3 atom can thus be perceived as the image of a negotiation phase on which the two participants have agreed. The existence of this agreement has to imply the fact that the negotiation has to come to an end.

In Figure 3.e), a3 atom changes its state and, at the same time, communicates to the other atoms to stop. The expression of this method is:

*localr(Rname1, success, I1) @ extr(Rname2, success, I1) @ ^stop(I1) <>- ready(I1)*

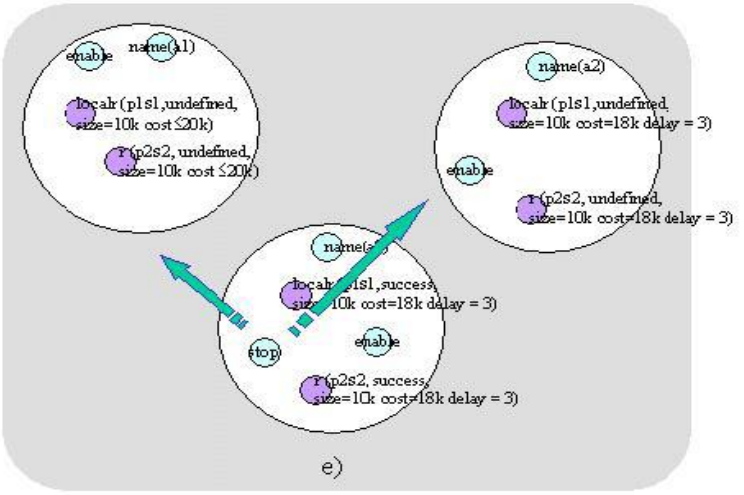
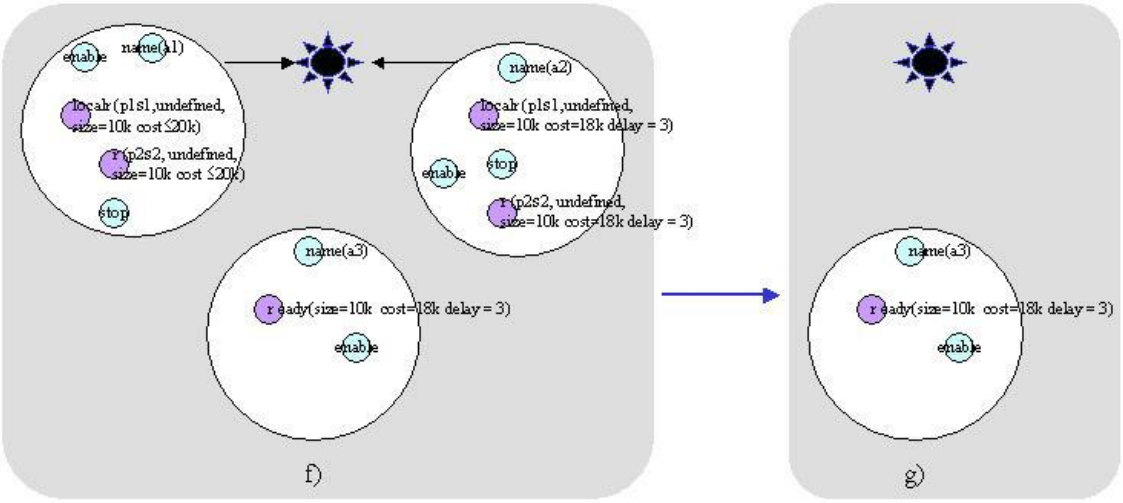



**Fig. 3.e)** Transformation of a3 atom state

The method *stop <>- #t* makes that, at a certain moment, the atoms containing *stop* particles be dissolved (see Figure 3. f.), the only active atom being the one containing the agreement (see Figure 3.g)).




**Fig, 3. f)** Dissolution of a1 and a2 atoms containing stop particle, **g)** The active atom: a3 atom containing the agreement

Thus, in this section, the negotiation process by using the IAMs metaphor has been defined, and the negotiation composed of a set of negotiation sequences has been modeled. Each of these sequences was represented by a set of negotiation atoms, which, at their turns, each of them administrates independently a private negotiation phase as well as the set of the snapshots associated to the phase.

A snapshot describes the status of the negotiation and the set of the negotiated attributes. Also, a negotiation is characterized by the role of participants and the policy of coordination attached to it. These policies can be described by using different methods. The proposed model of the negotiation process allows describing the evolution of a negotiation by a parallel development of negotiation atoms associated to methods modeling the coordination policy.

In the next sections, the coordination model will be defined by using this describing model of the negotiation process. Our objective is to achieve a correspondence between the coordination policy that a sequence has to satisfy (static model), and the set of methods modeling the evolution in time of a negotiation sequence (dynamic model).

Figure 4 shows the architecture of the collaborative system:

Given that each negotiation is composed of a set of negotiation sequences, the coordination process of one or more negotiations will be structured into modules (services) that correspond to the sequences involved in the negotiation.

In the next section, we will briefly describe the architecture of the negotiation system in which the interactions take place.

## 4. The Collaborative Negotiation Architecture

The main objective of this software infrastructure is to support collaborating activities in virtual enterprises. In VE partners are autonomous companies with the same object of activity, geographically distributed.

Taking into consideration, the constraints imposed by the autonomy of participants within VE, the only way to share information and resources is the negotiation process.

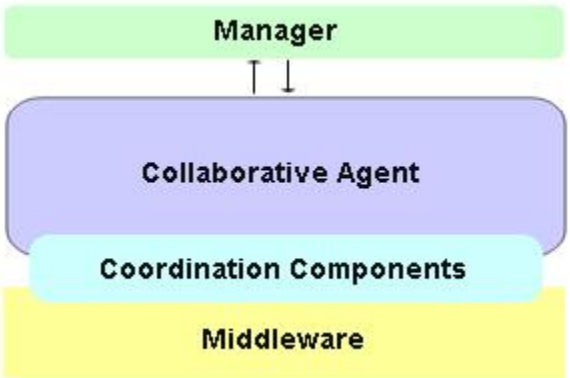



Fig. 4. The architecture of the collaborative system

This infrastructure is structured in ***four*** main ***layers***[1]: Manager, Collaborative Agent, Coordination Components and Middleware. A first layer is dedicated to the Manager of each organization of the alliance. A second layer is dedicated to the Collaborative Agent who assists its gas station manager at a global level (negotiations with different participants on different jobs) and at a specific level (negotiation on the same job with different participants) by coordinating itself with the Collaborative Agents of the other partners through the fourth layer, Middleware[2]. The third layer, Coordination Components, manages the coordination constraints among different negotiations which take place ***simultaneously***.

A Collaborative Agent aims at managing the negotiations in which its own gas station is involved (e.g. as initiator or participant) with different partners of the alliance.

Each negotiation is organized in three main steps: initialization; refinement of the job under negotiation and closing[3]. The initialization step allows to define what has to be negotiated (Negotiation Object) and how (Negotiation Framework)[4]. A selection of negotiation participants can be made using history on passed negotiation, available locally or provided by the negotiation infrastructure[5]. In the refinement step, participants exchange proposals on the negotiation object trying to satisfy their constraints[6]. The manager may participate in the definition and evolution of negotiation frameworks and objects[7]. Decisions are taken by the manager, assisted by his Collaborative Agent[8]. For each negotiation, a Collaborative Agent manages one or more negotiation objects, one framework and the negotiation status. A manager can specify some global parameters: duration; maximum number of messages to be exchanged; maximum number of candidates to be considered in the negotiation and involved in the contract; tactics; protocols for the Collaborative Agent interactions with the manager and with the other Collaborative Agents [9].

## Conclusions

This paper proposes an intelligent mechanism for modeling and managing parallel and concurrent negotiations. The business-to-business interaction context in which our negotiations take place forces us to model the unexpected and the dynamic aspects of this environment. An organization may participate in several parallel negotiations. Each negotiation may end with the acceptance of a contract that will automatically reduce the available resources and it will modify the context for the remaining negotiations. We have modeled this dynamic evolution of the context using IAMs metaphor that allows us to limit the acceptance of a negotiation to the available set of resources. The proposed negotiation infrastructure aims to help the different SMEs to fulfil their entire objectives by mediating the collaboration among the several organizations gathered into a virtual enterprise.

A specific feature that distinguishes the negotiation structure proposed in this work from the negotiations with imposed options (acceptance or denial) is that it allows the modification of the proposals through the addition of new information (new attributes) or through the modification of the initial values of certain attributes (for example, in the case of gas stations the gasoline price may be changed).

In the current work we have described in our collaborative mechanism only the interactions with the goal to subcontract or contract a task. A negotiation process may end with a contract and in that case the supply schedule management and the well going of the contracted task are both parts of the outsourcing process.

In order to illustrate our approach we have used a sample scenario where distributed gas stations have been united into virtual enterprise. ***Take into consideration this*** scenario**,** one of the principal objectives was related to the generic case and means that this proposed infrastructure can be used in other activity domains.

Regarding research perspective continuation, we will focus on the negotiation process and the coordination process taking into consideration the contracts management process. In this way the coordination can administrate not only the dependence between the negotiations and the contracts which are formed and with execution dependences of those contracts.

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# ASSET PRICING IN A CAPITAL MARKET

**Valentin Gabriel CRISTEA**[*]**

**Abstract**

*This research shows us risks in acquiring assets on capital markets. Behavior of investors uses limited rational theory, adaptive theory of expectations and mind theory. Simon asserted in 1955 that "a normal human being is not entirely rational in making his decisions because of various heuristics and behavioral prejudices." The hypothesis of adaptive expectations asserts that "adaptive rationality of human preferences and expectations, given that individual decisions are prefered over time, incomplete information, and different learning environments" (Brocas and Carrillo, 2000; Hey, 1994). Compared to EU firms investing in the financial market, Romanian firms invest less because of poor asset quality, labor market uncertainty and inadequate transport infrastructure, according to the EIB survey of December 4th, 2018.*

**Keywords:** *asset, debt, pricing, capital market, financial market, risks.*

## 1. Introduction

Asset pricing theory is an important foundation for financial theory, practice and policy. The asset pricing model is dated on 1960s evolves and it was improved over time.

The behavioural asset pricing centers on the role of behavioural forces on investor, asset prices, and market behaviours. The behavioural finance views investors are not rational in their investment decisions. This means systematic deviations of asset prices and market efficiency from rational point of view. In respect with this, Shiller, 1981; Shefrin and Statman, 1985; De Long et al., 1990; De Bondt, 1998; Shleifer, 2000; Baker and Nofsinger, 2002; Shiller, 2003; Shiller et al., 1984; Statman, 2008, many evidence point to the ideas that the pricing in the stock market is complex, and relies not only on the fundamental forces, but also on human emotion and mistakes.

### 1.1. Asset pricing testing strategy

Based on the above theoretical perspectives, the behavioural asset pricing theory ensures theoretical foundation on the roles of both fundamental and behavioural risk factors in asset pricing determinants modelling. Acket et al., 2003; Lucey and Dowling, 2005; Statman et al., 2008 studied multiple sources of behavioural risks that could be categorized as cognitive heuristics (cognitive shortcut) and affective biases (sentiment, emotion, and mood). Then, in practice, Baker and Wurgler showed in 2007 that there are issue related to the choice of behavioural factors; how to measure them, how to understand the variations in investor behaviour over time, and how to determine which stocks have limited arbitrage potential. Moreover, empirical evidence highlighted that risk and returns relationships are heterogeneous due to many causes.

In asset pricing testing strategy, the factor and style investing framework has been employed to collect the heterogeneous risk-return relationships. Baker and Wurgler, 2006, 2007; Kaplanski and Levy, 2010; Kurov, 2010) demonstrated that the behavioural

finance paradigm is giving an alternative views on the roles of factor and style investing in asset pricing behaviour. In factor investing, it has been observed that the firms' equity risk and returns profile are heterogeneous given different firm and industry characteristics. In style investing, Graff, 2014, behavioural finance interest is to capture specific stocks that are prone to behavioural risks influence.

Based on the above theoretical perspectives, the behavioural asset pricing theory provides theoretical foundation on the roles of both fundamental and behavioural risk factors in asset pricing determinants modelling.

## 2. Content

The foundations for investor behaviours are found on bounded rational theory, adaptive expectation theory, and theory of mind. Simon said in 1955: "The bounded rational theory asserts that a normal human being is not entirely rational in his/her decision making due to various behavioural heuristics and biases". Brocas and Carrillo, 2000; Hey, 1994 stated that this theory is complemented with the adaptive expectation hypothesis that postulates adaptive rationality of human preference and expectation given that individual decisions are under timeinconsistent preferences, incomplete information, and different learning environment. Meantime, the theory of mind provides a cognitive neuroscience perspective to justify the dual process -cognitive and affective- on the human neural basis that rationalizes the rational -cognitive logic- and irrational -cognitive heuristics and affective bias- affect human decision making stated Camerer et al., 2005; Shimp et al. in 2015.

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Shefrin and Statman studied in 1994 the behavioural asset pricing theory that provides theoretical foundation on the roles of both fundamental and behavioural risk factors in asset pricing modelling. Statman assume in 2008 four statements in the behavioural finance asset pricing models (BAPM): (i) investors are normal, (ii) markets are not efficient, (iii) investors design portfolios according to the rules of behavioural portfolio theory, and (iv) expected returns follow behavioural asset pricing theory. The behavioural portfolio theory (Shefrin and Statman, 2000) proposed an optimal portfolio construction that is segregated into multiple mental accounts that resemble both bonds and lottery like features. Shefrin and Statman (1994) stated the behavioural asset pricing theory which focuses on firm features or characteristics that are possibly describe what normal investors want namely utilitarian, expressive, and emotional benefits studied by Shefrin and Statman, 1994; Statman, 2008.

The behavior of the financial market is explained by the study of the limited rational market and the adaptive market hypothesis. Miller suggested in 1987 the limited limited market theory (Bounded-EMH) as the result of rational limited human behavior. Lo introduced the adaptive market hypothesis in 2004, 2005, 2012. Nawrocki and Viole showed in 2014 that these theories provide a theoretical basis for the dynamic behavior of financial markets due to a complex combination of investor behavior that adapts to changes in time, information and technology.

Fundamental factors are based on firm fundamentals and macroeconomic fundamentals. Company fundamentals - The role of accounting variables on stock returns is reported in the equity model (Ohlson (1995)). Graham and Dodd (1934) used the use of accounting information in stock valuation in "the practice of choosing to justify the farm is limited to dividend yields (DY), earnings per share (EPS) and earnings ratio (PER)." These variables are the only information reported in newspapers and are available to all investors. Lee and Lee (2008), Ong et al. (2010), Tee et al. (2009) and Thim et al. (2012) provided empirical evidence to support these statements. For eaxample, the importance of EPS in influencing the return of shares in Malaysia is supported by Pirie and Smith (2008) and Thim et al. (2012). Indeed, support for DY as one of the determinants of return of shares in Malaysia is provided by Pirie and Smith (2008), Dehghani and Chun (2011), Kheradyar et al. (2011) and Lee and Lee (2008), Economic Factors determine the firm's business and therefore return stocks as postulated in the theory of arbitration prices according to Ross, 1976. Clare and Priestley, 1998; Ch'ng and Gupta, 2001, show that "the evidence of macroeconomic factors that are significant in explaining stock prices in Malaysia is not conclusive." This research shows that macroeconomic factors are determinants. Considering several larger macroeconomic variables, three aggregate indicators of the macroeconomic index, namely the Coincident Index (CI), the Lead Index (LEI), and the LAI, are used. Izani and Raflis, 2004 showed that variables were significantly correlated with stock yields in Malaysia.

H1: Company fundamentals determine stock returns.

H2: The main macroeconomic factors determine stocks.

According to the survey provided by the EIB in December 2018, "investment firms remain focused on replacement and tangible assets". The EIB says that "investment in intangible assets is below the EU level (25% vs. 36%)." The innovation-focused analysis of Romanian firms shows that "most innovative firms use solutions rather than their development," says the EIB "Approximately 12% of companies face funding constraints and dependence on domestic sources of funding remains high," the EIB quotes. "Access to finance is a major problem in Romania than in other EU countries, and innovative firms in the field advanced technologies, find it hard to find external financing. "The lack of adequate transport infrastructure is a major obstacle for Romanian companies compared to similar EU enterprises", says the report. "The lack of adequate transport infrastructure is a major obstacle for Romanian companies compared to similar enterprises in the EU", concludes EIB.

This research gives an insight into the theory and practice of price behavior of assets. This research has shown that the asset pricing model includes fundamental risk factors (ie firm and macroeconomic fundamentals) and behavioral variables (ie investor sentiment and emotion), both through rational and irrational elements of investor decision.

Shefrin and Statman in 1994 explained the role of behavioral factors in inventory returns, while the popular behavioral factors invested are investor sentiment and investor sentiment. For sentiment, this article shows that consumer sentiment index (CSI), business conditions index (BCI), and stock index futures (FKLI) are behavioral factors. These indicators represent consumer opinion, business and institutional investors. Mat Nor et al., 2013; Tuyon et al., 2016). (Ahmad and Rahim, 2009, Chan, 1992, Cornell, 1985, Garbade and Silber, 1983, Stoll and Whaley, 1990 used these variables to explain Malaysian behavioral factors, because institutions normally use this mechanism as a hedging mechanism (Tuyon et al., 2016). In terms of emotions, this research proposes an emotional index through the volatility of the stock market, which is the investor's emotion in terms of Taylor (1991) demonstrated that negative events evoked rapid, rapid and social psychological, cognitive and emotional reactions rather than positive ones. Lo and Repin (2002) noted that traders with more experience experienced a stronger excitement in response to short-term market fluctuations than more experienced traders.

H3: Investors' sentiment affects the return on equity.

H4: The investor's emotion determines the stock.

In practice, there are the results of this research that highlight useful practical implications. As a rule, behavioral risks distorting fair fundamentals must be controlled both in risk modeling and in portfolio management. In portfolios management, Shefrin and Statman (2000) created behavioral portfolios theory and showed an optimal portfolio construction that is spread over several mental accounts that resemble both bonds and lottery features. Mauboussin, in 2002, points out that "an adapted investment strategy is argued to be more efficient in a complex market system that changes over time due to constant information and technological change." In line with this intuition, several authors have proposed behavioral investment approaches as follows. Livanas (2007) shows that the value of portfolio gains should be greater than the value of portfolio losses to hedge investors' risk of asymmetric risk tolerance. Ma (2015) described three different ways to develop investment strategies with the ability to adapt to economic regimes, market yields or changes in market volatility. Jacobs and Levy (2014) wrote about the dynamic selection and diversification of the portfolio must take into account the multidimensional source that affects the return on inventories. Montier (2007) highlighted the need to have portfolios and risk diversification strategies.

In theory, investors are assumed to be rational and adaptive human beings, demand for stocks would be influenced by rational (fundamental) and irrational (behavioral) forces. We can reconcile the previous ones with the interdependent behavioral theories of the decision, the limited rational theory (Simon, 1955), the theory of perspectives (Kahneman and Tversky, 1979) and the adaptive expectation of human behavior (Tinbergen, 1939). Moreover, it is important for investor investors that there is a risk that investors will be forced to pay for their investment. Due to the limited adaptive nature of investor behavior, stock prices will have dynamic behavior. Dynamics show that inventory trends in nonlinear fashion relationships and risk / return relationships are heterogeneous under certain conditions. This was shown by previous researchers as (Baur et al., 2012; Blume and Easley, 1992; Fiegenbaum, 1990). The limited-adaptive trait of behaviour behavior of the investor and behavioral dynamics will lead to limited, adaptive market efficiency as postulated in EMH (Miller, 1987) and AMH (Lo, 2004, 2005, 2012). Current research complements the theoretical research of empirical evidence on the predictability and adaptive nature of capital market efficiency / inefficiency (Kim et al., 2011).

Research has studied and found that both fundamental and behavioral risks should influence the return on assets, thus quasi-rational risk factors. Within the multifactorial model of pricing of existing assets, both economic and firm foundations have been recognized as a source of risk in equity investments, namely fundamental risks. They were most investigated separately. Ross's APT framework motivates economic factors, and firm foundations have been investigated according to Graham and Dodd's (1934) own equity model, or Ohlson's own equity modeling model (1995). This research combined these two factors into the multifactorial factor of asset pricing. For macroeconomic factors, instead of using individual economic variables as commonly used, this research uses three macroeconomic indices (coincident index, leadership index, delayed index) that represent large economic variables. For a fundamental farm, this research uses three robust fundamentals (earnings ratio, dividend yield, earnings per share) that are commonly used by industry practitioners to assess equity. In short, all of these fundamental factors are very significant in influencing returns. Behavioral Risks - In the behavioral research of existing asset prices, the risk of popular behavior used is emotion and emotion. In general, these behavioral variables are significant in influencing the return of shares in Malaysia and provide confirmation of evidence of the validity of the BAPM framework (Shefrin and Statman, 1994).

Heterogeneity of risk-return relationships - Given the limited investor rationality, the predictability of risk-return relationships is also expected to be heterogeneous for various reasons. The empirical conditions that determine the heterogeneous relationships between risk and profitability relationships are the characteristics of the industry (Kaplanski and Levy, 2010, Kurov, 2010), the characteristics of the firm (Baker and Wurgler, 2006, 2007), market states in loss and earnings Bassett and Chen, 2001; Lee and Li, 2012; Ni et al., 2015; Pohlman and Ma, 2010). Therefore, in the asset pricing test, the pooling of stocks in similar industry groups and company-specific groups provides companies with a homogeneous feature to correct the possible source of specification (Barber and Lyon, 1997; Filbeck et al., 2013 ). This research examines possible differences in behavioral risk impacts on defensive and speculative industrial stock groups, with the belief that the latter is subject to behavioral prejudices. While company-based subgroups of portfolios are segmented on the basis of size, value and prices due to differences in return on inventories in different company characteristics documented in existing literature (Banz, 1981, Rosenberg et al., 1985, Shefrin, 2000; Drew and Veeraraghavan, 2002). This research classifies the penny stock based on 1 ringgit or lower share price, according to De Moor and Sercu (2013). Behavioral Finance Students have argued that the relationship between stock characteristics and trading behavior is due to different psychological traps (Chang et al., 2015). In particular, company characteristics use investors to distinguish the group that has a higher or more popular relative value. In investment practice, popular stocks are in news and are highly traded by retail investors. As such, popular stocks may be associated with a misinterpretation of farm characteristics, which is not due to fundamental elements (Ibbotson and Idzorek, 2014; Shefrin, 2015).

As far as the small business is concerned, they are recommended by many analysts, despite the fact that they have a higher risk and are highly speculative stocks, because these stocks are attractive, affordable and popular among retail investors with a presence (Bhootra, 2011; Chandra and Reinsten, 2011; Chou et al., 2012; Wood and Zaichkowsky, 2004).

Behaviors have a greater impact in negative situations (with the states in crisis market). Behavioral factors during the crisis period depend and are higher than in non-crisis periods. Influences of fundamental and behavioral risks are stronger in crisis than in non-crisis situations. This judgment is embraced by a higher individual coefficient for these risk factors during the crisis state. Hence, investors are more sensitive and sensitive to negative and negative news. They are panicked in the event of a market crisis.

Analyzing in addition the lag effect of fundamental and behavioral factors on return of inventories, delayed accounting variables are performed to mitigate concerns about the delayed effect of inventory returns. The economic and behavioral effects will be delayed to determine the feedback effects of historical return information. All fundamental and behavioral variables are significant determinants of return of shares. It is noticed that in crisis situations dynamic / risk relations are distorted.

Basic analyzes are conducted by the European Investment Bank (EIB) on Romanian companies samples to observe the current effects of the determinants on stock returns.

The results obtained revealed four models, namely fundamental factors, economic fundamentals, behavioral factors and combined factors. In the first models, all firm and economic fundamentals determine the profitability of stocks. It is noted that all behavioral factors are significant. In the latter model, all fundamental fundamental factors remain significant determinants of risk. However, economic risks and behavioral risks are significant. Statistics show that behavioral factors remain very influential in determining stock returns, followed by firm fundamentals and, ultimately, economic factors with minimal influence on stock performance.

Jacobs and Levy (1988) have introduced the disadvantage of the industry and the effects of the firm on the purification of real resources. Jacobs and Levy, 2014 showed the consistency of this idea. The research in question studies and expands this idea from the perspective of behavioral finance. The ideas of Jacobs and Levy can be expanded through this analysis to provide a discussion of the disaggregation of behavioral effects across different stock groups to find and manage the degree of risk of risky behavior in the equity portfolio.

In the asset pricing model, it is tested on different groups of industrial companies. The industry group can be divided into defensive and cyclic industrial groups. All core risk groups have a significant value in stocks in the defensive industry. Concerning behavioral risks, we can see that only two behavioral risks are significant as risk factors. This is in line with the theory that defensive stocks should be less vulnerable to behavioral risks.

## 3. Conclusions

"Access to finance is a major problem in Romania than in other EU countries, and innovative firms in the field advanced technologies, find it hard to find external financing. "The lack of adequate transport infrastructure is a major obstacle for Romanian companies compared to similar EU enterprises", says the report. "The lack of adequate transport infrastructure is a major obstacle for Romanian companies compared to similar enterprises in the EU", concludes EIB.

This research gives an insight into the theory and practice of price behavior of assets. This research has shown that the asset pricing model includes fundamental risk factors (ie firm and macroeconomic fundamentals) and behavioral variables (ie investor sentiment and emotion), both through rational and irrational elements of investor decision. Asset pricing is achieved through the factor and style investment Framework to provide behavioral justification on the role of investment characteristics and style. Empirical analysis demonstrates limited instability and heterogeneity of risk factors (dynamic). The previous analysis is in line with the behavioral theories mentioned and previous empirical evidence reflected in the literature of financial behavior. For practitioners, research findings show how we can manage the dynamic risk-return relationship and excessive exposure to behavioral risks using the suggested behavioral risk quadrant. There are many possible sources of behavioral risks, characteristics, style and possibly new elements that can determine the heterogeneity of risk / return relationships in the impact of asset price formation in financial research. These issues need to be investigated in future behavioral pricing research on global assets.

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# APPLICATIONS OF FAIR VALUE PRICING

**Valentin Gabriel CRISTEA***

**Abstract**

*The 2008 crisis prolonged and deepened divergences in fair value measurement as the most reliable and other measurement systems. The introduction of IFRS 13 contributed to improved results at the level 3 asset prices observed in companies operating on the Bucharest Stock Exchange. The literature has shown that in International Financial Reporting Standards (IFRS) 7, different levels of fair value are relevant to value.*

*This research analyzes market prices of the different levels of fair value hierarchy reported under IFRS 7. It is noted that fair value assets measured at different levels of hierarchy are relevant for value, while liabilities are valued differently.*

**Keywords:** *asset, asset prices, pricing, liabilities, fair value measurement, levels of fair value.*

## 1. Introduction

Song et al., 2010, described the model used to calculate the correct values are based on unobserved or firm values generated data and are also referred to as brand-to-model, unlike Level 2 financial instruments.

In this study we specifically discover the effects the requirements of IFRS 7 on the Romanian financial sector were also written by Song et al., 2010 and Goh et al. 2009. The market reaction is examined against the fair value (assets and hierarchy levels reported under IFRS 7). The study applies to all listed companies on the BVB Bucharest Stock Exchange. BVB is relevant in this respect links the economy of Romania and the global economy.

The World Economic Forum (2016) classifies BSE on the largest stock markets in the world, according to the Global Competitiveness Index.

### 1.1. The different fair value levels

Using the balance sheet and the Ohlson model (1995), the results of this article shows that the fair value of tier 1, 2 and 3 assets as and the fair value of debt level 3 are relevant over time, while the fair value of liabilities 1 and 2 is irrelevant.

The calculations also show that the setting of market prices for the level 2 and 3 fair value assets (debts) is not lower for rating companies the high debt to low debt equity. In this respect, the calculations show that the price at level 3 assets improved by the introduction of IFRS 13 and the position the 2008 financial crisis. The article in question, An additional advantage of this article is that he searches for differentiated prices in the three correct ones value levels for IFRSs when there was a level comprehensive and binding. IFRS 13 shows how to the fair value is measured on the three levels of hierarchy and compare it with pre-IFRS 13. Deaconu et al. (2010) stated that, prior to the mandatory application of IFRS 13, it must to disclose the hierarchy levels in IFRS 7. IFRS refers to the Statement of Financial Accounting Standards (SFAS) 157. SFAS 157 represents the Financial Accounting Standards (FASB) equivalent to IFRS 13; SFAS157 and IFRS 13 to handle the measurement of the fair value and thus to influence the value presentation of IFRS 7. Hopewell Hlatshwayo and Mbalenhle Zulu showed that "Deaconu et al. did not disclose accurately hierarchy in terms of IFRS 7 during the sampling period because there was no complete and mandatory description a fair value measurement standard in accordance with European standards in the IFRS 7 disclosure requirements. "

The introduction of IFRS 13 has had an impact on investors' perception in terms of liquidity and information asymmetry of assets (liabilities) with fair value of level 2 and 3, as they exist now a comprehensive standard dealing with fair value.

The results of this study is important for standard suppliers and investors and will help you understand the impact of fair value hierarchy presentation IFRS 7 in financial sector in Romania.

The article is organized as follows: firstly, relevant literature is presented and it is specified hypotheses. Sample selection is described procedure, data and method of research to be used in the study and then discussing the results of the study, and finally exposing conclusion.

## 2. Content

Measuring fair value is important because the values of financial instruments presented in the statement the financial position influences the disclosure of the fair value hierarchy of IFRS 7. IFRS 13 defines " fair value as a price that would be received to sell an asset or to pay to transfer a debt into one the orderly transaction between the market participants from measurement data "(IASB 2011). Using the above, we plan to measure the assets and liabilities that are not traded on active markets, because fair values

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need to be estimated by other methods. IFRS 13 is extremely important for this article because IFRS 7 entry into force before IFRS 13 and fair principles the values of the valuation hierarchies in IFRS 7 are determined by IFRS 13. IFRS 13 is an accounting standard that addresses the measurement of fair value, and before that there was no such approach.

Barth et al. (2001) say that studies of the relevance of value many times examine the relevance and reliability of the amount in question. Barth, Beaver and Landsman 1996; Carrol, Linsmeier and Petroni 2003; Petroni and Wahlen 1995 asserted that the information content carried by the fair values in the financial statements are relevant.

Goh et al. (2009) showed that one of the FV-A objectives is to ensure transparency in evaluation of the financial elements, to allow investors to sound economic.

In some articles, the relevance of the FV-A value is studied have produced incoherent results.

An article written by Goh et al. (2009), using a survey of US bankers, obtained that the level 1 fair value assets are significantly differently valued from fair value assets of levels 2 and 3. Moreover, there were no major differences between the level 2 and 3 assets with fair value. Song et al. (2010) conducted a study on a sample of US banks found that level 1 and 2 fair value assets are significantly different from level 3 of fair value assets. However, they do not record significant differences in pricing at fair value of level 1 and level 2. Deaconu et al., 2010 have obtained similar results to Song et al. in a study conducted on a sample of European banks. Previous results from this study are valuable through its relevance studies and are based on efficient market theory (Deaconu et al., 2010). Deaconu et al. (2010) show that during the financial crisis, in 2008 the markets were not efficient. Thus, the financial crisis might have confused effects on the results of these studies and their recognition, Deaconu et al. cites this as one of the limitations of their study. In these earlier studies, focusing on the periods before and during the 2008 financial crisis, this article focuses on the post-financial crisis of 2008, and also compares the current financial crisis to the financial crisis. Dechow, Myers and Shakespeare 2010 says that "management's decision is necessary to determine the correctness of values to some extent," while Song et al., 2010 assumes that "fair values are inherently subject to error measurement, and this creates an incentive for management to manipulate figures ". Song et al., 2010 states that "the combination of information asymmetry and sensitivity of fair values to management manipulation and error casts doubt on the reliability of fair values. " There is still a debate on the reliability of fair values, although accountant counselors seem to reach consensus on the relevance of fair value.

Some accountants such as Song and co. 2010 asserts in support of the fair value that information extracted using fair value capture the reality better, volatility and ease of financial reporting, while other scholars say that fair values are less verifiable investors because they are inherently prone to a error of estimation greater and susceptible to manipulation by those charged with governance (Penman 2007).

There are arguments against FV-A showing an asymmetry of information challenge between management and investors or owners.

De Klerk, De Villiers and Van Staden 2015 asserts that information asymmetry occurs when people who administer a the entity is different from investors or owners. So, Healy and Palepu 2001 say that "its investors owners will require relevant information to evaluate and monitoring the performance of management or companies. "

The first hypothesis analyzes the relevance of the three values and fair value hierarchy of IFRS 7. It has been established that investors need relevant and reliable information about the future revenues and cash flows.

We set that goal FV-A is to ensure transparency in the financial assessment. IFRS 7 disclosure requirement and valuable instrument categories can be seen as an instrument to achieve it.

Disclosure of different levels of hierarchy of fair value in terms of IFRS 7 allows investors to assess how financial liquidity has been calculated and determined, tools and informational risk associated with fair values.

Goh et al., 2009 concludes that the level 2 and 3 fair values have a higher risk of investor information. This is because Level 1 instruments are traded on active markets and levels, and Level 2 and 3 are not actively traded, but are based on model ratings. In this context, Goh et al. (2009) states that the level 2 and 3 fair values have a higher value, and investor information risk being input from models that are not publicly available. Goh et al. still notice that during anytime economic fluctuations active assets play a crucial role in growth capital and therefore have a price premium as far as they are moderate by liquidity surprises (Holmström and Tyrol 2001).

In contrast to liquid instruments (level 1), we assert that investors want to observe the fair values of illiquid instruments (levels 2 and 3). This argument is supported by Goh et al. through worry during the financial crisis of 2008, there were several banks with the fair values of their assets were below the market especially levels 2 and 3, thus suggesting investors most likely these assets were reduced.

The information asymmetric challenge (information risk) along with a fair value measurement error can cope unreliable amounts. Therefore, this study states that level 2 and 3 fair values are more prone to errors because they use them models of fair value determination, as they have been suggested similarly in studies on this topic (Deaconu et al., 2010, Dechow et al., 2010; Goh et al. 2009).

Epstein and Schneider (2008) show this as poor quality information may have a negative impact on prices, results in the measurement error. And we believe that in the risk of information on level 2 and

level 3 levels is high compared to level 1 as it is involved in similar studies (Deaconu et al., 2010, Dechow et al., 2010, Goh et al., 2009; Song and colab. 2010).

Investors will lower asset prices and passives with a high level of information asymmetry (Easley, Hvidkjaer & O'Hara 2002).

Hlatshwayo and Zulu showed in 2019 that "the fair value of assets level 1, 2 and 3, as well as the fair value of liabilities level 3 are value relevant".

Therefore, we affirm that fair value assets of level 1 and the debts will have the highest price combination on (value value) because they are traded on active markets and subject to less or no estimation errors and information risk. For level 2, suppose a relative value less than level 1 as active level 2 and debt is based on models, but higher than level 3.

Finally, we estimate that the level 3 assets and liabilities should have the least relevance of value, because they are based on unseen data, therefore, higher estimation errors and information risks.

Therefore, the first hypothesis is given as follows:

H1: Value of Financial Instruments " the fair values are inversely proportional to the order of the hierarchy level IFRS 7.

The second hypothesis refers to the effect of capital adequacy of the price of assets and liabilities at fair value " levels of hierarchy presented in terms of IFRS 7. Deaconu et al. (2010) affirm that banks with a poor financial position have an incentive to manage earnings by using them discretion to improve reporting on the financial situation.

Goh et al. (2010) noted that the price of investors is the largest brand-to-model asset for banks with a stronger financial position. Unlike level 1 assets and level 1 fair value liabilities, setting fair values for level 2 and level 3 activities and liabilities require management discretion.

Thus, poor capital adequacy increases susceptibility the handling of assets and liabilities with a fair value level 2 and 3 as management discretion is applied in determining them (Deaconu et al., 2010).

The second hypothesis is shown as follows:

H2: market price for 2 and 3 value assets at fair value and the liabilities presented in accordance with IFRS 7 are lower for companies with high indebtedness than companies with a report on reduced equity.

The third hypothesis is about the effect of the introduction of IFRS 13 on the pricing of different financial instruments the values of the fair value hierarchy presented in terms of IFRS 7.

IFRS 7 entered into force before IFRS 13 and previous research suggested that pre-IFRS 13 refers to SFAS 157 for guidance on disclosure of hierarchy levels with respect to IFRS 7.

This article shows that there is a possibility not all IFRS listed on SFAS 157 and having a direct direction taking into account the liquidity and the risk of informing the fair value hierarchy presented in IFRS 7 terms of IFRS 13 period. At level 1, the fair value of assets and liabilities is based on the observable prices market (Goh et al., 2009), liquidity and the risk of information is noticeably diminished. It shows that the market will react differently at levels 2 and 3 assets and liabilities at fair value reported in the period before and after IFRS 13.

The third hypothesis is:

H3: Determination of market prices for value assets 2 and 3 at fair value and obligations presented in accordance with IFRS 7 are expected to be different in the previous period and after IFRS 13.

The fourth hypothesis relates to the effects of the 2008 financial crisis on price setting at fair value hierarchy levels assets and liabilities presented in accordance with IFRS 7.

Studies on this topic have produced incoherent results and is differentiated on the three fair value hierarchies IFRS 7 levels. We affirm that the 2008 financial crisis has had confusing effects on the prices of the different the hierarchy of the fair value assets and liabilities in EUR the terms IFRS 7.

In line with our argument, Deaconu et al. (2010) shows that during the financial crisis of 2008 prices were not effective. Goh et al. (2009) showed that the financial crisis of 2008 had an accentuated liquidity risk and level 2 and risk information 3 assets with fair value. Therefore, it is suggested that it will impact the price differentiation in the three hierarchies levels during or in the period before the 2008 financial crisis.

The fourth hypothesis is expressed as follows:

H4: Differentiated price of assets and liabilities at fair value in the three levels of hierarchy presented in accordance with IFRS 7 will be different during and after the 2008 financial crisis.

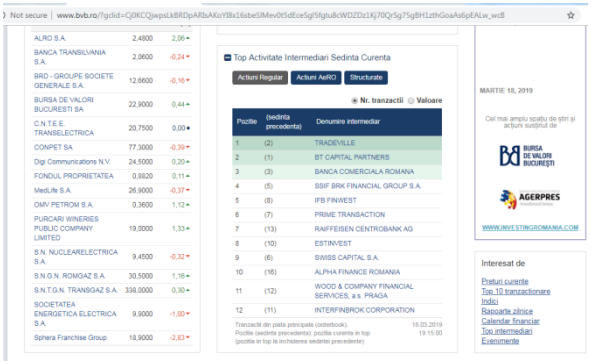
Deaconu et al., 2010 proposed the most common model used in the relevance studies of the value of the balance sheet and residual income approach. The balance sheet approach says that asset value (FVA) minus fair value of Liabilities (FVL) is equal to the market value of equity (MVE) (Landsman 1986). Although this approach is easy to understand and apply, its disadvantages are that the fair values of all assets and liabilities must be determined which is not the case; Second, not all assets and liabilities are measured at fair value; and third, not all assets and liabilities are recognized in accordance with IFRS 7 (Deaconu et al., 2010).

Barth and Landsman (1995) state that to highlight the effect off-balance sheet items, net income (NI) should be introduced in the equation to act as an intermediate for these elements.

The Residual Income Approach or the Ohlson Model (1995) tells us that the MVE is equal to the book value of equity (BVE).

The 2008 crisis prolonged and deepened divergences in fair value measurement as the most reliable and other measurement systems. The introduction of IFRS 13 contributed to improved results at the level 3 asset prices observed in companies operating on the Bucharest Stock Exchange. We note

that 12.5% of the companies that operate on the Bucharest Stock Exchange are in the banking sector. The literature has shown that in International Financial Reporting Standards (IFRS) 7, different levels of fair value are relevant to value.




Picture 1[1] from BVB website

## 3. Conclusions

"Access to finance is a major problem in Romania than in other EU countries, and innovative firms in the field advanced technologies, find it hard to find external financing. "The lack of adequate transport infrastructure is a major obstacle for Romanian companies compared to similar EU enterprises", says the report. "The lack of adequate transport infrastructure is a major obstacle for Romanian companies compared to similar enterprises in the EU", concludes EIB.

This study analyzes asset pricing and fair value the levels of the hierarchy of commitments in line with IFRS 7.

The article proposes the effects of the high debt the equity ratio and possible price differences, the result of the introduction of IFRS 13 and the impact of IFRS.

During the 2008 financial crisis, H1 results show that fair value assets in the three hierarchy levels are positive associated with share price. Contrary to expectations, the results have been completed that the hierarchical level of debt at fair value level 2 is positive associated with the share price, which presents a gap in literature for future studies. Assets and liabilities at fair value hierarchy levels are different, except for prices for assets at fair value levels 1 and 3. H1 was not confirmed in compliance with the financial sector as a whole, but has been confirmed for the insurance industry as regards fair value assets.

Our results have found that investors in the financial sector does not reduce assets and liabilities at fair value with respect to companies with a high indebtedness, but they place at reducing the value of assets and liabilities at fair value at levels 2 and 3 in the insurance industry. The H3 results show that the introduction of IFRS 13 had the effect of positive effect on asset prices at fair value at level 3 with respect to share price. For H3 we analyzed the differences within it variables between prior and post IFRS 13 and analysis of trend analyzes. Value adjusted after adoption of IFRS 13 increasing, confirming that the results are more explicative in comparison with the previous IFRS 13 period. A limitation of this study is that differences between variables have not been statistically examined, but this can be addressed in the future.

The results in H4 show that compared to the previous period and during the 2008 financial crisis, setting prices at fair value asset level 3 improved in the period following the 2008 financial crisis. However, the explanatory power of the variables used for a low H4 test in the post-crisis period compared to the pre-2008 financial crisis, highlighted by the decline. These tests also included an analysis differences between periods variables during and after the financial crisis of 2008 and trend analysis.

The limitation for the H3 result applies.

There are many possible sources of behavioral risks, characteristics, style and possibly new elements that can determine the heterogeneity of risk / return relationships in the impact of asset price formation in financial research. These issues need to be investigated in future behavioral pricing research on global assets.

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# APPLYING THE QUALITY MANAGEMENT SYSTEM AND OPTIMIZING ITS COSTS

**Andrei DIAMANDESCU***

**Abstract**

*The approach of this paper is to optimize the costs of applying the integrated quality management systems in industrial organizations. In this case, the optimization implies the determination of the limit of the costs generated by the quality system to which a maximum benefit is obtained or, in other words, the minimum cost to which the company's activities may materialize in the expected results through the implementation of the quality management system. The cost optimization for quality can be achieved in a complex way that is less used in the practice of organizations by mathematical modeling, or by an easier way – the preferred method by the practitioners – by comparing the performance of the organization with a reference standard (e.g. ISO 9001 ), which captures the difference from performance prior to the implementation of the quality management system. To justify the application of the second way (through comparisons), we propose to present the results of the study conducted by several industrial enterprises in Romania that have implemented the integrated quality management system.*

**Keywords:** *optimization, cost of quality, econometric model, quality system, standard*

## 1. Introduction

Currently, most industrial enterprises have integrated quality systems in which, along with ISO 9001, two or more ISO standards have been implemented. In this situation highlighting and optimizing costs for quality becomes more complex, less accurate and costly.

From the study we have undertaken in several industrial enterprises, it has emerged that the quality management system (TQM) based on ISO standards has made a definite improvement in the efficiency and competitiveness of enterprises. Improvement is, however, superior to companies that have implemented an integrated TQM system combined with the implementation of Kaizen continuous quality improvement methods.

As a result, we appreciate that in the future all organizations that will introduce a quality management system will assimilate the system proposed by us, namely the Integrated Management System for Continuous Quality Improvement (SIMICQ). The analysis of the efficiency of such a quality system can be achieved by mathematical modeling, but it is best suited to a methodology based on the evolution of the performance indicators, respectively, of our organization's financial indicators. Therefore, our study aims at developing a methodology for optimizing the quality costs of this model.

## 2. Optimizing the cost of the quality management system through econometric models

The implementation of the ISO quality system will generate costs on the one hand and benefits on the other hand. The decision of implementation is based on the criterion of economic efficiency, i.e. the impact that the implementation and operation of the system will have on the performance of the organization. This involves recording a minimum cost in order to obtain an expected benefit, or, in other words, getting the maximum benefit at a fixed cost, impact that we can determine with the help of appropriate econometric models. It follows that cost optimization in this case is a typical problem of mathematical analysis whose function, in relation to the objective pursued, may be maximum or minimum, as follows: either a function **F** for which there is a set of values **V** belonging to the string of real numbers **R** and ***X0*** is an element of the **R** string so that minimizing the cost for an expected result or maximizing the results at a fixed cost can be defined as:

*(1) $F(X_0) \leq F(x)$ for minimization*

*(2) $F(X_0) \geq F(x)$ for maximization*

The F (x) function is called the objective function or cost function. It follows that for the optimization of the costs of the quality management system we can use the cost - benefit model which according to relations (1) and (2) is given by the relation:

*(3)* $VNA = \sum_{n=1}^{D} \frac{B-C}{(1-r)^n}$

In which: [n = 1...D]; VNA = net updated value; B = estimated value results; C = costs;

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r = discount rate; n = reference year; and D = the horizon analyzed in years.

The goal is to maximize VNA, which is the same as determining the minimum costs. The quality generated by the ISO 9001: 2015 standard can be analyzed for a period longer than one year. Thus, to calculate the sum in equation (4) we will include these multiples of years, i.e. $VNA_0$, $VNA_1$, ..., $VNA_D$ for $n_0$ to $n_D$. This series of VNA data allows testing to determine how well the resulting VNA value falls within the proposed limit (E). The best analysis can be done by the chi-square test whose calculation relation is:

$$(4)\ X^2 = \sum (O - E)^2 / E,$$

Where: O = the obtained value; E = the expected value for the VNA

In $VNA_0$, $VNA_1$, ..., $VNA_D$, there is the highest VNA value resulting when the VNA maximum was produced at the lowest cost, that is the optimal cost. We will use the resulting VNA value as a comparison with the proposed VNAE. If this value is within the VNA> VNAE, then the corresponding VNA cost is the optimal cost.

If the difference between $VNA_1$, $VNA_2$, ..., $VNA_D$ is, for example, at 0.95 (Bradley, Hax, Magnanti, 1977) confidence interval for VNA values at time $n_0$, $n_1$, ..., $n_D$ to the degree of freedom 4 (we considered the 5-year period to confirm cost minimization or cost optimization), the chi-square values of the variables analyzed should be equal to or greater than 9.50. The optimal cost is found at the point analyzed for which the difference value is greater than 9.50.

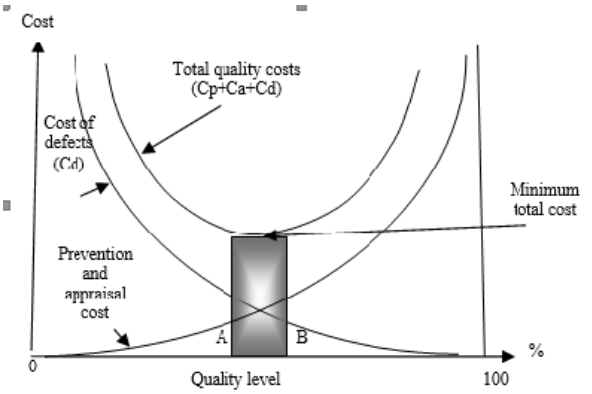
The specialty literature also presents other econometric models that can optimize the cost of the quality system. We mention the Juran model, the Schneidermann model and the improved ISO, Six Sigma econometric models.

### 2.1. The Juran Model

The basic premise of this model is that the evolution of quality costs in an enterprise is determined by two fundamental variables: prevention costs and failures costs. Each of these cost categories is represented by two curves, one decreasing – the cost of the failures (defects) and another increasing – the costs of prevention and appraisal from the chart in Figure no. 1, and their sum is even the total cost of quality that is sought to be minimized (Figure 1) (Ioniță, 2008).

According to this model, the cost-quality correlation highlights that as the new methods and techniques are implemented to prevent errors, the overall cost of quality is reduced as a result of lower costs due to the defect products. The efficiency with which resources are used in preventive purposes is maintained only up to an optimal point (in Figure 1, the shaded area between points A and B), where the minimum cost is obtained and the quality level is considered optimal. In this interval the costs of defects (Cd) are approximately equal to those of prevention and appraisal (Cp + Ca) of defective products. The efficiency with which preventive resources are used is maintained only at the optimum point where the minimum total cost is obtained. Beyond this optimal area (A and B), increasing the prevention costs leads to a further reduction in the cost of defects, but to a lesser extent compared to effort. Therefore, the total cost of quality increases faster than the quality level. As a result, it is preferable for economic agents to position themselves in the optimal area where there is a balance between the efforts to increase quality and the results that are obtained.

Fig. no. 1. Standard Model of Quality Costs presented by J. M. Juran in 1951

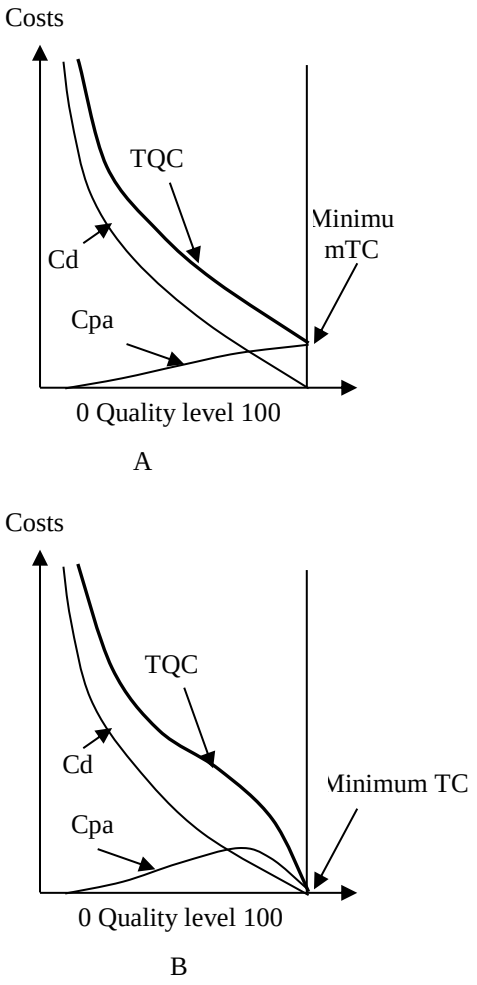



### 2.2. The Schneidermann Model

This model presents a modern approach to the correlation between cost and quality. The assumption from which it is based is the existence of a theoretical balance between the points corresponding to the minimum total cost, the prevention and appraisal cost and the cost of the failures.

According to the point where the total cost is minimal, a maximum level of quality (quality equivalent to the "zero defects" principle) is achieved, because the implementation of the continuous improvement strategy promoted by the Kaizen management model does not require infinite investment. Because short-term prevention and evaluation costs are cumulative and evolve after the equation of an ascending parable (starting at a minimum), it is considered that these two cost categories may in the long run be zero, while improving the level of quality during the period of use of the good. Thus, in the long-term, it is possible to improve the quality of excellence with low resource consumption. Schneidermann's model therefore relies on the philosophy of excellence, founded in the 1980s, that the quality obtained should not be optimal but perfect in terms of efficiency, which implies minimal expenses, considering being inacceptable the cost-quality correlation promoted by Juran's classic model. In Figure no. 2 it is represented the approach of the cost-quality correlation in the Schneidermann model (Schonberger, 1988, cited by Olaru, 1999).

Fig. no. 2 Approach cost-quality correlation in Schneidermann's model




A. minimum total short-term cost (zero defects);

B. the effects of simplification (long-term) improvement;

Cpe - the cost of prevention and evaluation;

Cd - costs of defects;

Minimum CT - Minimum total cost of quality

Nowadays in the specialty literature, there are presented improved econometric models for optimizing the quality of costs, among which, more significant, we have seen the ISO model and the Six Sigma model.

## 3. The basis for the decision of implementing the integrated quality management systems by determining the competitiveness gained by the company

If the impact of total quality management system – TQM can be measured by comparing the organization's performance with a benchmark (e.g. ISO 9001) that captures the difference from performance prior to TQM implementation or by optimizing the cost of quality using econometric models that we have presented, in the case of the quality system proposed by us the efficiency / performance will be measured by a methodology based on the analysis of the performance indicators of the organization. This orientation is based on the findings of the companies where we have been documented to prepare this paper, and where the decision to implement cost-optimized quality systems using econometric models is not approved by management.

The results of our research have highlighted several situations that justify the position of managers in this case, as follows:

- The actual reality in industrial enterprises shows that the quality system based on the ISO 9001 standard is outdated, with all industrial enterprises practicing for many years integrated quality systems so, alongside ISO 9001, they were implemented two or more quality standards. In this situation, highlighting and optimizing costs for quality becomes more complex, less accurate and costly;
- By the implementation of the quality system (TQM) based on ISO standards, there has been a definite improvement in the efficiency and competitiveness of enterprises. However, the improvement is clearly superior for companies that have applied the integrated TQM system using Kaizen continuous quality improvement methods;
- In the case of generalizing the integrated management system of continuous improvement of quality, highlighting costs and optimizing them is very complicated.

Since, as we believe, in the near future, all industrial enterprises will move to this new quality system, a methodology should be established to analyze the effectiveness of its implementation, a methodology best suited to the evolution of performance indicators, respectively financial indicators of the company.

## 4. The system of indicators of economic efficiency analysis of the integrated management system of continuous improvement of quality

The implementation of a quality management system has as its primary objective the performance of the organization. Generally, performance is associated with two key processes – performance management and measurement. Performance measurement appears as a performance management sub process, which focuses mainly on identifying, tracking and communicating performance results using performance indicators. To measure and analyze the performance of some activities, processes, and projects that are essential within the organization, it is recommended to use Key Performance Indicators (KPIs). These indicators are basic elements of the performance measurement and monitoring process that quantifies the achievements of some activities, giving visibility to the performance of organizations. More specifically, once objectives have been set to implement the decision that will lead to increased performance our case – implementation of the chosen quality system,

indicators are needed to measure the expected progress. It is this requirement that responds to the KPI, which will show the degree of achievement of the objectives. As a rule, a KPI-type indicator is expressed as a percentage or average, and it should respond in particular to the question, "Why?". Not everything that can be measured is a performance indicator. Thus, the fact that there were found, for example, 20 scrapes is not a KPI, but that there were 25% more scrap and two orders lost due to lack of customer confidence is a KPI.

Therefore, key performance indicators are quantitative measures, both financial and non-financial, on the performance of those tasks, operations or processes within the organization. The most used performance indicators are the financial ones, but the main indicators followed vary according to the industry (production, trade, professional services, etc.) and the function of the company (production, sales, human resources, financial etc.) by destination, could be the following: *strategic*, *managerial* or *operational*.

*Strategic indicators* provide information to a company's management about: return on invested capital, risk or opportunity, profit on assets used, turnover, market share, share price, employee satisfaction and customer satisfaction.

*Managerial indicators* provide management information such as availability of resources, effort level, and cost per unit of income.

*Operational indicators* provide information on individual performance – related to processes, activities, products, specifications, procedures, efficiency.

Although the enterprise's economic and financial performance measurement indicators are considered to refer to past performance, they have very useful information in economic analysis. Thus, the economic efficiency, determined with the help of the financial performance indicators, expresses, in the context of the insider's attributes, precisely the result of the implementation of the quality system, materialized in the continuous improvement of the products, processes, activities and proper involvement of the motivated employees the degree of achievement of the set goals and the satisfaction of a number of customers in line with the company's capabilities and environmental objectives.

For a helpful, meaningful analysis of the objectives we have been pursuing in the case study that we have presented, we have carefully selected the key performance indicators by choosing those who provide the competitive advantages generated by the quality system, are directly related to performance, measurable and provide comparability to various references. In order to highlight the contribution of the implementation and operation of the integrated quality management system to the improvement of the economic and financial results of the analyzed enterprise, we have used the following indicators: turnover (CA), variable costs, variable costs margin (MCV), fixed costs, operational profit, profitability threshold (PR), investment recovery term (T), economic rate of return on investment (RRE), updated net income (VNA), and economic efficiency (R).

## 5. Applying the proposed method to evaluate the efficiency of quality management system in an industrial company

The company which we will exemplify the proposed method manufactures high-tech electronics and home appliances, used for household needs. It has 2,500 employees and a turnover of 384 million Euros in 2015. The company has implemented an integrated quality management system – ISO 9001: 2008, ISO 14001: 2005, ISO 50001: 2011, implemented in two stages. In 2007 it was implemented the integrated system ISO 9001: 2008 and ISO 14001: 2005, and since January 2014 it was also implemented the ISO 50001: 2011 standard, being a high-energy consumer enterprise.

Together with this integrated quality system, the company has implemented, since 2014, the Kaizen continuous improvement quality management system. Thus, "*6 sigma methods*", "*total productive maintenance*", "*just in time*" have been integrated. As will be shown below, the implementation of the quality management system has had a strong impact on the efficiency of the company.

We have made this case study to demonstrate the efficiency of the implementation and operation of the integrated management system for the continuous improvement of quality in industrial organizations. Thus, we have first analyzed the impact of the implementation of the integrated quality system, comprised of the three previously mentioned standards, for the period 2006-2011 and then the one generated by the combined action of the integrated system and the integrated system of continuous improvement of quality for the period 2011-2015, under the conditions of application of the Kaizen methods.

### 5.1. Analysis of the efficiency of implementing the integrated quality system in the company during the period 2006-2015

Table 1: Excerpt with the company's financial data before the implementation of the quality management system (Year 2006)

| Economic indicator | Value (thousand Euros) | Percentage of turnover, % |
|---|---|---|
| Turnover | 190,000 | 100.00 |
| Variable costs | 114,750 | 60.39 |
| Variable Cost Margin (MCV) | 75,250 | 39.61 |
| Fixed costs | 66,500 | 35.00 |
| Operational profit | 7,030 | 3.70 |

With these values, the profitability threshold can be determined by the formula:

$$PR = \frac{CF}{MCV} \times 100$$

CV – Variable costs;

MCV – Variable Cost Margin;

PR – Profitability threshold;

CF – Fixed costs;

$PR = \frac{66,500}{75,250} \times 100 = 88.37\%$ of the production capacity

Thus, the profitability threshold expresses the minimum percentage of activity reported to the production capacity, for which the profit is null.

The results show that for the analyzed company the profitability threshold is 88.37% and in absolute values 167907 thousand Euros.

If the variable cost margin is used, determined as a percentage of the turnover, the profitability threshold value is reached, i.e. the minimum value of the turnover for which the profit is null. The calculation formula is:

$PR = \frac{CF}{MCV\%} = \frac{66,500}{39.61\%} = 167,887$ thousand Euros

In the same year, the total costs of non-quality, represented by the cost of internal and external defects, which amounted to 28,000 thousand Euros, equivalent to 14.74% of the turnover, were quantified. This means that, in fact, the actual variable costs were only 75,250 × (100 – 15) = 63,963 thousand Euros, and the difference, amounting to 11,287 thousand Euros, represents non-quality costs.

The successful **implementation of the quality management system** meant a considerable improvement of the economic indicators, which is noticeable by consulting the company's financial data for 2011 (Table 2).

Table 2: Excerpt with the company's financial data after the implementation of the quality management system (Year 2011)

| Economic indicator | Value (thousand Euros) | Percentage of turnover, % |
|---|---|---|
| Turnover | 253,000 | 100.00 |
| Variable costs | 153,000 | 60.47% |
| Variable Cost Margin (MCV) | 100,000 | 39.53% |
| Fixed costs | 90,330 | 35.70% |
| Operational profit | 12,905 | 5.1% |

As you can see, the value of the turnover reached 253 million Euros. Stabilization of the manufacturing process has led to a reduction in the cost of defects, which has resulted in an 84% increase in profit over 2006.

The results show that the profitability threshold is 90.3% in 2011 and in absolute values of 228,510 thousand Euros.

$PR = \frac{CF}{MCV\%} = \frac{90,330}{39.53\%} = 228,510$ thousand Euros

$PR = \frac{90,330}{100,000} \times 100 = 90.33\%$ of the production capacity

The fact that the profitability threshold is higher than in 2006 can be explained by the faster growth of turnover and investment.

Also for the year 2011 were quantified the total costs of non-quality, represented by the cost of internal and external defects, which amounted to 23,276 thousand Euros, equivalent to 9.2% of the turnover. This means that, in fact, actual variable costs were only

100,000 × (100 – 9.2) = 90,800 thousand Euros, and the difference of 9,200 thousand euro represents non-quality costs.

The successful **implementation of the integrated quality management system and the integrated quality continuous improvement system** meant practically an approach to reaching the zero defective target, as can be seen from table no. 3, with the company's financial data for 2015.

Table 3: Excerpt with the company's financial data after the implementation of the integrated quality management system and the integrated quality continuous improvement system (Year 2011)

| Economic indicator | Value (thousand Euros) | Percentage of turnover, % |
|---|---|---|
| Turnover | 384.000 | 100.00 |
| Variable costs | 230.400 | 60.00 |
| Variable Cost Margin (MCV) | 153.600 | 40.00 |
| Fixed costs | 134.400 | 35.00 |
| Operational profit | 19.200 | 5.00 |

As shown in Table 3, the turnover reached 384,000 thousand Euros, representing an increase of 152%. Stabilization of the manufacturing process led to a reduction in the cost of defects, which resulted in an increase in profit of 1.5 times compared to 2011. This means that a 9.2% reduction in defective costs has led to an increase of about 50% profit.

The results show that for the analyzed company the profitability threshold is 87.5%, and in absolute values of 336.000 thousand euro.

$PR = \frac{CF}{MCV\%} = \frac{134,400}{40.00\%} = 336,000$ thousand Euros

$PR = \frac{134,400}{153,600} \times 100 = 87.50\%$ of the production capacity

Also for the year 2015 were quantified the total costs of non-quality, represented by the cost of internal and external defects, which amounted to 7,680 thousand Euros, (that is, three times lower than in 2011) equivalent to 2.0% of the turnover. This means that, in fact, actual variable costs were only 153,600 × (100 – 2.0) = 150,528 thousand Euros, and the difference of 3,072 thousand Euros represents non-quality costs.

This result shows that by successfully introducing of the integrated quality management system combined with management systems of continuous improvement of quality – Kaizen it was reached the situation very close to zero defects objective (in this appreciation of the result, it must be considered that the integrated management system for continuous quality improvement was only present in three years of the five-year period considered). As a result, we appreciate that in the future all industrial enterprises will move to a quality system of the type that we have presented in this case study. The analysis of the efficiency of such a quality system is best suited to a methodology based on the evolution of performance indicators, respectively, in our case, the financial indicators of the enterprise.

## 6. Conclusions

It follows that by using the quality management system proposed by us, there is a significant increase in business efficiency and the business is much better protected in case of a potential demand reduction, due to the increased ability of the company to achieve profit. Also, in times of crisis, leadership can earn valuable time to get back on business. At the same time, the possibilities of increasing turnover are improved without any constraints in terms of production capacities or additional investments. However, the benefits obtained are complete only as long as the existing production capacities are fully utilized. This is also the objective of the management, the goal of the owners, but also the interest of the national economy.

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# AN UNKNOWN TREASURE – HOW DO COMPANIES DETERMINE THE VALUE OF THEIR DATA?

**Barbara ENGELS***

**Abstract**

*The collection, analysis and exploitation of data are key drivers of the digital economy. But the importance of data for economic success is also increasing in industries that are not primarily associated with the digital economy. The basis of efficient data management is the evaluation of the data processed by the company. This study provides details of the data evaluation methods currently used by German companies. For an empirical analysis, a total of 1,235 firms from different sectors of manufacturing industry and industry-related services were surveyed using the IW-Zukunftspanel 2018. The study asks whether, and for what purposes, companies of different sizes and with different degrees of internationalization and digital orientation determine the value of their data. It also examines the characteristics which lead a company to prefer one data evaluation method over the others. Thus, an overview of the status quo in German corporate data evaluation is built up. The empirical analysis shows that data evaluation is still a side issue for German business. Most companies neither analyse their data now nor intend to do so in the future. Of the companies in this sample, it is mainly those that offer digital products that evaluate their data. Companies are currently unable to capture the potential of the data they possess and hence are unable to exploit the economic potential of digitalization.*

**Keywords:** *Digitalization, Data Governance, Big Data, Data Management, Data Economy*

## 1. Introduction

The key drivers of digital transformation are the analysis and processing of data. In the digital economy, data is a central production factor. Even in sectors not primarily attributable to the digital economy, data collection, evaluation and analysis are becoming increasingly important (Yin/Kaynak, 2015). In addition to increasing efficiency and improving production, data management can enable new types of business models. Furthermore, data trading is becoming increasingly important (IDC, 2017). Different companies offer a huge amount of data, including address, market, consumer and spatial data (Dewenter/Lüth, 2018, 20). Data platforms from Industry 4.0, where machine-generated, non-personal data are very important, are less strongly represented so far. One reason for this is that many companies in these industries do not yet manage their data efficiently.

The basis for efficient data management is the ability of the company to evaluate its own data. It needs to be clearly determined what a data set contains and which value it holds for different stakeholders. If a company wants to use data as a production factor, it needs to be able to price its data in order to include it in the production as a cost or profit factor. An evaluation of the data is also indispensable for transferring data to other entities, for example in the context of data trade. Knowing how to determine the value of the data being used by the company contributes to the data sovereignty of the company, and thus to the ability to control data and to use it skillfully and effectively.

This study analyses the extent to which German companies from manufacturing industry and industry-related services sectors determine the value of the data generated or processed in their companies. Through logistic regression analyses, the factors that contribute to the ability and willingness of a company to measure the value of its data are determined. It is also analyzed which methods of data evaluation the companies use and which purposes they pursue through attaching a value to their data.

To the knowledge of the author, this is the first study that empiricially demonstrates the status quo of data evaluation – and hence the potential for data analyses and digital transformation itself. The sample that this analysis is based on – small and medium-sized companies belonging to the manufacturing sector and related sectors – underlines the contribution of this paper, since these companies do not directly belong to the digital economy but have a high digitalization potential within the framework of Industry 4.0. The "data treasure" these companies can take hold of includes data generated by sensors, machine running times and downtimes, and data on product characteristics. This data is used, for example, to make processes more efficient and effective. It can also foster new business models. The analysis and evaluation of these large data sets is becoming a critical success factor.

## 2. Data

The following analysis is based on an enterprise survey. The sample used is based on the IW-Zukunftspanel conducted in spring 2018. The IW-

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Zukunftspanel is a regularly conducted representative survey of managing directors of industrial and industry-related service companies in Germany.[1]The survey includes general data on revenue, industry, age and management structure of the company as well as questions on internationalisation, research and development and innovation activity. In spring 2018, the companies were additionally survey on their data stocks and evaluation.

For the empirical analysis, a total of 1,235 firms from different branches of manufacturing industry and industry-related services were considered. The sample is not representative. Large companies are deliberately overrepresented in order to be able to make comprehensive and broadly-based statements about this subgroup as well. However, this distortion does not play a role in the regression analyses, because they are controlled regarding to the industry and size.

The range of sectors in which the companies surveyed operate is broad. A quarter of the companies surveyed belongs to the metal and electrical industry (excluding mechanical engineering). Almost one fifth belongs to business-related services such as information services, management consulting, auditing, research and development and marketing. As industry-related sectors, logistics and wholesale trade (14 percent) as well as media, iinformation and communication technology (6 percent) are included.

More than two-thirds of the companies have less than 50 employees and one of three even has less than ten employees. One tenth has at least 250 employees. Most of the companies (88 percent) surveyed generated an annual revenue of less than 50 million euros. 27 percent had an annual revenue of up to 1 million euros. With a correlation coefficient of 0.73 there is a clear and statistically significant correlation between the number of employees and the revenue.

The sample also differentiates between digital and non-digital companies. It is assumed that there are different affinities for data evaluation depending on the degree of digital orientation, since data and data sovereignty are particularly important in the digital economy.[2] The survey included an evaluation of the company's own digital maturity as well as the extent to which digital products are part of the company's service offer. Both can, but do not have to be related. Particularly in Industry 4.0, companies focus on digital value-added processes, but often produce non-digital end products or end products with only a few digital components.

The digital maturity of companies was measured by the strength of digitalization of the processes and products (goods or services). 1,177 of the companies surveyed provided information on whether they have virtualised their products, processes or tools in full, in part or not and whether they work with digital models, or whether their business models are based on data models, data analyses or algorithms. 984, or 84 percent, of these 1,177 companies are not rated as digitalized, but as computerized. They therefore tend to use digitalization only partially and in a supportive way (they are rather digitized than digitalized). A clear minority of 16 percent or 193 companies is digitalized. In order to determine the degree of digitalization regarding the company's product offer, the share of total revenue that can be attributed to either entirely digital goods and services (e.g. software, data models, web design), to products with digital components, or to on non-digital products is examined. Non-digital companies are those whose revenue is 100 percent attributable to non-digital products. More than one third of the companies surveyed belong to this group. Only 4 percent of the companies have a revenue that is almost entirely attributable to digital products. 11 percent have a "digital" revenue of more than 50 percent. Overall, the companies surveyed provide digital goods and services only to a moderate level.

There is no strong correlation between digital orientation and the degree of product digitalization in this sample. The correlation coefficient between the two variables is 0.31 and the relationship is statistically significant. Among digital companies, only 15 percent offer only non-digital products; among non-digital companies, the share amounts to 39 percent. All in all, the companies surveyed in Germany are classified as having a low to moderate digital degree. This also renders them very relevant for an analysis of the significance of data evaluation because particularly companies that are still at the beginning of their digitalization possess large data stocks generated in the production process that are neither analysed nor put into efficient use.

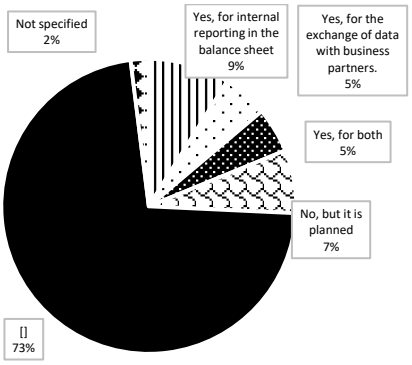
## 3. Data Evaluation Among Companies

A very broad understanding of data has been used in order to determine the extent to which companies determine the value of their data. In this analysis, "evaluation" means defining an economic value, i.e. a monetary value, based on various factors such as quality and currency. Data are per se very heterogeneous. Depending on the source, generator, storage type, analysis method or purpose, numerous classifications can be made:[3] Data can be classified according to their structure (unstructured, structured or semi-structured), their format (e.g. text, image or video file), their reference (person-related, potentially person-related or not person-related) or its generator (machine-generated or not machine-generated). There is also a physical, semantic or syntactic understanding of data. In the present survey, it was left to the respondents' judgement how they view the question they were asked, "Do you determine the value of the

[1] Lichtblau/Neligan, 2009.
[2] BVDW, 2017 and IDC, 2017.
[3] Dewenter/ Lüth, 2018, 5.

data that exist in your company?". It remains unclear how raw or processed the data is that the respondents had in mind. A detailed query of the considered data sets would be desirable because the relevance of the data evaluation probably varies significantly depending on the data characteristics. However, this goes far beyond the scope of this analysis. The empirical analysis shows that the evaluation of data is anything but prevalent among the surveyed companies (Figure 1): Almost 80 percent of the companies do not determine the value of their data, and almost three quarters do not have any plans for a future evaluation either. The fifth of all companies that evaluates data has different evaluation purposes: 9 percent of these companies evaluate their data for internal accounting and reporting purposes, 5 percent for the exchange of data with business partners and 5 percent for both.

**Figure 1:** Data evaluation in companies: Share of companies that evaluates data or not (question." Do you determine the value of the data that exist in your company?"); n=1,235




Logistic regression analysis is used to examine which company characteristics influence the probability that a company determines the value of its data (Table 1). The aim is to identify which companies are more likely to be pioneers in this area. The dependent variable is the binary variable "Evaluation of data yes/no". Three models are estimated:

- **Model I - General** contains the general evaluation as the dependent variable. The enterprise evaluates the data for internal reporting, for the exchange of data with business partners, or for both purposes;
- **Model II - Internal** contains the internal evaluation as the dependent variable. The company evaluates the data only for internal reporting;
- **Model III - External** contains the external evaluation as a dependent variable. The enterprise evaluates the data only for the exchange with business partners.

The control variables are the number of employees (different size categories), the revenue (different size categories), the sector, whether companies are engaged in research and development, whether they are innovators, whether they operate internationally, are digitally mature (see above), and what proportion of their revenue is attributable to digital products (see above; different size categories). The category not listed in each case is the basic category to which the resulting estimates refer. This means, for example, that for the control variable "number of employees 10 to 49" the estimated value is compared to those referring to the number of employees in the not specifically listed basic category "less than 10 employees". The numerous control variables reduce the number of companies included in the estimation to 960, as some did not answer the relevant questions. A multicollinearity test showed no alarming multicollinearities that could distort the estimation results. Robustness tests with regressions in which only revenu or number of employees were controlled, but not both at the same time, also lead to reliable results. In order to interpret the results not only qualitatively but also quantitatively, odds ratios were established.

**Table 1:** Logistic regression result (odds ratios[4]).

***/**/* Significance at the 1-/5-/10 percent level; Standard error in brackets. Number of companies: 960.

| | General (I) | Internal (II) | External (III) |
|---|---|---|---|
| Number of employees (basis: less than 10 employees) | | | |
| 10 – 49 | 0,858 | 1,029 | 0,659 |
| | (0,245) | (0,331) | (0,242) |
| 50 – 249 | 0,566* | 0,834 | 0,443* |
| | (0,188) | (0,309) | (0,189) |
| 250 and more | 1,655 | 2,432* | 1,132 |
| | (0,732) | (1,211) | (0,615) |
| Revenue (basis: small - up to 1 million Euro) | | | |
| Medium-sized (1 to 50 million | 2,051* | 1,452 | 1,926* |
| | (0,621) | (0,487) | (0,743) |
| Large (50 million euros | 1,291 | 0,528 | 2,270 |
| | (0,600) | (0,288) | (1,272) |
| Sector (basis: chemistry/pharmaceuticals) | | | |
| Metal/Electrical Industry | 0,762 | 0,785 | 0,824 |
| | (0,298) | (0,332) | (0,492) |
| Other industry (excl. mining) | 1,660 | 1,509 | 2,232 |
| | (0,714) | (0,705) | (1,401) |
| Construction | 0,361* | 0,392* | 0,498 |
| | (0,185) | (0,218) | (0,370) |
| Logistics/Wholesale | 1,148 | 1,230 | 1,841 |
| | (0,487) | (0,566) | (1,128) |
| Media/ICT | 0,331* | 0,398 | 0,389 |
| | (0,188) | (0,252) | (0,311) |
| Industry-related services | 0,726 | 0,526 | 1,110 |
| | (0,310) | (0,252) | (0,689) |
| | 0,796 | 0,800 | 0,930 |

[4] Odds ratio is a measure of association in which two odds are compared with each other. Odds are quotients of the probability that an event will occur and the probability that it will not occur. Odds ratio for the evaluation of data shows by how much greater the probability is that a company will evaluate its data if that company meets a particular property (e.g. being digitally mature) compared to the group without that property.

| | | | |
|---|---|---|---|
| Mechanical | (0,374) | (0,407) | (0,649) |
| Research5 | 1,042 | 1,066 | 0,958 |
| | (0,245) | (0,279) | (0,301) |
| Development | 0,927 | 1,114 | 0,702 |
| | (0,213) | (0,287) | (0,211) |
| Innovator6 | 0,842 | 0,828 | 1,090 |
| | (0,168) | (0,185) | (0,285) |
| Internationalisation7 | 1,050 | 0,889 | 1,323 |
| | (0,220) | (0,209) | (0,364) |
| Digital maturity | 1,176 | 1,042 | 1,182 |
| | (0,132) | (0,137) | (0,165) |
| Product digitalization8 (basis: non-digital) | | | |
| Digital > 95% | 4,067* | 3,015* | 4,803** |
| | (2,234) | (1,923) | (3,510) |
| Digital 50 to 95% | 6,390* | 4,064* | 10,590* |
| | (2,346) | (1,684) | (4,860) |
| Digital/digital components > 50 | 3,595* | 2,774* | 4,695** |
| | (0,964) | (0,821) | (1,716) |
| Digital/ digital components 10 | 2,303* | 2,061* | 2,354** |
| | (0,606) | (0,592) | (0,887) |
| Digital/ digital components < | 1,525 | 1,396 | 1,902 |
| | (0,534) | (0,534) | (0,929) |

Table 1 shows which factors significantly increase the probability that a company determines the value of its data. A value of 1 means that the probability is equal to the reference group. This analysis allows the following conclusions:

- The probability that a company evaluates its data increases significantly if the company offers a relatively large number of **digital goods and services (product digitalization)**. However, the strongest effect is not seen among companies with only digital products, but among those that generate more than 50 but less than 95 percent of their sales with digital products. The probability that a company generally evaluates its data increases by a factor of 4.1 if a company generates 95 percent or more of its sales with digital products, and by a factor of 6.4 if the revenue share of digital products is between 50 and 95 percent. This is in comparison to companies with 100 percent non-digital products. However, the small number of cases and the high number of standard errors must be taken into consideration. The probability that a company evaluates its data increases by a factor of 3.6 (2.3) when a company generates 50 percent or more (between 10 and 50 percent) of its revenue with digital and partially digital products. In addition, in the models that analyse internal or external data evaluation, these effects are statistically significant and strongly positive. The highest effects are achieved in Model III (external evaluation). The probability even increases 10-fold if a company owes 50 to 95 percent of its revenue to digital products.
- The **revenue** has a strong significant effect on the evaluation probability. Again, the highest category value does not produce the strongest effect (except for the internal evaluation). Companies with particularly high sales show no significant effects. On the other hand, the effect for medium-sized companies is significant compared to small companies. The probability that a company evaluates its data increases by a factor of 2.1 if the company has an average revenue (compared to a company with a low revenue of up to EUR 1 million). A similar effect results for the external evaluation.
- Also for the **number of employees**, there is no estimated effect that constantly increases with the category values. A mid-level category has the only significant value. Revenue and the number of employees therefore influence the probability that companies evaluate their data. However, this does not apply to all size categories. The probability that a company evaluates its data in general changes by a factor of 0.6 if the company has 50 to 249 employees; this means eventually a decrease in probability. The probability of the external evaluation (Model III) changes by a factor of 0.4, i.e. it also decreases relative to the reference group. The estimated value of the internal evaluation (Model II) is not significant. However, in Model II the probability of internal evaluation increases 2.4-fold if the company has 250 employees or more (with a high standard error).
- There are some significant differences depending on the **sector**, but these are much smaller than those for product digitalization and revenue. It is remarkable that companies from the media and ICT sectors, which are most likely to belong to the data-based digital economy, evaluate their data significantly less ofent than companies from the reference group chemistry/pharmaceuticals. The probability that a company evaluates its data only increases by a factor of 0.4 or 0.3 compared to the reference group if the company belongs to the construction sector or the media/ICT sector. For the construction industry, the probability of internal evaluation changes by only 0.4. Compared to the reference group the probability decreases.
- Research and development, internationalization, being an innovator an being digital mature have no significant impact on the probability that a company evaluates data. The key driver of data evaluation is the degree of **product digitalization**. This is particularly relevant when focusing on the evaluation of data for the exchange with business partners (external evaluation). The fact that product digitalization has a considerable influence on the probability of data evaluation is logical: Digital products often include or require the

[5]Companies with continuous research or development had corresponding expenditures in the years 2015 to 2017. Where such expenditure was not identified every year, research/development was described as occasional.

[6] Innovators are companies that have introduced new or significantly improved products, services or processes since 2015.

[7] Non-international companies are those with no foreign activity. Weakly internationalised companies are those with an export volume of less than 25 percent of turnover. Strongly international companies have an export volume of more than 25 percent of revenue and they have production or research and development partly abroad.

[8] Product digitalization categories are formed according to the percentage of revenues generated by digital products.

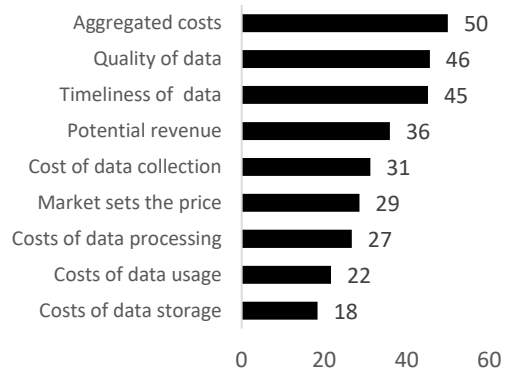
analysis and evaluation of data. This applies either to the product itself (in the context of its use) or to the further development and optimisation of the product. If, in an alternative model, the revenue is omitted, for example in order to obtain a higher number of cases, a significant effect of **digital maturity** is obtained. The probability that a company will generally evaluate its data increases by 1.3 when it is digitally mature, compared to only computerized companies. This also applies to the external evaluation. The internal evaluation does not show a significant coefficient. The quality of the reduced model is lower than that of the initial model. Therefore, the more comprehensive model with the lower number of cases is used.

## 5. Methods of Data Evaluation

The companies that determine the value of their data were also asked which factors and methods they use to do this. These include cost-based assessments (by cost of collection, storage, processing, use), market-based assessments (potential turnover, market pricing) and property-based assessments (quality and timeliness of data). For simplification, the terms method, factor and aspect are used synonymously in the following. Overall, only a selection of methods is considered in this paper. A full analysis would exceed the scope of this analysis. Figure 2 shows the results based on the IW-Zukunftspanel.

Most companies (50 percent) evaluate their data according to the costs of collection, preparation, use and/or storage. It is reasonable to combine the different types of costs to aggregated costs, as it is difficult to clearly differentiate the costs. 46 percent of the surveyed companies evaluate their data according to quality, followed by timeliness (45 percent). In total, 50 percent of the companies evaluate according to the two related criteria of quality and timeliness. Revenue-oriented evaluation methods follow. Among the cost-oriented methods, the evaluation according to the costs of data collection is particularly relevant; more than 30 percent of companies evaluate data using this aspect. The costs of data storage are almost irrelevant for the companies surveyed.

**Figure 2:** Methods of Data Evaluation. Share of companies according to data evaluation method, in percent. Multiple answers possible. Number of companies: 218.




On average, the companies consider three factors or aspects when determining the value of their data. Only one fifth uses merely one evaluation method. 12 percent of the companies evaluate their data, but do not consider any of the above aspects. These results show that several aspects play a significant role in data evaluation. There are numerous data evaluation methods that this study could not take into consideration.

There is no difference in the choice of the evaluation method depending on whether the evaluation is made for internal or external purposes. Both the companies that evaluate their data for internal purposes and those that evaluate them for external purposes prefer an evaluation according to costs, followed by quality and the timeliness of the data. Also, among those who evaluate data both for internal and external purposes, these preferences prevail.

**Table 2.** Methods of evaluation according to company characteristics. Results of chi-squared tests on the equality of means of different subsamples (depending on whether company falls into

the respective category or not). ***/**/* Significance at the 1-/5-/10 percent level.

| | Costs | Data | | Potential revenue | Market sets price |
|---|---|---|---|---|---|
| | | Quality | Timeliness | | |
| Digital maturity | 0,151* | 0,122 | 0,127 | 0,197** | –0,027 |
| Product digitalization | 0,036 | –0,113 | –0,111 | –0,049 | –0,138 |
| Research | 0,159** | 0,204*** | 0,185** | 0,155** | –0,128* |
| Development | 0,144** | 0,059 | 0,052 | 0,068 | –0,108 |
| Innovator | 0,180*** | 0,105 | 0,174** | 0,126* | –0,129* |
| International | 0,130* | 0,020 | –0,074 | –0,104 | 0,011 |
| Many employees | –0,025 | 0,128 | 0,168** | 0,095 | –0,048 |
| High revenue | 0,054 | 0,112 | 0,174** | 0,089 | 0,018 |

Table 2 contains the results of chi-squared tests on the equality of means of the response values of different subsamples of the surveyed companies. These tests can reveal differences between companies according to their characteristics. For this purpose, the surveyed company characteristics (apart from the sector) were defined as two categories per variable. A division of the variables into more than two categories would have led to very small subsamples in the mean value tests, as only a maximum of 218 enterprises commented on the methods of data evaluation. Therefore, regressions based on a small number of cases would not lead to reliable results and are hence dispensed at this point. Instead of distinguishing between four different employee categories, the companies were divided into those with up to 49 and those with at least 50 employees ("many employees"). This limit was also chosen in order to achieve a sufficiently large number of companies in the different categories. A distinction was also made between companies with either small revenue and companies with medium or large revenue ("high revenue"). Companies with digital products are those that generate at least 10 percent of their revenue with digital products. For example, row 1 of Table 2 shows to which extent a statistically significant difference exists when a company determines its data according to costs, data quality or timeliness, potential revenue or market price or not, depending on whether the company is digitally mature or not.

- **Digitally mature** companies evaluate their data significantly more often according to potential revenue than companies that are not digitally mature. They evaluate them mostly according to quality. This is not shown in Table 2, but in descriptive statistics that are not listed for the sake of space. The same applies to the preferred methods/criteria in the following sections.
- The fact that a company generates less or more than 10 percent of its revenue from **digital products** has no statistically significant effect on the popularity of the chosen data evaluation method. Companies with digital products most often evaluate their data according to the general costs.
- Companies with **research** activities evaluate their data less according to the price set by the market than companies that are not active in research. Research companies evaluate more according to the quality of the data, the actuality of the data, the costs in general, the potential revenue and the costs of the collection than non-research companies. For research companies, the quality of the data is most likely to determine the evaluation and not the market price.
- Whether a company is engaged in **development** or not contributes to small differences in data evaluation. There is only a significant difference in the costs, which developing companies choose significantly more frequently than non-developing companies. Developers most often evaluate according to the general costs.
- When a company is regarded as an **innovator**, it evaluates its data more in terms of general costs, timeliness of data, potential revenue and cost of use than a non-innovative company. Innovators evaluate most often according to the timeliness of the data.
- **Internationally** operating companies evaluate their data significantly more often according to the costs than nationally operating companies. They are most likely to evaluate their data based on general costs.
- Companies with a particularly large number of **employees** rate the timeliness of the data significantly more often than companies with few employees. It is their preferred method of data evaluation.
- The same applies to companies with **high revenues** compared to companies with lower revenues, except that companies with high revenues primarily evaluate the quality of the data.

Overall, there is no clear preference among companies for an evaluation method. This indicates how complex the evaluation of data sets is in practice. It is remarkable that innovative, researching and digitally mature companies evaluate the quality and timeliness of the data. In addition to the quality and timeliness of the data, the costs also matter. Cost evaluation is a more rational, conservative evaluation method, which is not necessarily effective for data trading, where the potential benefits of both the supplier and the customer, and thus the potential revenue, must be considered. However, the companies surveyed tend not to use market-related evaluation methods. Only digitally mature companies are pioneers in this area and evaluate their data significantly more often according to the potential revenue the data could generate.

## 6. Conclusion

This empirical analysis concludes that the evaluation of data among German industrial companies and companies from industry-related services sectors is still a marginal issue. Most companies do not evaluate their data and do not intend it either. Among the companies in this sample, it is mainly those that offer digital products that evaluate their data. Data that is collected along the value chain is still a black box for most companies in industry and industry-related sectors. Companies are currently unable to capture the potential of the data they possess. Only a few companies obviously know what their data or data sets are worth.[9]

If German industrial companies and companies from industry-related sectors evaluate their data, they usually use more than one method for data evaluation. A preference for a specific method is not evident from the analysis. This underlines the complexity of data evaluation in practice. Most of the times, companies evaluate their data either according to costs in general, or according to the quality and timeliness of the data. It is advisable to provide companies with standardized assessment tools in order to better assess the quality and timeliness of the data. Standards in data evaluation could also lead to more consistent evaluations and better comparability of data sets, which could simplify their trading and handling inside and outside the company. Organized data infrastructures that offer a clear technological and legal framework could, in addition to further research in this area, lead more companies to use the opportunities offered by data management and consequently better exploit the potential of digitalization.

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# THEORETICAL APPROACHES ON OPTIMAL CAPITAL STRUCTURE

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**Abstract**

*F. Modigliani and M. Miller demonstrated in 1958 that in the context of perfect market the financial structure of the firm does not influence its value. Since then, many researchers have approached the issue of financial structure in less restrictive hypotheses. Without reaching a consensus, they have tried to prove that the optimal capital structure exists. The goal of this article is to synthesize the literature on the financial structure and to relate the theories to known empirical evidence. The main models of the optimal financial structure belong to the agency theory, the signalling theory, the transaction cost economics and the pecking order theory.*

*Financing decision varies according to a number of factors that may influence capital structure differently: firm profitability, dividend policy, growth opportunities, asset specificity, corporate tax shield, company size and some macroeconomic factors such as inflation rate and capital market condition.*

**Keywords:** *optimal financial structure, agency theory, signalling theory, transaction cost economics, pecking order theory*

## 1. Introduction

The capital structure of a firm is the relative proportions of debt (bank loans or bonds issuance) and equity (common and preferred stocks) in the total financing of its assets. Planning the capital structure leads to optimizing the use of funds and the ability of adapting easily to environmental changes.

The goal of this work is to synthesize the theories on the capital structure and where is possible, to relate these theories to known empirical evidence.

An archetypal construction of the image of a theory that relies on a set of hypothesis empirically tested in order to describe the information as foundation element required for the fulfilment of the needs of a company has been shaped by professor Raymond J. Chambers in the '50s. Using this framework as a preceding mechanism to the formation of the positive theory leads to the idea that the theories can present a set of objectives and hypothetical realities based on a process rich in theoretical knowledge.[1]

The first theorists who analysed the optimal capital structure are F. Modigliani and M. Miller who claimed in 1958 that the value of the enterprise is the same regardless of its financial structure[2]. Their research was based on the hypotese of no taxes (either personal or corporate). Five years later, the two authors reverted to this statement, pointing out that in the presence of corporate income tax, the value of an indebted firm is equal to the value of an unindebted firm, increased by the tax savings achieved as a result of indebtedness[3].

The main criticism that can be attributed to F. Modigliani and M. Miller's model is its unrealistic assumptions. According to the two authors, the only goal of the company is to produce cash-flow and share it between shareholders and creditors. They consider that managers always act according to the shareholders' interests and there are no conflicts between the objectives of the creditors and those of the shareholders. For F. Modigliani and M Miller the majority shareholders and the minority shareholders have the same objectives. In addition, information is accessible to all and there is no information asymmetry between those who hold capital and those who need it.

Since F. Modigliani and M. Miller, many researchers have approached the study of the corporate capital structure based on less restrictive hypotheses, trying to find the optimal capital structure. In this paper will be analysed the most relevant results of these researches, namely the agency theory, the signalling theory, the contracting cost theory and the pecking order theory.

## 2. Theoretical approaches on optimal capital structure

### 2.1. The financing decision and the agency theory

In the agency theory, the company is no longer seen as an actor, aiming to maximize profit, but as a group of partners, each with its own goal. The company's behaviour is comparable to the market, in the sense that it is the result of a complex balancing

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[1] V. M. Stefan-Duicu, Contabilitatea si rationamentul profesional, Nemira Publishing House, pg. 105, 2016.
[2] F. Modigliani and M Miller, The cost of capital. Corporation Finance and the theory of investment, American Economic Review, 49, 1958
[3] F. Modigliani and M Miller, Corporate income taxes and the cost of capital: A correction, American Economic, Review, 53, 1963

process. Different participants in the life of the enterprise (managers, shareholders, creditors, employees etc.), taken separately, have certain goals and interests that are not necessarily conciliatory in a spontaneous manner. Consequently, conflicts can arise between them, especially since the function of the modern enterprise, based on the separation of property and power, requires that the administration be entrusted to managers by those who hold the funds.

The optimal financial structure results from a compromise between the different types of capital (equity or debts) that can solve these divergences of interests, considering that leverage and use of equity diminish certain conflicts and induce others. This financial structure should allow maximizing the company's global value.

In the agency theory, indebtedness is considered a way to resolve potential conflicts between managers and shareholders. In 1976, M. Jensen and W. Meckling[4] showed that in order to find the optimal financial structure of the firm, two consequences of indebtedness must be taken into account:

- In the presence of corporate income tax, managers are interested in indebtedness because interest expenses are deductible leading to reduced corporate tax and net profit growth;
- The indebtedness generates three types of agency costs: control costs (for shareholders) and justification costs (for managers); costs caused by the risks related to the firm's investments, which lead to the increase of the interest rate required by the creditors; bankruptcy costs.

The indebtedness allows shareholders and managers to adhere to same objectives.

Companies are interested to indebt until the point on the increase of its value owed to the financed investments will be equal to the marginal costs generated by the indebtedness. The optimal level of indebtedness is the one that allows the minimization of overall agency costs.

The indebtedness incites managers to be efficient. More the company is indebted, more its bankruptcy risk is higher. For managers the bankruptcy means generally losing their jobs, the remunerations and other advantages. For this reason managers will aim to maximize cash-flow and choose investment projects with positive net present value. In the absence of indebtedness, the bankruptcy risk is limited, but the market will assume that the managers do not aim maximum performance. The value of the company will decrease and, if there exists a managers' co-interest system (remuneration related to the value of company shares), they will lose.

For shareholders, the indebtedness has two advantages over the issuance of new shares. The first is the leverage effect on the return on equity. The second advantage is that the loan does not lead to dilution of the share capital.

The indebtedness resolves certain conflicts of interest between shareholders and managers, but generates new conflicts (between shareholders, sometimes allied with managers, and creditors) and costs (costs of bankruptcy and reorganization, agency costs, monitoring costs).

Allying, shareholders and managers can divert in their advantage part from the company's assets to the detriment of the creditors. For example, they can use a loan to distribute dividends.

In a company with high debts reported to the equity, the owners of the firm could be tempted to take excessively risky projects. Shareholders will practically benefit from all the advantages if the investments turn out to be profitable. Otherwise, most of the losses are borne by the creditors. The interests of creditors and shareholders are therefore in direct conflict. This inefficiency is one of the costs of indebtedness.

Creditors know that shareholders are tempted to choose risky investments or to incite managers to do so. Therefore, they may include in the loan agreement clauses that restrict the managers' abilities to make risky investments on the duration of the loan agreement or clauses that allow creditors to demand early repayment of the debt in case of excessive risk.

The second problem of over-indebtedness is the company's inability to finance profitable investments because its indebtedness level is too high. For example, a company with a debt of EUR 10,000,000 has the opportunity to make an investment of EUR 5,000,000 with a gross profit of EUR 12,000,000 and a net present value of EUR 7,000,000. If the EUR 10,000,000 loan clauses provide for the priority reimbursement of this debt, then no new lender or investor will want to fund the new investment. From the net profit of EUR 12,000,000, the first EUR 10,000,000 will go directly to current creditors, leaving only EUR 2,000,000 instead of EUR 5,000,000 to repay the new loan. This investment cannot therefore be realized, resulting in a loss of value.

In order to find solutions to the conflicts that may arise between shareholders and managers on the one hand and creditors on the other hand, it is necessary to look for the means by which shareholders and managers are prevented from acquiring a share of the wealth of the enterprise to the detriment of the creditors. Therefore, it is necessary to try to limit or avoid decisions that increase the risk of company's assets or that lead to sub-investment and tend to reduce the value of existing debts, even if this involves a decrease of the company's value. In addition to the various legal subtleties that can be incorporated into loan agreements, other solutions are also in practice:

A solution to resolve these conflicts is the special clauses set out in the loan agreement, such as: guarantees or security clauses, setting limits on debt, dividend distribution limitation clauses and early repayment clauses.

[4] M. Jensen and W. Meckling, Theory of the firm: Managerial behavior, agency costs and ownership structure, Journal of Financial Economics, vol. 3, octombrie 1976

Another solution is the issuance of convertible bonds or bonds with stock option. The convertibility clause or the exercise of the stock option may prompt the current shareholders to change the structure and risk of the asset portfolio in order to increase their long-term profit, as this could also come to the bondholders who are potential shareholders.

### 2.2. The capital structure and the signalling theory

Empirical studies demonstrated that the announcement of a stock issue can drive down the stock price, while additional indebtedness leads to an increase in the stock price. In addition, for complex securities transactions (such as shares with priority of dividends or convertible bonds) or for the simultaneous sale and purchase of securities of various forms (such as bond issue to finance share repurchase), we can see that the more issued securities are more like equity, the more the stock will fall. All of these findings can be explained by the signalling theory.

The basis of the signalling theory is the concept of information asymmetry. Managers of a company know more than outside investors (shareholders or creditors) about the profitability and prospects of the company. Hence, investors may be interested in a signalling activity done by managers.

The information disseminated by managers is not necessarily true. According to the signalling theory, the managers of the performing firms can send specific and effective signals that separate these companies from the non-performing ones. The particularity of these signals is that they are difficult to be imitated by the non-performing companies. The most used signals of this type are the capital structure, the dividend policy or the use of complex financial securities.

Another signal regarding the value of the firm is the degree of diversification of the portfolio of a majority shareholder. If he owns a profitable investment project, he will affect a large part of his savings for this project, to the detriment of other forms of placement. Given the asymmetry of information, the low degree of diversification of his portfolio can be interpreted as a signalling activity tending to prove the value of the project to the market.

Starting from this observation, H. Leland and D. Pyle[5] argue that the value of a company is positively correlated with the share of capital held by the majority shareholder. Any change in the portfolio of the majority shareholder will lead to a change in the market's perception of future cash flows.

Research in this direction is continued by S. Ross[6] who deduces that the financial structure chosen by the managers for their company is a signal regarding the type of the firm. For S. Ross, the market only evaluates the perceived cash flow. Managers, who have privileged information about these flows, can make changes in the financial structure of their business and thus change the perception of the market. Managers must derive an interest in the issuance of these signals and be penalized for the issuance of a misleading signal. A good company is therefore the one that borrows and repays the debts at maturity, according to the loan agreements. The model proposed by S. Ross[7] consists of the balance based on the combination between a signalling activity and an incentive system. This model leads to the following conclusions, which can be compared to those of M. Miller and F. Modigliani: the cost of capital is independent of the financing decision, even if the level of indebtedness is specific to each enterprise; bankruptcy risk is an increasing function of the level of indebtedness.

Despite the reserves and criticisms addressed to S. Ross's model, it presents a coherent theory of the financial structure of the enterprise.

### 2.3. Transaction cost economics and the financing decision

The contracting cost theories have their origin in the "Nature of the Firm" of Ronald Coase[8], and were developed later by Oliver Williamson in "Markets and Hierarchies"[9]. One of the contractual theories is known as Transaction Cost Economics (TCE) and comes from the work of these authors. TCE argues that in some circumstances a hierarchy (a firm) can make a more efficient allocation of resources than a market (a bargaining system). This is due to imperfections in markets such as imperfect information and bounded rationality. These imperfections generate three types of transaction costs:

- Information costs: costs associated with searching relevant information and meeting the agents with whom the exchange will take place. For example, stock brokers mediate the market transactions of investors and their fees reflect the information costs.
- Bargaining costs: costs associated with coming to a reasonable agreement and drawing up an appropriate contract.
- Policing and enforcement costs: costs related to supervising the fulfilment of the contract and make sure that the other party sticks to the terms of the contract. This category includes the litigation costs.

O. Williamson starts from the observation that after signing a contract, the parties to the contract (shareholders, managers, creditors) can change their behaviour to their advantage, which can lead to perpetual ex-post adjustments to make the long-term contractual relationship viable. In the case of a financing contract, the issue of debt or equity is no longer just a source of funding, but also a means by

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[8] R. Coase, The nature of the firm, Economica, vol. 4, 1937
[9] O. Williamson, Markets and Hierarchies, New York, The Free Press, 1975

which these adjustments are made. It is a different approach to what has been presented so far, because the financing decision is taken according to the company's assets, not its liabilities. The decision to issue debts or equity to fund an investment project is similar to the company's decision to buy a product from the market or to produce itself. Loan financing corresponds to the market, while equity financing is closer to the hierarchy.

According to Williamson[10], the choice of funds will be determined by the degree of specificity of the assets. Asset specificity can take a variety of forms, including: location specificity (a buyer or seller locates its facilities next to the other to economize on inventories or transportation costs), physical asset specificity (investments are made in specialized equipment or tooling designed for a particular customer), human capital specificity (one or both of the parties develop skills or knowledge specific to the buyer-seller relationship) etc.

Investment in a specific asset is generally the subject of incomplete contracts between the firm and investors to allow significant subsequent adaptations. The issue of equity is more efficient than the debt to make these adjustments. For example, if the specific investment is a research and development project, the shareholders will tolerate more than the creditors the fact that it does not generate the expected profitability within the planned deadlines.

Instead, indebtedness does not allow for ex-post adjustments because the interest must be paid at regular intervals, the loan must be reimbursed at the due dates, otherwise bankruptcy procedure will occur. Moreover, if the investment is specific, the borrowers will fear this potential bankruptcy and therefore require very high interest rates.

If the asset funded is not specific, debt, which is a simpler financing formula, seems more appropriate. Indeed, the probability of making ex-post adjustments is minimal since this investment will probably generate income more regularly.

In some situations the most advantageous form of financing is leasing, which corresponds to the hybrid form of organization.

Suppose an enterprise needs regular (not specific) equipment and that the purchase of products resulting from the use of this equipment is defective or unsatisfactory. We also believe that this equipment easily supports intensive use (its maintenance and overheating costs are low). Under these circumstances, the most advantageous way for a company to obtain those products is by using that asset under a leasing contract. Firstly, the company has no interest in being the owner and user of the equipment at the same time, the cost of use being the same. Secondly, the owner (the lessor) can specialize in this type of equipment and can resume and rent the equipment more efficiently than a financial lender could do. Leasing appears for the asset considered as the lowest-cost financing method.

### 2.4. The pecking order theory and the optimal capital structure

If for O. Williamson the specificity of the assets explains the choice of financing mode and therefore the financial structure, for S. Myers and Majluf[11] the preference for a particular way of financing has another explanation.

S. Myers sees the firm as a coalition seeking to increase the volume of corporate wealth, which is made up of equity and organizational surplus. The last one reflects the present value of the costs of overly high wages, too many staff, gratuities, and so on. Creditors can impose reduction of the organizational surplus if the reimbursement of the debt or the payment of interest is compromised. This situation can be avoided if the company is financed by internal funds, meaning by earnings retained and reinvested.

If it is necessary to resort to external financing, the issue of debts will be preferred over the issue of equity that would implicitly require the distribution of additional dividends. The indebtedness has a minor effect on stock price. There is less scope for debt to be misvalued and therefore an issue of debt is a less worrisome signal to investors.

According to the pecking order theory of capital structure companies prefer internal finance, because these funds are raised without sending any adverse signals that may lower the stock price. If external finance is required, firms issue debts first and issue equity only as a last resort. This pecking order is due to the fact that investors consider the debt issue as a good omen and the equity issue as a bad omen.

The pecking order theory seems to work best for mature, profitable companies of most business. But there are exceptions. For example, fast-growing high-tech firms often issue common stock to finance their investments.

## 3. Conclusions

Considerable work has been done to test the validity of the main theories of capital structure. *Table 1* shows a summary of the origins and evidence of these theories.

The inventory of empirical works shows that there is no clear solution for finding the optimal financial structure. The four theories analyzed and their outcomes are valid only under certain conditions and with certain limitations. The conflict arises also between the outcomes and recommendations of the various theories that are often mutually exclusive.

[10] O. Williamson, Corporate Finance and Corporate Governance, the Journal of Finance, vol. 43, nr. 3, Iulie, 1988

[11] S. Myers and N. Majluf, Corporate financing and investment decisions when firms have information that investors do not have, Journal of Financial Economies, vol. 13, Iunie 1984

In conclusion, there are many factors affecting the capital structure of firms. The most prominent factors that have been correlated to leverage are:

- Firm profitability. The pecking order theory hypothesises that profitability is inversely related to leverage. In contrast, the agency and signalling theories suggest that profitability is directly related to leverage for two reasons: to take advantage of the interest tax shields associated with higher leverage, and to discipline managers by paying out cash to creditors instead of wasting the funds on negative net present value projects.
- Asset specificity. The general consensus among researchers is that debt financing is suitable for low specificity assets, and equity is preferred when the level of specificity is high.
- Size of the company. Size can be considered as an explanatory predictor for variations in firm leverage. Several financial theorists consider that the larger firms can negotiate for loans on more favourable terms, so are more likely to take on more debt than smaller firms. In addition, banks prefer to loan larger firms because they are less risky than smaller firms. Other analysts argue that the fixed costs associated with equity issues should be smaller for large firms. On that account, the company's size should be inversely correlated to leverage.
- Age of the company. Age plays a significant role on firms' ability to acquire debt. Older firms are deemed to be more stable and thus more reputable due to their ability to survive over a longer period of time. Therefore, the prediction is that older firms will have more long term debt in their capital structures.
- Growth prospects. The general consensus among researchers is that growth opportunities are negatively related to leverage, principally because future growth prospects are intangible and hence cannot be easily collateralised.
- Corporate income tax. Modigliani and Miller demonstrated that the tax savings associated with interest tax shields induce firms to take on more debt. Therefore, a positive association between tax and leverage should be observed.
- Dividend policies. Empirical evidence on the relevancy of dividend policy has provided conclusive evidence on the dividend signalling theory, which suggests that dividend increases are associated with managements' confidence of future stability of cash flows. Dividend pay-out ratio is theoretically predicted to be negatively correlated to leverage due to the positive association between dividend pay-out and the market value of equity.
- Institutional, legal and financial factors. Fan, Titman and Twite (2008: 2) examine a cross-section of firms in a heterogeneous sample of firms in 39 countries, and they conclude that institutional differences are an important determining factor of capital structure choices compared to other factors like industry affiliation. For example, they document that firms tend to use less debt in countries where dividends are preferentially taxed.

The cost-benefit analysis of the funding options allows for the optimal financial structure.

Table 1: Summary of the origins and evidence of the main theories of capital

| Theory | Origin of theory | Evidence for | Evidence against |
|---|---|---|---|
| Agency cost theory | Jensen and Meckling (1976) | Kim and Sorensen (1986)<br>Vilasuso and Minkler (2001)<br>Harvey et al. (2004)<br>Berger and Bonaccorsi di Patti (2006) | Brounen, DeJong Koedijk (2006) |
| Signalling theory | Leland and Pyle (1977)<br>Ross (1977) | Myers and Majluf (1984)<br>Smith (1986)<br>Brennan and Kraus (1987)<br>Baker and Wurgler (2002) | Barclay and Smith (1996)<br>Barclay and Smith (2005)<br>Brounen et al. (2006) |
| Transaction cost economics | Coase (1937)<br>Williamson (1975) | Bradley, Jarrell and Kim (1984)<br>Barclay and Smith (1995)<br>Frank and Goyal (2009) | Abor and Biekpe (2005)<br>Mutenheri and Green (2003) |
| Pecking order theory | Myers and Majluf (1984) | Kester (1986)<br>Titman and Wessels (1988)<br>Rajan and Zingales (1995)<br>De Migueland Pindado (2001)<br>Flannery and Rangan (2006)<br>Leary & Roberts (2010) | Helwege and Liang (1996)<br>Frank and Goyal (2003) |

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# THE ACCOUNTANT'S AVERSION TO RISK WHEN CHOOSING ACCOUNTING POLICIES

**Mariana GURĂU***
**Mariana Zenovia GRIGORE****

**Abstract**

*The accounting community is currently focusing on harmonizing accounting rules by creating a common accounting language at global level to increase the comparability and relevance of financial reporting information.*

*The current requirements of reporting standards for presenting a true and fair image of the financial position have evolved from the practical necessities imposed by the activity of the economic entities. In this respect, it is necessary to reposition the regulations which define the concrete techniques for assessing the items presented in the balance sheet and in the income statement.*

*In the accounting field, financial information is important for the users. It can be influenced by accounting policies, by the methods of valuation chosen by the specialist.*

*This article is a point of view on the requirements of financial reporting, with particular emphasis on the valuation for the presentation of balance sheet and income statement. In Romania, in the absence of a tradition in this field, there is a risk aversion when it comes to evaluating for the purpose of presentation in the financial statements.*

*We included in these paper an advisory study involving professional accountants and presented their point of view in the field of valuation at different times of the financial year.*

*One of the objectives of these study is to clarify underline the importance to choose the accounting policies with no implications of taxes rules. The accountant have to understand that in our days accounting policies must be independent*

**Keywords:** *accounting policies, valuation, disconnection, financial statement, income statement.*

## Introduction

Accounting theory was developed to support and unify accounting practices, by providing explanations targeted at defining it and served as a force of understanding necessary to ensure a system and logic for accounting practice. In time, the concepts of accounting theory and accounting practice were separate, and sometimes even they came to be contradictory. The practice has become less dependent on random and error.

Accounting research has progressively evolved from normative research to an empirical approach. Regarding the evolution of economic sciences, the introduction of a positive approach required the use of new tools whose first experiments were made on the validation of the decision-making utility hypothesis of accounting information.

Empirical tests have highlighted that the market has the power to predict the content of accounting information to be made public, which has raised the question of the nature of the usefulness of accounting rules and, in general, of the institutional role of accounting as a system for producing financial information.

This article is a synthesis of the research conducted with the objective of developing the concept of positive accounting research and reflecting the importance and timeliness of the assumptions regarding the accounting practices of the entities formulated and tested by positive steps.

In Romanian modern accounting reglementation there was a strong instability. For studding the risk aversion of accounting specialists when choosing accounting policies is necessary an approach to the relationship between accounting and taxation.

The notion of disconnection between accounting and taxation (fiscality) is pretty new. This is the reason for what there are a fear about valuation in the circumstances where taxation does not recognizes it.

In the absence of a modern accounting tradition, the accountant prefers to apply taxation rules in accounting purposes.

This is not a new topic in our work, we already studied the role of accounting policies in the image provided from financial statement, but in this paper we intend to include an advisory study involving professional accountants and provide their point of view in the field of valuation at different times of the financial year.

For this purpose, we have tried to involve fifty five accountant from companies with different business areas. Forty nine accountant have accepted to answer at our questions.

When we started the study, our intention was to detect the opinion of the accountant about the accounting policies, but we have met the ignorance about the difference between valuation and revaluation,

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between fiscal and accounting depreciation, between fiscal and accounting economic life of fixed assets.

At the end of the study we will analyze how the participants in the economic circuit, users of financial information, are affected by this relation starting from the goals of each area.

The topic we approached was analyzed by many researchers.

About the disconnection between accounting and taxation in Oprean and Oprean[1], 2012, p. 20) opinion the synchronization with the accounting firm's taxation system converges towards developing accounting methodologies by which to mitigate and to eliminate the carrying distorted representation of reality and to express achieving equity in financial accounting reports.

According to Băcanu[2] "The similarities between the accounting objectives and the taxation objectives are only at a general level. Thus, both for accounting and taxation there are various secondary objectives, which joined together help for fulfilling a main objective".

## 1. The Accountant's Aversion To Risk When Choosing Accounting Policies

**The objective of** accounting (financial statements) is to provide a true and fair view regarding financial information about the reporting entity that is useful to existing and potential investors, lenders and other creditors in the decisions they take on providing resources to the entity.

Information about the financial position aims:

- economic resources controlled by the entity and that are useful for anticipating the entity's ability to generate future economic benefits;
- structure of funding sources, it is necessary to anticipate future needs credit and the possibility of obtaining such loans;
- the distribution of profits and future cash flows, liquidity, solvency of the entity and the ability to adapt to changes in the economic environment in which it operates.

Those who prepare the financial statements are people, and certainly their subjectivism also intervenes. Thus, besides the accounting objective, the company, the tax and the professional accountant also intervene. The accountant is the one that has to answer to all these objectives.

**The objective of taxation** consists in calculating, charging, placing, tracking payment of taxes and contributions due from economic units, state.

These objectives are achieved by promoting financial policy economic and social. Taxes are a form of sampling a part of the income or property of individuals or legal entities to the state to cover its expenses. This sampling is necessarily non-refundable basis and without consideration of the state. It is necessary that fiscal rules to be known and respected as from payer and the tax authorities.

**The objective of the economic entity**, of the owner is to make a profit. Ownership unbundling and power within the entity favored the development and other objectives, but whose implementation remains subject to obtaining a satisfactory profit. These goals relate to increasing or maximizing sales and the quality of service rendered or goods.

Making a profit remains, therefore, the first purpose of the entity, but not only.

**The accountant objective** is to achieve the first three objectives respecting accounting and tax rules so that:

- To present a true and fair view of the financial position, financial performance of the entity and changes in financial position and financial performance (the objective of accounting);
- Ensure the correctness of the calculation and recording taxes owed by the economic entity (which consists of fiscal objective);
- To build the desired result as beneficial owners using tax incentives and accounting and tax treatments, when the choice (within the limits of the objectives of the two fields of accounting and taxation).

In this study we will consider the behavior of the professional accountant, his choices in respecting the three objectives, considering his concern to circumvent the risks.

A comprehensive global financial reporting framework provides greater comparability of financial information, ensures the quality and transparency of financial information, increases user confidence in accounting information.

In order to create such a reporting framework, pursuing the reduction of creative accounting practices and accounting fraud, accounting research focuses on studies on the standardization of corporate governance practices among issuers in different market segments, the harmonization of accounting policies and practices, the laying down of interpretative provisions, allowing for the alignment of the accounting policies of the totally new operations that are basically ignored by current practices, reducing the number of options permitted by accounting policies and their interpretive delineation.

Emphasizing the conformity of annual financial statements with the provisions of accounting reference

[1] Oprean, V. and Oprean, D. (2012). Dileme ale ingineriei organizaţiilor: complementaritatea relaţiilor contabilitate fiscalitate în context macro şi microeconomic. RFPC. No. 10

[2] Băcanu, M.N. - „*Comparative Study Regarding the Taxation Objectives and the Accounting Objectives – Domains of Influence in the Economic Circuit"* International Conference: Development as purpose of human action New challenges for the economic science, Special Issue Volume XXIII (2016)

regarding their true image, M. Ristea[3] underlines the fact that the conformities with the provisions from accounting regulations do not exclude the presence of some liberties.

For the realization of the empirical study we used as scientific research methodology, the accounting positivism, based on hypotheses, even arbitrary, proceed to their empirical testing based on observed data, seeking to explain and predict facts that identify an accountant predictable behavior. Focus of accounting theory is not represented by a conceptual edifice, the whole accounting postulates and principles, because principles are intended now to explain the experimental results without themselves being explained. "If the assumptions do not correspond to the results of empirical observation, theory is invalidated, requiring either abandoning assumptions either their reformulation.

As a research method, we used questionnaire-based research and, as a form of research, the statistical survey.

The questionnaire is a data collection method that includes a predetermined set of questions, built for information or opinion analysis, transmitted directly or by mail to designated respondents in a specific manner.

Respondents should complete the questionnaire without the researcher's assistance, which diminishes the response rate. On the other hand, it is necessary to follow the relevance in the questioning of the questionnaire, which will ensure a short time that should be invested in order to respond and interest for the respondent. The format, content and mode of expression are key elements of the questionnaire. In this respect, an optimal wording must be found that does not bother the respondent, but at the same time ensures access to all the information the researcher needs.

We wrote the questionnaire using both closed questions (which involve answers by simply ticking a variant), but also open questions that offer the possibility of personalizing the response where the respondent considers it necessary.

Closed questions are characterized by the provision of predefined responses, which facilitates comparisons and analysis of the collected information, ensuring a higher understanding of the questions, and the information obtained is of great relevance to the study undertaken.

Open questions are used to test more complex elements that do not know all the categories of response and are usually used to establish the point of view of each respondent.

Open questions are directed to the outline of the professional judgment used in drawing the financial statements.

Respondents also had the opportunity to add their comments if the answers provided did not fully represent their point of view.

We took into account the boundaries of a survey based on a questionnaire reflecting the lack of flexibility, the low response rate, the lack of control over the studied environment, the impossibility of spontaneous reactions.

The general hypothesis of the study is: *In choosing the accounting policies, the accountants are prudent, they don't like the risks.*

The study was conducted between January and March 2019, and the analysis was conducted on the basis of a sample of fifty-three different business entities, small and medium-sized companies that prepare simplified financial statements.

Our approach resulted in receiving fifty-three completed questionnaires. In the process of building the database for information processing, four questionnaires were filled in incorrectly. Wrongful questionnaires were not considered.

After the first selection stage, there were forty-nine questionnaires. Of these, thirty come from companies that have their own accounting department, of which twelve have part-time employees, and eighteen have full-time employees. Nineteen of the respondent companies chose to outsource the accounting service.

Thus, the responses taken into account and analyzed were received from forty-nine enterprises: thirty with their own accounting department and nineteen enterprises that turned to accountancy firms, information that we systematized in the following table:

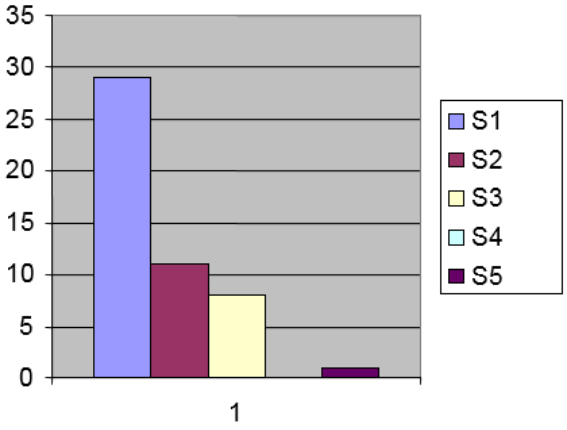
<table>
<tr><td rowspan="3">Companies participating in the study</td><td rowspan="3">49</td><td>→ Outsourced accounting service</td><td>19</td><td></td><td></td></tr>
<tr><td rowspan="2">→ Own accounting service</td><td rowspan="2">30</td><td>→ Part time program</td><td>12</td></tr>
<tr><td>→ Full time program</td><td>18</td></tr>
</table>

[3] Mihai Ristea, *Conformity and Liberty in Accounting Policies of Financial Period Closing*, article published in Pro Domo, Monthly Journal of CECCAR, no. 2/2011 pg 19-22

## 2. Presentation of collected data and their analysis in the context of the formulated hypotheses

The wording of the questionnaire was generated by the fact that in recent years, financial reporting as a product of accounting has become necessary for an increasingly diverse group of users. Therefore, the need to present a true and fair view of the financial position, performance and change in financial position becomes more and more motivated.

Eight respondents were dissatisfied with the lack of clear procedures for accounting and tax rules. What measures do you think should be taken so that the accountant can take time to apply the accounting policies?




S1 = Reducing the frequency of legislative changes;

S2 = Reduction in the number of tax returns;

S3 = Introduction of clear procedures for both accounting and tax rules;

S4 = Improve the accounting and tax knowledge of civil servants;

S5 = Other.

**Limits of study and suggestions for future research**

WE accepted the small degree of response following the study of Selltiz and the collaborators, taken over by A. Duţescu, who managed to highlight the advantages, disadvantages and elements that lead to the availability or unavailability of answering a questionnaire by mail or traditional.

In this paper we did not propose, in the present study, to analyze the impact of non-compliance with the accounting principles, on the outcome I tried through a case study that I presented in another paper.

For closer the theory to practice, we propose for future research a study witch start from the practical needs to the existing theoretical structures, to explain the extent requires all companies to enter in this carousel of convergence regarding submission of accounting information unpolluted from fiscality.

Understanding of the application of accounting principles through the components and joints philosophy of Recognition and Measurement (as practical) and rules on financial statements and disclosure (that theoretically) are at a very low level, which broadens very abyss between specialists in creating accounting standards and those applying them in practice.

## Conclusions

In conclusion, the hypothesis formulated was confirmed, respectively, that a large part of the economic agents is somewhere on the edge between accounting and taxation when drawing up the financial statements from the point of view of recognizing and evaluating the balance elements. Because the time spent as well as the cost of tax processing of accounting information is significant, even an educated accountant professional may be forced to discount the accounting principles with the hope of saving time and administrative costs.

Questionnaires with questions about evaluation included the risk aversion of accountants. Thus, it is found that:

- The knowledge about the valuation of economic assets at the entrance to the entity is largely known. Only two of the respondents had incomplete answers in this area, ie they did not introduce the cost of the internal transport.
- The derecognition valuation rules are known by all accountants in the studio, including those on inventory (FIFO, LIFO, CMP).
- Confusion, (30% of respondents) between evaluation and reassessment is made.
- There are major reluctances to the inventor's valuation for the balance sheet. Forty five of the forty eight respondents answer that they find it risky to use inventory value, because there are no rules to guide them.

As a result of the study, our proposal is to develop detailed rules for the end-of-term evaluation, so that the view reflected by the financial statements of the companies is a true and fair one.

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# THE INFLUENCE OF THE GDP CONVERSION RATE INTO GNI ON SOCIAL PROGRESS. COMPARATIVE ANALYSIS AT THE EU LEVEL

**Elena Mihaela ILIESCU***

**Abstract**

*Gross Domestic Product per capita is one of the main and indispensable indicators around which official reports are built representing thusthe comparative macroeconomic outcomes across states, being considered also a benchmark for national wealth analysis and comparison.*

*However, reality has shown that this results indicator, although one of the most popular and publicized macroeconomic variable, does not reflect a real and complete perspective on the economic and social situation of the citizens of the analyzed country. Proof of the viability of this outlook lies with the World Bank using GNI per capita in order to achieve annual hierarchization of savings in four groups (high income countries, upper middle-income countries, lower middle-income countries and lower income countries). This criterion was also adopted with the European Community in order to establish for each Member State the contribution to the Community's budget as well as the contribution from VAT.*

*Starting from these points of view and taking into account that, regardless of the level at which the economic activity takes place, the final goal must be the same - the satisfaction of the human needs in rational conditions - the present paper has two objectives: first to analyze comparatively , for the EU Member States, the share of GDP in GDP (per capita) and, secondly, to verify using empirical data the link between the rate of conversion and the social progress of these states. As a variable for measuring the quality of life, the reporting shall be made according to the Social Progress Index. This is because, in order to achieve the economic and social development objectives, financial resources are determinant but not enough - the human resources (and, implicitly, the educational system), the material and informative, along with qualitative aspects such as ethics and equity in the distribution of income represent also indispensable premises.*

**Keywords:** *gross domestic product, gross national income, social progress index, conversion rate, comparative analysis*

## 1. Introduction

Achieving the optimal level of macroeconomic outcomes is the primary objective and decision-maker's resolution, and the level reached, a barometer of confidence in the national economy, for both civil societies, the business environment, the rating institutions and international institutions.

From the broad range of these indicators, GDP per capita represents the most publicized and widespread variable in official reports on the evolution of national economies.

However, considering that it is an exclusive indicator of results, reflecting the economic activity from the point of view of the value added within the national economies (with indisputable implications on the level of employment, evolution of the inflation rate, budgetary revenues), it expresses only the economic power of the country, without providing sufficient information regarding the economic power of national economic agents.

Under these circumstances, gross national income per capita has been imposed internationally, being increasingly used, especially in the context of economic and social globalization, an irreversible process that makes the distinction between local and national more and more visible. Proof of the relevance of this indicator is also the annual World Bank hierarchy of the world's economies, which divides the states into four groups, according to GNI per capita (high income countries, upper middle-income countries, low income countries and countries with lower incomes). This criterion was also adopted at the level of the European Community in order to establish for each Member State the contribution to the Community budget as well as the contribution from VAT.

Moreover, since the interest for personal progress has passed the individual boundaries, becoming an objective of the national and international development strategies, the focus has been on theconversionrate of the domestic results into national incomes, as well as to the extent to which this aspect puts animprint on the quality of life of the citizens, becoming thus a topic of intrigue, both from the theoretical and practical perspective.

In fact, the desire to balance the three directions affecting the individuals' quality of life (economy, society and the environment) has "overthrown" the economy, generating increased attention and commensuration of the other two segments, which resulted in the construction of new indicators, relevant from the point of view of the environment and social welfare.

Thus, if, from the macroeconomic outlook, the degree of GDP conversion into GNI reflects the extent to which the economic strength of the country is transferred to the material prosperity of its citizens,

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information on social welfare and environmental quality is synthesized and expressed using new indicators of social progress assessment - Social Progress Index, Prosperity Index, Genuine Progress Indicator, Life Quality Index, and so on.

The analysis of the interdependence between these three essential aspects of human life (economic, social and environmental), with direct and immediate implications on the quality of life, is also the subject of the present research paper, with the purpose to determine, on the basis of empirical data, members of the European Union (with a distinct analysis on Romania) can be established a general relation - valid between the rate of GDP conversion into GNI and the overall progress of the society.

Drawing a conclusion in this respect will allow emphasizing the role other factors have on the progress and the society's wellbeing, and most importantly the identification of the ways in which these complementary factors, which are considered to be secondary, can be improved so that the premises for the effective improvement of the quality of human life on all its levels are created.

This is because, one thing is certain - income is a determining, important but insufficient factor. The interest center needs to be moved from how much we invest to what we invest and, above all, on qualitative results.

In fact, this goal was materialized in 2015 in a new Global Action Program, formulated as "Agenda 2030 for Sustainable Development" and adopted by all 193 United Nations member states that set out a plan so that, by 2030, extreme poverty, inequality and injustice are eradicated, while pursuing the protection of the planet (17 global sustainable development objectives).

## 2. Brief presentation of the methodology

A first step towards achieving the research's objective is to determine the rate of GDP conversion into GNP. In order to allow comparability of the results, the reporting is made at GDP / capita and GNI / capita, both expressed in $, at purchasing power parity. The empirical analysis targets data published by the World Bank for 2017 (currently the most recent definitive data) for the European Union member states.

As a variable for measuring the quality of life, the reporting shall be made according to the Social Progress Index. This option is based on two objective aspects[1]:

- considering that the computing method relates to three essential aspects for determining social well-being and quality of life in general: the degree of satisfaction of basic human needs (food, medical care, water and sanitation, housing, personal safety), access to fundamental well-being (access to basic education, access to communications and information, health and well-being, environmental quality) and the opportunities created (personal rights, personal freedom and freedom of choice, inclusion, access to advanced education), the indicator only commensurate with information about others two factors of interest in this paper, namely society and the environment;
- taking into account the four fundamental principles according to which it was built (excluding social and environmental indicators, attention focused on inputs not on inputs, holistic and relevant for all countries, applicability[2]), since 2014 when the nonprofit organization Social Progress Imperative, with Deloitte's support, publishes annually a Social Progress Index report for 146 countries, it has become one of the most widely used and cited sources of documentation in specialized studies.

Considering that the fundamentals of economic theory suggest a positive correlation between the conversion rate of GDP / capita into GDP / capita and Social Progress Index, the analysis of the relationship between the two variables involves firstly establishing of a link but also determining the intensity and the meaning of this link. To this end, the Data Analysis function is used in the Excel spreadsheet program because it provides the value of the linear correlation coefficient r. Thus, a positive value of the correlation coefficient reflects a direct correlation between the two indices, and a negative value indicates a relationship reverse in terms of their evolution.

Considering that in order to establish the correlation intensity, although there is no unitary approach, the references are made predominantly to the interpretation proposed by Professor Will G. Hopkins in 2000 for the interpretation of the correlation coefficient r we will consider the intervals set by it, thus[3]:

- between 0.0 and 0.1 - negligible correlation between variables;
- between 0.1 and 0.3 - minor correlation;
- between 0.3 and 0.5 - moderate moderate correlation;
- between 0.5 and 0.7 - high correlation;
- between 0.7 and 0.9 - very high correlation;
- between 0.9 and 1.0 - almost perfect correlation.

A first analysis of the correlation between GDP / capita GDP / capita GDP and the Social Progress Index was made for all EU member states, but the uneven distribution of data, the Pearson correlation coefficient of minor value (-0.12933) and the significance threshold greater than 0.05 reveals that there is no linear relationship between the two indicators. This aspect makes the analysis of the graphical representation of the linear function and of the determination coefficient (R2) not statistically relevant.

However, the absence of a linear link does not rule out any link between the analyzed variables.

[1] Michael E. Porter, Scott Stern, Michael Green (2017), *Social Progress Index 2017*, Washington, Social Progress Imperative, p. 3
[2] Idem, p. 2
[33] Gabriel SticlaruStastistical Applications with SPI, EdituraCoolPrint, Bucharest, 2012, pp. 50-52

Therefore, further analysis is justified to identify another type of correlation. In this sense, the EU countries are grouped into two categories - countries with a GDP conversion rate in GNI of over 100% and countries where the conversion rate is below 100%.

As far as Romania is concerned, since the Report on the Social Progress Index was published in 2014, the retrospective analysis of the correlation between the two variables is limited to the period 2014-2017 and the GDP / capita and GNI / capita are also expressed, in $, to purchasing power parity.

## 3. GDP conversion rate in GNI versus the Social Progress Index

### 3.1. Comparative analysis across EU countries Content

Grouping of EU countries according to the macroeconomic indicator of dominant output (GNI or GDP) also illustrates an uneven distribution of data as shown in Tables 1 and 2. According to the same data, the distribution is uneven, including from the perspective of correlating the position in countries' rankings according to GDP / capita with the position regarding the conversion rate or the IPS level.

**Table no. 1** Turnover rate of GDP / capita in HNI / capita vs SPI for EU member countries with a conversion rate higher than 100%

| Rank* (according to GDP/capita) | Country | GNI/GDP % | SPI % |
|---|---|---|---|
| 4 | Austria | 100.20 | 87.98 |
| 5 | Denmark | 102.00 | 90.57 |
| 6 | Germany | 102.06 | 88.5 |
| 7 | Sweden | 101.54 | 89.66 |
| 8 | Belgium | 100.84 | 87.15 |
| 9 | Finland | 101.19 | 90.53 |
| 11 | France | 102.19 | 85.92 |
| 13 | Italy | 100.54 | 82.62 |
| 25 | Greece | 100.07 | 78.92 |
| 28 | Bulgaria | 101.30 | 74.42 |

**Source:** author's work based on World Development Indicators data, last updated date 3/21/2019

*Malta is missing because it is not included in the Social Progress Index 2017

**Table no. 2** GDP conversion rate in GNI vs SPI for EU member countries with a conversion rate of less than 100%

| Rank (according to GDP/capita) | Country | GNI/GDP % | SPI % |
|---|---|---|---|
| 1 | Luxembourg | 70.07 | 89.27 |
| 2 | Ireland | 81.84 | 88.91 |
| 3 | Netherlands | 99.42 | 89.82 |
| 10 | UK | 98.36 | 88.73 |
| 14 | Spain | 99.98 | 86.96 |
| 15 | Czech Republic | 94.83 | 84.22 |
| 16 | Slovenia | 97.45 | 84.32 |
| 17 | Cyprus | 97.41 | 81.15 |
| 18 | Lithuania | 96.70 | 78.09 |
| 19 | Estonia | 97.98 | 82.96 |
| 20 | Portugal | 97.81 | 85.44 |
| 21 | Slovak Republic | 97.67 | 80.22 |
| 22 | Poland | 96.04 | 79.65 |
| 23 | Latvia | 99.26 | 78.61 |
| 24 | Hungary | 95.92 | 77.32 |
| 26 | Romania | 97.31 | 73.53 |
| 27 | Croatia | 98.18 | 78.04 |

**Source:** author's work based on World Development Indicators data, last updated date 3/21/2019

Although for both groups, the Pearson correlation coefficient reflects an average correlation between the variables analyzed (Table 3 and Table 4), the significance threshold of more than 0.05 indicates that there is no linear relationship between the two indicators.

Moreover, the graphical representation of the scatter plot of the two variables values in each of the two groups of countries reflects the existence of a polynomial trend, but of a low intensity (R2 = 29, 8% for the countries with a conversion rate over 1 and R2 = 42% for countries with conversion rate below 1). It should be taken into account that in the case of nonlinear correlations the coefficient R2 no longer reflects the degree of determination but only the intensity of the analyzed trend.

**Table no. 3** Correlation coefficient between the GDP conversion rate in GNI and SPI for EU member countries with a conversion rate higher than 100%

| | Column 1 | Column 2 |
|---|---|---|
| Column 1 | 1 | |
| Column 2 | 0.36387 | 1 |

**Source**: author's work based on data in table no. 1

**Table no. 4** Correlation coefficient between the GDP conversion rate in GNI and SPI for EU member countries with a conversion rate of less than 100%

| | Column 1 | Column 2 |
|---|---|---|
| Column 1 | 1 | |
| Column 2 | - 0.40009 | 1 |

**Source**: author's work based on data in table no.2

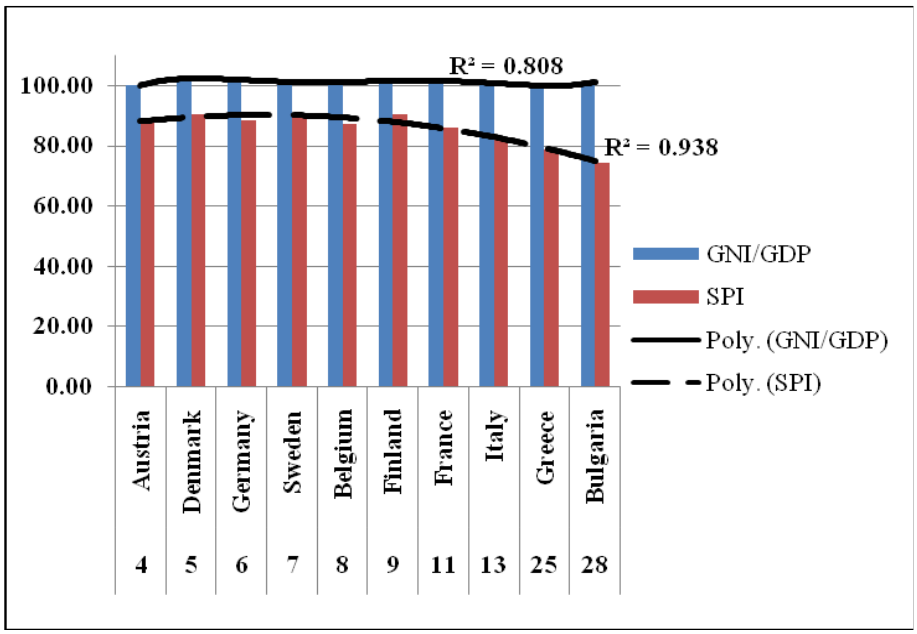
We observe that in countries with a conversion rate higher than 100%, the fact that the national per capita income is higher than the GDP / capitaput their mark, in positive but moderate way (r = 0.36387) on the social progress – the countries with the highestconversion rate in this group also records also the highest level of the social progress index.

In the case of countries with a conversion rate of less than 100%, a national income per capita lower than GDP / capita also influences moderately but in the negative (-0.40009), the level of social progress index - in this group, the social progress index is higher for countries with the smallest conversion rate.

Taking into account the identified restrictions, the analysis of the link between the GDP share in GDP and the degree of social progress will be limited to graphical comparison through column type charts and the identification of a trend of the two variables, depending on the position of the countries in the EU GDP classification / capita.

As a consequence, Chart 1 illustrates comparatively the GDP / capita GDP conversion rate and the Social Progress Index for EU countries where national / capita income is higher than GDP / capita. In this case, the rate of conversion is higher and, although it does not fluctuate much (maximum 2 percentage points), the distance between the two variables increases as GDP / capita decreases.

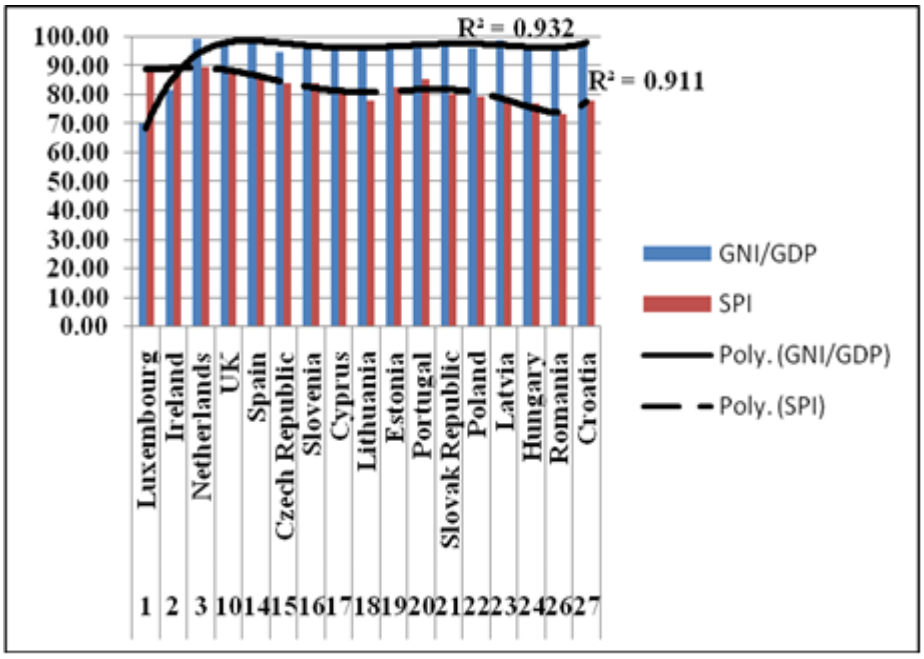
**Chart no. 1** GDP conversion rate into GNI vs SPI for EU member countries with a conversion rate higher than 100%




**Source:** author's work based on the data in table no. 1

The situation is not much different for the second category of countries, i.e. those for which the rate of conversion is less than one, as suggestively illustrates graph no. 2.

**Chart no. 2** GDP conversion rate in GNI vs SPI for EU member countries with a conversion rate of less than 100%




**Source:** author's work based on the data in table no. 2

Thus, the smallest conversion rates (70.07% and 81.84%, registered by Luxembourg and Ireland, the first two countries in the GDP / capita ranking), ensure the highest levels of social progress but by passing between the 95% - 99, 8% (which includes the rest of 15countries within the group), as GDP / capita decreases, decreases on average the level of registered social progress, and the gap between the two variables can be seen on the graph.

### 3.2. Retrospective analysis for Romania

Empirical data and graphical representations for both groups of countries analyzed reflect the direct, positive link between the level of social progress and GDP / capita and also the moderate correlation between the social progress index and the GDP conversion rate in the GNI, situation confirmed by the figures shown for Romania and summarizedin table no. 5.

**Table no. 5** GDP conversion rate in GNI vs SPI in Romania

| AN | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 |
|---|---|---|---|---|---|---|---|---|---|
| GNI/GDP% | 98.7 | 98.49 | 98.34 | 98.25 | 97.84 | 98.72 | 97.68 | 97.37 | 97.31 |
| SPI% | - | - | - | - | - | 67.72 | 68.37 | 72.23 | 73.53 |

**Source:** author's work based on World Development Indicators, last update date 3/21/2019 and Social Progress Index, 2017 Report

The limited time horizon for which the data is available, makes an analysis of the correlation between the two variables unviable, but it is worth noting that the value of the Pearson correlation coefficient is also negative for Romania, which corresponds to the general trend determined in the countries of its group (Table 6).

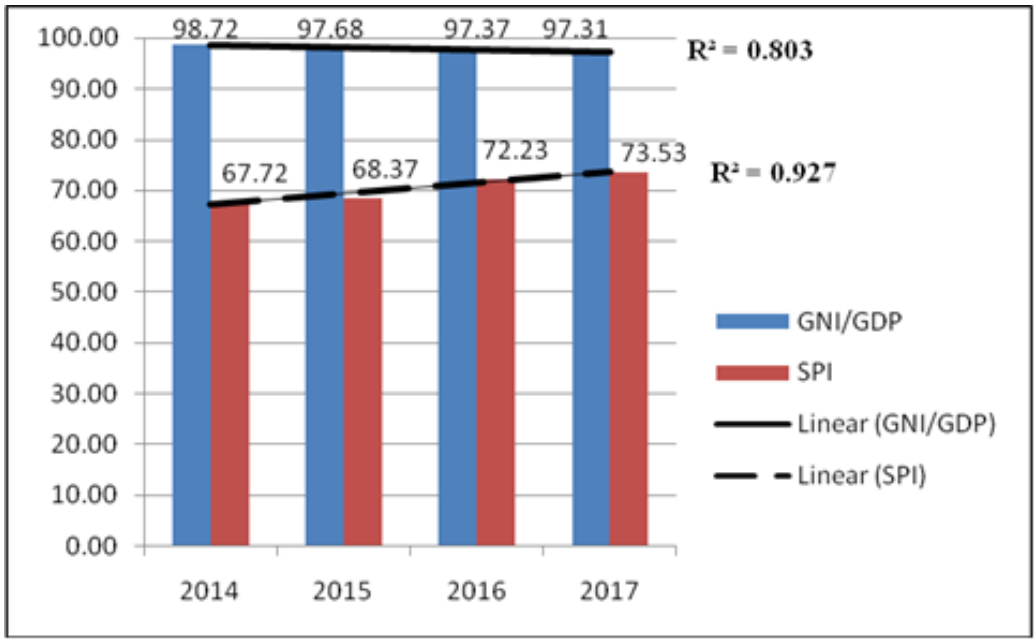
Thus, as illustrated in Chart no. 3, although the conversion rate has decreased during the analyzed period, the social progress index has increased, strengthening the idea that GDP / capita puts its mark on the evolution of the quality of social life.

**Tabel nr. 6** Correlation coefficient between the rate of GDP conversion into GNI and SPI in Romania

| | Column 1 | Column 2 |
|---|---|---|
| Column 1 | 1 | |
| Column 2 | - 0.81003 | 1 |

**Source:**the author's work based on the data in table no. 5

**Grafic nr. 3** GDP conversion rate in GNI vs SPI in Romania




**Source:** the author's work based on the data in table no. 5

So, although it is highly discussed and disputed, the relevance of GDP / capita, in the analyzes and reports regarding the standard of living and quality of life in the world states, it proves to be an indispensable but not sufficient source of information.

## 4. Conclusions

If traditionally, the economic theory focuseses on GDP / capita to analyze and compare the standard of living for the world's states, in the last years it has been noted that particular attention is paid to GNI / capita as a benchmark for countries ranking for the same purpose. This is because it has been found that circumstantial situations can facilitate the increase of the value of the domestic final output, without this favorable situation being transferred to the national economic agents. Moreover, worries about climate change, increasing conflicts and social discrepancies have generated interest for other indicators of measuring the quality of life, social implications gaining priority over the economic ones.

In the light of the foregoing, the present paper has been built on the premise that an empirical analysis at the level of the EU Member States will support these new approaches.

However, reality has shown that the normative approach is not complementary to the positive one, and no clear relationship can be established, generally valid between the degree to which GDP is conversioned into national income and social progress. Furthermore, graphical representations show the same evolution of social progress and GDP / capita.

The moderate correlation level between the GDP conversion rate into GNI and IPS and the declining trend of the social progress along with the country's GDP / capita decline, demonstrate that the macroeconomic outcome indicators remain pillars of the quality of life for citizens of the national states but , lead at the same time to a clear conclusion: factors outside the exclusively economic sphere activities such as politics, education, economic and entrepreneurial culture of the population, traditions, but above all the public administration decision-makers abilities to manage their national wealth, leave a mark to an even greater extent than the macroeconomic results on the standard of living.

As a result, alongside the media coverage of all macroeconomic outputs, the popularization of complementary indicators such as the Social Progress Index would lead to an increase in the level of information and, implicitly, an increaseof the expectations and involvement of civil society as a stakeholder of national economies.

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# CONTROL AND AUDIT IN MARKETING

**Plamen ILIEV**[*]

**Abstract**

*In the report, control is seen as a function of management, among others, such as planning, forecasting, marketing, etc., through the prism of marketing and in the sense that these functions are also subject to control. Marketing is an integral part of marketing audit, and marketing control. In general,* ***marketing control*** *assesses the achieved market outcomes, the marketing costs incurred and the degree of achievement of the marketing goals.*

*In turn, the* ***marketing audit*** *evaluates the way it works. Whether the organization of work in the marketing department, the existing rules and procedures provide the necessary prerequisites for achieving the marketing objectives and do not increase the risks over the inherent market risks.*

*In summary, marketing planning and marketing strategies are part of company planning and strategies,* ***marketing control****, also as part of internal and financial control, has the task of assessing the degree of correspondence between planned and achieved in the field of marketing as well as to take responsibility for undue costs and unused reserves. The same is true of* ***marketing audit****, as part of internal audit, is the means of constant, independent and objective assessment of the adequacy of the organization of the marketing activity and of the decisions and actions of the collaborators from the units that carry out the marketing activity of the company.*

*Marketing control and audit may not be the complete and necessary response to revitalizing marketing strategies but provide a generic mechanism in pursuit of this necessary goal.*

**Keywords:** *control, audit, marketing, planning, strategies*

## Introduction

Marketing control and auditing is a topical topic of today, and in the future for the following reasons:

- The control, which has emerged in ancient times, is an essential necessity for the regulation of social and interpersonal relations;
- With the time and development of society and economic relations, it becomes of particular importance for the construction and development of different economic systems;
- Control is largely determined by the right to power and ownership of means of production, or, in other words, the owner of capital is most often entitled to exercise control;
- The State exercises control functions to protect state interests and property in tax, social security, redistribution, social spheres, and so on;
- Where we talk about marketing control and auditing, the company's owner or management must implement and develop it for business development, sales growth, profits, and so on. When using an external marketing audit, it is intended to obtain an independent opinion on this type of activity and its possible corrections.

All this implies certain marketing relationships, following marketing control and audit, in order to increase profits, reduce costs and their return, and the purpose of the topic and the relationship with the applied literature.

## 1. Control as a function of management

Etymologically, the term ,,control" derives from the French word ,,controle", which literally means checking. Essentially, however, the concept of verification is not covered by the content of the control. Usually, checking is to check something that is part of the whole. It gives an idea of the current state of phenomena and processes. Unlike checking, control is checking something finished and whole, with all its components. Over time and scope it has unlimited action.

The subject of this report is control as a function of the management of economic systems or, in particular, of marketing as one of the management functions. In this aspect control arises with the emergence of the state.

Governance according to economic theory is a factor of production (the other factors are labor, capital and land). It is done through some basic functions such as: planning, organization, command, coordination, control, etc. Control not only impacts the results as a feedback management but is viewed as a continuous process.

For the control of economic systems it is appropriate to use the notion of **economic control**. But the control is mainly involved in the management of economic systems. That is why it is more in line with the name management control. However, the concept of financial control has been adopted in practice. This is because the financial management and financial

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performance of enterprises through their accounting systems are mainly and most frequently checked.

Depending on the specifics of the control functions, **financial (accounting) and management (administrative) control** are encountered. The accounting control is exercised over the reliability of the financial statements and the protection of the assets. Managerial control over compliance with the organization's norms. It checks for suitability for economy, efficiency and efficiency. These indicators are critical to control. Economics is the acquisition with the lowest cost of materials or goods, while respecting quality. Efficiency is the achievement of objectives when comparing actual and expected results. Efficiency means achieving maximum results at minimal cost.

Audit derives from the word ,,audio", which literally means listening. It relates to the period from the Middle Ages to the Industrial Revolution, in which the accounts were heard publicly. During the Industrial Revolution, the creation of large enterprises led to the separation of ownership of capital from its management and to the need to protect owners' interests from fraud and error. That is when the organized audit appears. The audit, unlike the control, occurs much later and applies to the financial accounting activity, and for a long time this term was used only to express an opinion on the financial statements of the enterprises. However, performance and compliance auditing is already widespread. Performance Audit is also known as Operational (Managing) Audit and refers to an Efficiency, Efficiency, and Efficiency Assessment. The compliance audit focuses on the assessment of contracts and contractual relationships, tax commitments, the company's credit relations, the company's personnel policy, and management of human resources, marketing, all actions related to norms and rules that affect the end result of the object under review.

## 2. Origin of Marketing Control and Audit

Unlike the control that has been known much earlier, the idea of a marketing audit has sent us in the 1950s. Rudolf Dallmeier, former director of Boise Allen and Hamilton, recalls the idea of a leading marketing role in 1952. Robert Lavage, president of Ellik and Lavigne, dates back to the use of marketing audit in his company more than two decades ago. In 1959, the American Management Association published the first book on Marketing Audit under the title "Analyzing and Improving Marketing Performance". In the 60th marketing audit, it gained a prominent place in the service offerings of the management consulting companies. Even before the turbulent years of the 1970s, he managed to attract managerial attention.

An important principle in marketing auditing is to start with the market place, explore the changes that are going on, and what problems and opportunities they contain. Then, the objects of marketing strategies, organization and systems are explored. Finally, the auditor, which may be both internal and external, should investigate one or more key functions that are relevant to the company's marketing performance in detail.

## 3. Marketing control and Marketing audit

Marketing is a way of thinking that no user has any business activity and working to form his clients, the company works for its profits.

By its very nature, marketing brings together activities of: creation of new products, realization of the existing ones, stimulation of producers and consumers, pricing and different types of communications.

All of them are subordinated to a common strategy, an unresolved goal.

By marketing, in addition to achieving high profit, you can also seek to achieve other goals:

- increasing sales volume, increasing market share, increasing the image of the company and products, shifting competition or shrinking its market share and attaining a leadership position .

Marketing is an integral part of marketing, marketing audit, and marketing control. In general, marketing control assesses the achieved market outcomes, the marketing costs incurred and the degree of achievement of the marketing goals.

In turn, the marketing audit evaluates the way it works. Whether the organization of work in the marketing department, the existing rules and procedures provide the necessary prerequisites for achieving the marketing objectives and do not increase the risks over the inherent market risks.

A classic vision for marketing auditing can generally be defined as comprehensive, systematic, independent, and periodic auditing of the marketing environment, goals, strategies, and business activities of the business or its business units to identify problem areas and unused opportunities, and to propose an action plan to improve the company's marketing results.

The scope of marketing auditing in the last decade is characterized by significant changes in marketing theory and practice. The main direction of the changes can be systematized in several directions, or three main fields, which correspond to three fundamental questions:

- How does the company serve its markets and how satisfied its customers are;
- What is the "value" of the products and services the company offers?;
- What is the efficiency "of the actions to implement these products on the market?

**The first strand** is characterized by the fact that the emphasis is shifted from striving to satisfy consumer preferences better than competitors at all costs, to seeking a maximum return on the money invested in marketing.

**The second strand** states that marketing theory and practice is handled by modern and rapidly developing tools. This necessitates a constant change in the ways of collecting, processing and evaluating marketing information.

**The third strand** relates to the fact that, due to the growing marketing competence of the companies and the anticipated growth of supply, competition is sharply intensified and it is much more difficult for firms to achieve a lasting competitive advantage. This requires constant monitoring of objectives, strategies and tactical moves to achieve them. More frequent are the changes that are made in the organization of marketing activities.

All listed leads to an increase in internal and external risks to the organization and in particular to the success of its marketing activities. This fact prompts companies to look for adequate responses to change.

**The marketing audit** focuses on four of its features - comprehensiveness, systematicity, independence and periodicity.

- Inclusion means that the audit covers all spheres and directions of marketing activity. It is not seen as a series of independent audits of various areas of marketing activity, but as a system of interrelated activities that cover the overall activity of the organization in the field of marketing.
- Systematics of marketing audit requires that it be a continuous process that covers the entire management cycle in terms of time, including planning, implementation, control and evaluation procedures;
- Independence is a key prerequisite for achieving the audit objectives. It is achieved by ensuring functional and organizational independence;
- Privacy means the continuity of the audit process. It should not be seen as a one-time act but as a sequence of steps that include assessment, formulation of recommendations, performance appraisal, formulation of new recommendations, etc.

**Marketing control** as part of the control function in the company is subject to the general logic of the control process - diagnosis of results, evaluation of results, purpose and corrective actions.

The focus on annual performance has as main task to assess to what extent the goals set in the marketing plan have been achieved. For this reason, senior management is committed to its implementation. **The subject** of analysis and evaluation is all the main areas of marketing activity, both in terms of results achieved, such as sales, market shares, consumer satisfaction etc., and in the context of marketing costs incurred. Some of the following can be included here: Sales analysis, market share analysis and changes in the market, analysis of financial results related to the company's market positions, consumer satisfaction assessment, valuation of "brand value" owned by company evaluation of product innovation results, overall evaluation of marketing costs effectiveness.

The task is to evaluate the return on marketing costs. The assessment of the return is necessitated by the fact that the marketing costs should be considered as an investment with a certain return. Also, control over the effectiveness of marketing activity is aimed at assessing the results, in the context of whether the marketing resources of the company are being used in full.

**Marketing control** is so-called strategic marketing control. Its main task is to determine the achievement of the organization's strategic goals and whether the created work organization creates the necessary preconditions for doing so. This control does not focus on the specific direction of the marketing activity or on a certain group of marketing costs. It focuses on the organization of marketing activity in general and therefore does not handle a toolkit of indicators and methods. The importance of strategic marketing control is to generate information on the degree of correspondence between marketing goals and marketing practice in the company. Strategic Marketing Control is a commitment of senior management.

**Control** often improperly identifies itself with the internal audit of marketing activity. In recent years, however, internal audit includes, covering the marketing activity that has emerged as an independent direction in the business of companies.

## 4. Marketing planning before Control and Audit

In the majority of companies, the marketing plan is developed after the company's overall business plan has been developed. Marketing is only part, though very important from the structure of the company's plan. Other structural components of the master plan are production, research and development plans, finance, staffing, etc. Efficiency in marketing planning is greatly increased when it is in line with company planning, as a whole, and the marketing plan is developed as part of the company's strategic plan.

The marketing tasks must be consumer-oriented, constantly monitoring their needs and also monitor the behavior of competitors, identify their weaknesses and strengths, and their potential for market behavior. In this sense, the marketing function is leading. It determines the technical, the production policy of the enterprise, the style and the nature of the management of the entire entrepreneurial activity.

The marketing management cycle ends with control, which at the same time launches a new marketing planning cycle.

Marketing control is a process of measuring and evaluating the results of the marketing strategies and plans, the implementation of the corrective actions that ensure the achievement of the marketing goals. As a result, controls are introduced in marketing activity. For example, if the volume of sales is lower than expected, it is necessary to determine what is conditioned and what needs to be done to change the situation. If the sales volume is above expectations,

then it should be judged what this is causing and maybe it is possible to raise the price of the product. This may lead to some reduction in sales volume, but it is possible to provide a higher profit.

Typically, four types of marketing control - control of annual plans - are distinguished; profitability control; performance control and strategic control. Carrying out marketing activity implies significant costs and their rationality and effectiveness is precisely the control.

Analyzing the relationship between marketing costs and sales volume allows the company to assess the effectiveness of marketing costs and determine their most acceptable size. Typically, such an analysis is made for individual components of marketing costs. Such as: advertising costs; marketing research costs; costs of sales promotion; the costs of the traders and all related to the volume of sales. The results of this analysis should be evaluated in terms of the company's financial performance. This is necessary to understand at the expense of what and where the company receives money.

The financial analysis is conducted in order to reveal the factors that determine the return on investment. Elevation of a given metric is usually done in two directions:

- first, by increasing profits at the expense of increasing sales volume and / or cutting costs;
- secondly, by accelerating the turnover of capital, which is achieved at the expense of increased sales volume or reduction of assets (inventories, basic funds, number of unpaid bills, etc.). This explains the role of marketing factors in ensuring the financial stability of the firm.

One of the first steps in the marketing planning process is the implementation of a detailed marketing audit aimed at revealing the areas where problems and new opportunities exist and making recommendations for developing a plan to increase the effectiveness of marketing activities.

In other words, a marketing audit is a structured, logically consistent approach to gathering and analyzing information that aims to:

- to clarify the market position of the company at the moment;
- promote potential opportunities and threats in the company environment;
- to determine the organization's ability to meet the "requirements" made by the entity (users, intermediaries, suppliers, competitors) to it.

According to F. Kotler, the marketing audit is a comprehensive, systematic, independent and periodic review of the company's marketing and environment, goals, strategies, activities in terms of identifying problem areas and opportunities, and developing a plan to improve the company's business.

Unlike controls, marketing auditing should include: an analysis of the external environment and the company's internal condition; benchmarking of current activities with historical results; identifying future opportunities and threats that the company would face.

Rapidly changing economic processes require rethinking strategies annually, even monthly. Competitors are creating new products, customers are changing their business, distributors lose their efficiency, advertising costs hit the ceiling, government restrictions are on the way, and consumer unions are attacking. Many companies feel the need for periodic analyzes and research on their marketing operations, but they do not know how to approach them. Some companies make just minor changes that are economically and politically feasible but do not cope with the essence of the problem.

Correctly, companies develop a marketing plan, but management does not take a focused and objective view of marketing strategies, policies, organizations, and start-up operations. At the other extreme, companies take the top marketing leadership, hoping to shake the market. Somewhere in the middle may be the truth in the reorientation of marketing operations, based on changing external influences and opportunities.

**Instead of conclusion**

From what has been said so far, it can be summed up that **while marketing control** has the task of assessing the degree of correspondence between planned and achieved in marketing and the return on marketing costs and looking for unused reserves, **marketing audit** is the means of permanent, an independent and objective assessment of the adequacy of the organization of marketing activities and of the decisions and actions of the employees who carry out the marketing activities of the company.

But whether the marketing audit has reached methodological maturity, the answer is not yet, but the growing need to unify practices can lead to reasonable progress in this area to several years.

The marketing audit may not be the complete answer to the revival of marketing strategies, but it presents a generalized mechanism in pursuit of this necessary goal. Each company can benefit from a competent audit of various marketing operations and it can be of great benefit and maximize results.

In this respect, the imposition, use and development of marketing control and auditing is vital to any self-respecting organization in order to better develop and strengthen the market.

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# WOMEN AS CONSUMERS - EXPLORING WOMEN'S PURCHASING HABITS

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**Abstract**

*Consumer's behaviour is presented as series of activities that an individual buyer undertakes in the course of a process when selecting and purchasing the product. Resources that are available to the consumer are: time, money and ability to accept and process information's. Behaviour of the consumer is subjected to the influence of large number of factors that can be divided into: social, personal and psychological factors. The modern lifestyle has contributed in changes in purchasing behaviour of women. Women are no longer just housewives and mothers; therefore they have engaged their position in society and at work place. Due to the lack of time, which, apart from their families, is spent on their workplace, the assumption is that their purchasing habits have also changed. In this paper is explored a sample of 150 women for their purchasing habits, different forms of purchasing, the frequency of purchases, their visiting to the retail patterns of trade, and also are explored the differences with respect to the demographic characteristics of women.*

**Keywords:** *consumer's behaviour, women, buying habits, shopping patterns, demographic characteristics*

## 1. Introduction

Each consumer has his own buying habits that differ depending on the influence of various factors that can make affection on it. Consumer studies have begun when traders and manufacturers have realized that consumers were not always responding in accordance to their expectations. Today's consumers are autonomous and well-informed, and on their buying decisions can influence: social and personal factors and also psychological processes. Since consumers' behaviour is a complex process, it is necessary to differentiate consumers according to their lifestyles and therefore adjust marketing activities. Since the role of women in society and the family has also changed, due to lack of free time, the assumption is that women's purchasing habits have changed as well, and their habits that differ in terms of demographic characteristics. The main aim of this paper is to identify the women's purchasing habits in Republic of Croatia with regard to their social and demographic characteristics. The following research hypotheses are set out in this paper:

**H1:** Women's buying habits differ in terms of demographic characteristics.

**H2:** Women's buying habits differ in terms of the amount of monthly income.

These hypotheses are tested and explained in the results of this work.

## 2. Behavior of women as a consumer

Consumer behaviour can be defined as a process of studying individuals, groups, households, companies, institutions or different subjects in the role of consumers[1]. American Marketing Association (AMA) defines consumer behaviour as a dynamic interaction of knowledge and environmental factors that result in behaviour and exchange of aspects of consumers' life[2].

The most common grounds for the market segmentation are the demographic characteristics of the population (such as gender, age, degree of education, marital status, occupation, incomes). Here, demographics help to derive the target market more precise, while socio-cultural and psychological characteristics help to describe consumer attitudes[3]. For the purchase is claimed that has been primarily intended for women, that is, purchasing *is* a woman[4]. The economic circumstances in which a person is situated consists of their "consuming" income (level of income, stability and time frames), savings, wealth, debts, borrowing power, and their attitudes on spending in regards to savings[5]. A contemporary consumer wants a shopping experience, more affordable prices, faster buying and also he wants to simplify life[6]. In the new economy that is dominated by knowledge, digitalisation and speed connects all

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buyers[7]: therefore, buyers are well informed, they are looking after the quality with the globally competitive prices, expect to get solutions to their needs, fast service, shopping in accordance with their lifestyle and delivering value for money. During the last 25 years consumers' habits have significantly changed. It came to aging of population, the growth of multicultural societies, and also the major differences in purchasing power have occured. Consumer polarization has caused great differences in their needs which is reflected in various ways of buying[8].

Shopping is something that is done in a short period of time between work, going home, family life, and sleeping. In a post-feminist world, women have more money in terms of their employment, so it should be beneficial for sales, but the opposite happens. Because of their job, women do not have so much time and willingness to go shopping. Still, women still love to shop with friends and encourage each other to buy, and assist each other to avoid the wrong choices[9]. Research has shown that women and men are differentiated with regard to the products they buy, the way they buy products, how they respond to promotions and the way they process information's during purchases and also the time they spend in the store.

Women are doing the majority of household shopping, and men are mostly specialized in those things that are used outside the home[10]. Given the change in the traditional role of women in society, there has been a change in the role of men in the household[11]. Research into differentiations in gender-based decision-making is relevant to marketing theory and practice. Differences in purchasing behaviour of women and men affect their purchasing role as a consumer and as such on the marketing strategy of a company[12].

**Table 1**. Characteristics of consumer decision styles

| Decision style | Characteristics of style |
|---|---|
| The tendency to buy from habit | loyal consumers with certain brands and stores |
| Confusion of consumers with too many choices | lack of consumer confidence when choosing the right product |
| Impulsiveness | consumers inclined to unscheduled buying: they do not care how much money they will spend |
| Price sensitivity | consumers tend to look for and to buy cheaper products |
| The tendency to buy from recreation and pleasure | to buyers, shopping represents fun, recreation and brings pleasure |
| The affiliation to novelties in fashion | consumers tend to buy trend products |
| The affiliation to the brand | consumers tend to buy more expensive and branded products |
| Perfectionism | consumers tend to perfection seeks for the best quality products; they buy more carefully, more systematically and make comparisons between products |

**Source:** Sproles, Kendall (1986)

In accordance to the research done on consumer decision-making styles[1], women show greater preference for novelties and fashion than men, a greater inclination to buy from recreation and pleasure, they manifest greater purchasing impulsivity and greater willingness to buy from habit.

Women more process information's and evaluates the product according to all its features, while men value information's towards overall problem-solving. Women in shopping often enjoy a range of psychological and sociological pleasures, while men experience shopping as a function of obtaining the products they need[2]. At the end of the 20th century, consumerism has become a "way of life", and as a dominant ideology of modern capitalism, it affects the daily experience of social life[3].

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## 3. Methodology of research

### 3.1. Sample

The survey was conducted in Republic of Croatia in the area of Vukovar-Srijem and Osijek-Baranja County during the months of May and June of 2018. The study covered 150 respondents (N = 150). Participation in the research was voluntary, and the female respondents who agreed to participate completed an anonymous questionnaire that was specifically created for the purpose of this research. In Table 2. is shown the socio-demographic characteristics of female respondents.

**Table 2**. Socio- demographic characteristics of female respondents

| | N | % |
|---|---|---|
| Age group | 150 | 100 |
| 18-35 | 81 | 54 |
| 36-55 | 58 | 38,7 |
| 56 and over | 11 | 7,3 |
| Working status | 150 | 100 |
| Employed | 73 | 48,7 |
| Unemployed | 21 | 14 |
| Student | 45 | 30 |
| Pensioner | 11 | 7,3 |
| Marital status | | |
| Married | 60 | 40 |
| Unmarried | 80 | 53,3 |
| Divorced | 7 | 4,7 |
| Widow | 3 | 2 |
| Qualifications | 150 | 100 |
| Elementary School | 3 | 2 |
| Secondary school | 76 | 50,6 |
| Professional / University Baccalaureates | 39 | 26 |
| Professional / University Master | 28 | 18,7 |
| Postgraduate study / Doctorate | 4 | 2,7 |
| The place of living | 150 | 100 |
| City | 96 | 64 |
| Village | 54 | 36 |
| The amount of monthly income | 150 | 100 |
| Up to 2.000 kn | 49 | 32,7 |
| From 2.001 to 4.000 kn | 35 | 23,3 |
| From 4.001 to 8.000 kn | 50 | 33,3 |
| More than 8.000 kn | 16 | 10,7 |

**Source:** author's work.

### 3.2. Questionnaire

For the purposes of this research a questionnaire was formed. The first part of the questionnaire covers the socio-demographic characteristics of the female respondents, while the second part relates to 18 claims that are related to women's purchasing habits. The respondents were asked to comment on certain statements that are based on a Likert's five-degree scale that follows as*:* 1 = completely disagree, 2 = disagree, 3 = not agree or disagree (neutral), 4 = agree, 5 = strongly agree. All questionnaires were valid and were accepted in the sample.

### 3.3. Statistical data processing

After the data collection, data from the questionnaire were entered into the SPSS database and a detailed analysis was carried out with the help of the statistical package for social sciences IBM SPSS (Statistical Package for Social Science), version 19.0. The following types of statistical data analysis were used in this study: descriptive statistical analysis and nonparametric statistical analysis. Descriptive statistics were accounted for all variables where appropriate.

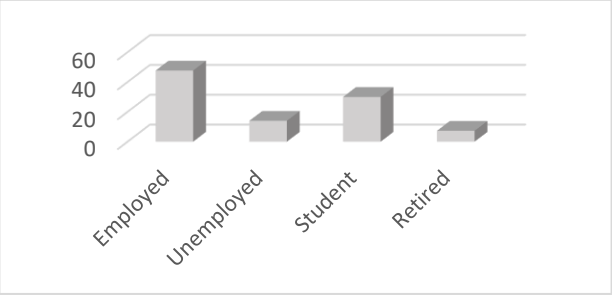
As all variables had abnormal data distribution (what was determined by Shapiro - Wilk test), therefore nonparametric statistics (Mann-Whitney U test) was used. The hypotheses were accepted or rejected at the significance level of $\alpha \leq 0{,}05$.

## 4. Research results of the shopping practice of women

### 4.1. Socio-demographic characteristics of female respondents

The study involved 150 female participants. The youngest person was 19 years old, while the oldest person in the sample was 77 years old. On Graph 1. is shown the working status of respondents.

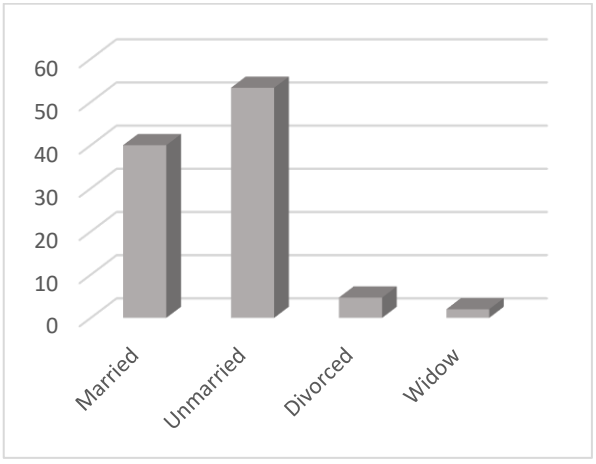
**Graph 1.** Working status of respondents




**Source:** author's work.

With regard to work status, the largest number of respondents, 48,7 % is employed, 14% of them are unemployed, 30% is studying, and 7,3 % of the surveyed individuals are retired.

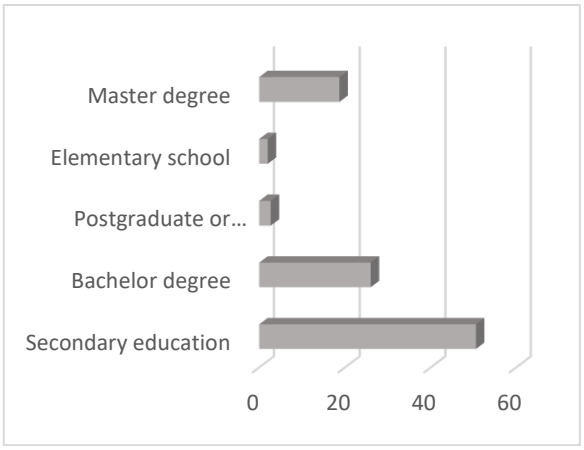
**Graph 2**. Marital status of respondents




**Source:** author's work

The largest numbers of respondents, 53,3% are unmarried, 40% are married, 4,7% are divorced, and 2,0% of respondents are widows.

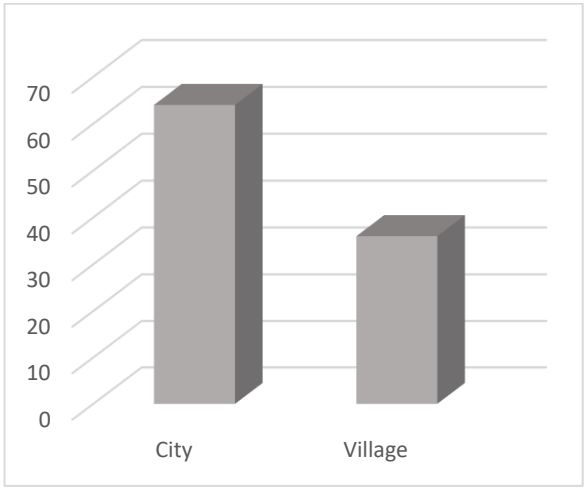
**Graph 3**. Educational structure of respondents




**Source**: author's work

The highest percentage of subjects is those with completed secondary education (50,6%). Following are the respondents with the acquired vocational / university's Bachelor degree, 26% of them, and 18,7% of the respondent's posses a diploma of a university / university's Master degree. Only 2,7% of female respondents have completed postgraduate or doctoral studies. The lowest number of respondents has completed elementary school (2%).

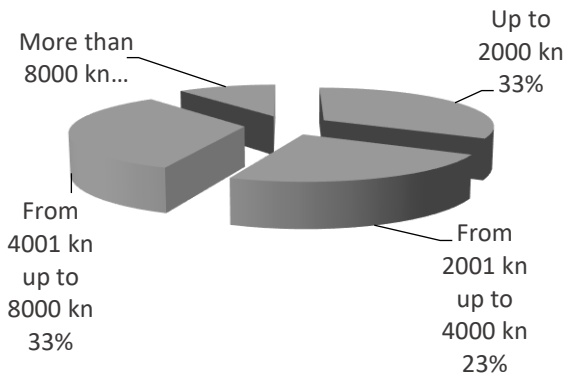
**Graph 4.** The place of residence of female respondents




**Source:** author's work

With regard to the place of residence, the largest number of respondent live in the city, 64% of them, while 36% of respondents live in rural areas, i.e. in the villages.

**Graph 5**. Female respondent's monthly income level




**Source:** author's work

The monthly income level of the largest number of examinees ranges from HRK 4.001 to HRK 8.000 (33,3%) and from HRK 2.001 to HRK 4.000 (23,3 %). Total of 10,7% of respondents have a monthly income of more than 8.000 Kunas. Also, a high proportion of respondents have achieved a low monthly income 2 000 Kunas (32,7%). It is assumed that is attributed to students and retired individuals.

### 4.2. Differences in purchasing habits with regards to socio-demographic characteristics (H1)

The first hypothesis cannot be accepted. At the set level of significance it is impossible to accept the assumption that the purchasing habits of women differ in terms of demographic characteristics: age, working status, marital status, qualification, place of residence and the level of monthly income.

### 4.3. Differences in purchasing habits with regards to the amount of income (H2)

Descriptive statistics for numeric variables are presented using the arithmetic mean (AS), standard deviation (SD), and median values (Table 3).

**Table 3**. Purchasing habits regulated by the amount of monthly income level

| | Up to 4.000 kn | | | | from 4.001 HRK kn | | | |
|---|---|---|---|---|---|---|---|---|
| VARIABLE | AS | SD | median | N | AS | SD | median | N |
| I often buy in hypermarkets. | 3,34 | 1,196 | 4,00 | 84 | 3,92 | 1,114 | 4,00 | 66 |
| I often buy on the Internet. | 2,23 | 1,196 | 2,00 | 84 | 2,83 | 1,431 | 3,00 | 66 |
| I spend majority of my income on products for children. | 1,65 | 1,058 | 1,00 | 84 | 2,33 | 1,244 | 2,00 | 66 |
| Other people influence my choice of product I will buy. | 2,61 | 1,109 | 3,00 | 84 | 2,02 | ,984 | 2,00 | 66 |
| I do my shopping over the weekend. | 3,17 | 1,096 | 3,00 | 84 | 3,67 | 1,057 | 3,00 | 66 |

**Source**: author's work

In order to identify the differences in women's purchasing habits due to the level of their monthly incomes, data distribution was tested by the Shapiro-Wilk test. Since all variables had abnormal distribution of data, non-parametrically Statistics or Mann-Whitney U test was used (Table 4).

**Table 4**. Mann-Whitney test as an indicator of the monthly income levels

| VARIABLE | Mann- Whitney U | Wilcoxon W | Z | Asymp. Sig. (2-tailed) |
|---|---|---|---|---|
| I do my shopping over the weekend. | 2089,000 | 5659,000 | -2,693 | ,007 |
| I often buy in hypermarkets | 2114,500 | 5684,500 | -2,578 | ,010 |
| I often buy on the Internet. | 2112,000 | 5682,000 | -2,571 | ,010 |
| I spend majority of my income on products for children. | 1884,000 | 5454,000 | -3,662 | ,000 |
| Other people influence my choice of product I will buy. | 1946,000 | 4157,000 | -3,261 | ,001 |

**Source**: author's work

The second hypothesis is accepted. Namely, at the given level of significance it is possible to accept the assumption that women with higher monthly income level are buying more often over the weekend ($Z = -2,693$ $p < 0,007$), on the Internet ($Z = -2,571$ $p < 0,010$), they often buy products for children ($Z = -3,662$ $p < 0,000$) and their buying is less affected by the other person ($Z = -3,261$ $p < 0,001$). Women with the higher monthly income level more often buy in hypermarkets ($AS = 3,9 \pm 1,1$ $N = 66$ vs. $AS = 3,4 \pm 1,2$, $N = 84$).

## 5. Conclusions

Since the traditional role of women in society has changed, the assumption was set on how their buying habits have changed. Buying is no longer just a woman's obligation to buy household goods but shopping has become a pleasure and a form of entertainment. The results of this research that has been conducted in two Slavonian counties, Vukovar-Srijem and Osijek-Baranja County in Republic of Croatia, indicate women's buying habits, the behavioural patterns of women as consumers, and point out to the potential differences between women as consumers in the sense of their socio-demographic characteristics. At the given level of significance, it is not possible to accept the assumption that women's habits of behaviour differ with regard to socio-demographic characteristics such as: age, work status, marital status, educational level and place of residence. Furthermore, the statistically significant differences in purchasing behaviour of women were determined due to their monthly income level. Women of higher monthly income levels are more likely to buy on weekends, in hypermarkets, on the Internet; they more often buy products for children, and their purchases are less influenced by other people. The proceeded research can be used as a basis for targeted market segments according to gender characteristics, as well as the subject for the future research to investigate purchasing habits of women in other counties of the Republic of Croatia and to make comparisons between them.

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# CHALLENGES FOR THE GLOBAL FINANCIAL SYSTEM

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**Abstract**

*According to the governor of the Bank of England, Mark Carney, the global financial system is currently lagging behind the evolution of the global economy, facing asymmetric concentrations of financial assets in advanced economies relative to economic activity. As the world re-orders, this disconnect between the real and financial is likely to reduce, and in the process other reserve currencies may emerge. By 2030, seven of the world's top 10 economies will be current emerging markets, according to the latest report by London-based multinational banking and financial service company Standard Chartered.*

*On the other hand, global tensions caused by economic sanctions and trade conflicts triggered by Washington have forced targeted countries to take a fresh look at alternative payment systems currently dominated by the US dollar. The global importance of the Chinese yuan seems destined to rise, according to strategists and economists who say flows in the currency will grow over the long term if Beijing continues to gradually open its financial system. The yuan will be increasingly driven by capital account flows, and not just trade-related flows.*

*Looking for a proper anchor of value for the international monetary system is becoming also an issue of a paramount importance. Gold is seen by an increasing number of players as a natural anchor of value and some are already preparing themselves to that by increasing their gold reserves. Holding physical gold is definitely the best hedge against a crash of any paper currency but nevertheless, we need a trustful worldwide monetary and financial system.*

**Keywords:** *global financial system, reserve currencies, fiat currencies, gold, dollar, yuan.*

## Introduction

The world re-orders and the worldwide monetary and financial system needs to be adjusted accordingly. Two issues have to be addressed in this respect:

1. The rebalancing of the global financial system in accordance with the evolution of the global economy and
2. The trust issue in respect to the USA dollar which is, for a long time, a fiat currency and is lately aggressively used as a sanctioning tool towards other states.

## 1. The rebalancing of the global financial system in accordance with the evolution of the global economy

According to the governor of the Bank of England, Mark Carney, the global financial system is currently lagging behind of the evolution of the global economy, facing asymmetric concentrations of financial assets in advanced economies relative to economic activity. As the world re-orders, this disconnect between the real and financial is likely to reduce, and in the process other reserve currencies may emerge.

Let us have a look at the present status and the forecasted evolution of the global economy.

**Global merchandise trade** reached a total of US$17.7 trillion in 2017**.** US$6.3 trillion were exchanged between developed economies (North-North trade), whereas trade among developing and transition economies (South-South trade) accounted for US$4.9 trillion. The remaining US$6.3 trillion were comprised of exports from developed to developing economies and in the opposite direction (North-South, and South-North trade). Thus, for developed economies, trade with developing economies was as important as trade with developed.

In 2017, developing economies shipped most of their exports to the United States of America (US$1.3 trillion), and then to China (US$1.0 trillion) and other Asian economies. They also sourced most of the imports from the same economies.

Despite efforts by the Trump administration to pressure Beijing into reducing the US-China trade deficit, the trade surplus with the US still reached $323.32 billion in 2018 – the highest level since 2006. The trade surplus grew 17 percent from around $275 billion in 2017. Exports to the US surged 11.3 percent year-on-year in 2018 to $478.4 billion, while imports from the US to China rose a scanty 0.7 percent over the same period.

The total value of **global e-commerce** transactions, both domestic and cross border, was also

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impressive, with US$ 16 trillion in 2013 (UNCTAD), US$ 25 trillion in 2015 (UNCTAD) and US$ 27.7 trillion in 2016 (The US International Trade Commission), with public traded companies like Alibaba, Alphabet, Amazon, Facebook, Microsoft, Netflix, Spotify leading the market.

**Global services trade** reached US$5.4 trillion in 2017, one third of the value of merchandise exports. Services exports mainly come from developed economies. These supply over two thirds of services traded internationally. However, several Asian developing economies have established themselves as important exporters. The world's top services exporter in 2017 was the United States of America, with US$781 billion worth of services sold internationally, representing 15 per cent of global exports. They were followed, at some distance, by three European Union member states (UK, Germany, France) that jointly captured 17 per cent of the world market.

The top five developing economies were Asian, comprising China, India, Singapore, Hong Kong SAR and the Republic of Korea. These five held a world market share of almost 15 per cent, the same as all other developing economies combined (UNCTAD Handbook of Statistics 2018, annex 6.4).

The rise of digital technologies promises to further transform international trade. We are entering a new era, in which a series of innovations that leverage the internet could have a major impact on trade costs and international trade. The Internet of Things, artificial intelligence, 3D printing and blockchain have the potential to profoundly transform the way we trade, who trades and what is traded.

The nature of competition in digital markets is materially different from competition in traditional markets as it tends to be based on innovation rather than on pricing. Questions have been raised about how much the adoption of digital technologies has raised economic productivity. Measures of productivity in the United States, for instance, suggest a significant slowdown since 2005.

Beyond facilitating trade in traditional services, digital technologies are enabling new services to replace trade in goods, ensuring the continued importance of services in the composition of trade. Another factor that could become more important for trade patterns in the digital age is market size. Digital technologies benefit from access to large amounts of information, which may be advantageous to large developing economies.

In 2017, **world foreign direct investment** (FDI) inflows decreased by 23 per cent to US$1.43 trillion. Thus, having reached a peak of US$1.92 trillion in 2015, investment fell back to 2013 levels. In developing economies, FDI inflows amounted to US$671 billion, almost double the value of FDI outflows (US$381 billion). Developing economies in Asia and Oceania accounted for more than two thirds of all developing economy inflows and more than 90 per cent of their outflows. Developed economies, by contrast, generate more FDI than they receive. In 2017, they recorded inflows of US$712 billion and outflows of US$1 trillion.

In 2017, developed economies' share of global outward FDI remained unchanged at 71 per cent. Over the last two years, developed economies in America accounted for an increasing proportion. Their share rose from 20 per cent in 2015 to 29 per cent in 2017, thus reaching the same share as Europe. On the recipient side, Asia and Oceania strengthened their position as the main host region of FDI in the developing world, accounting for one third of world FDI.

In the light of the above mentioned realities, we already perceive an asymmetric concentration of financial assets in advanced economies relative to economic activity. China is the leading exporter of the world, surpassing for the third consecutive year the USA. For the developing world it presents already the same importance as USA in terms of exports and imports. For developed economies, trade with developing economies is as important as trade with developed ones. As to the trade in services, five Asian countries held in 2017 the same market share in exports as USA did.

Regarding the FDI flows, developed economies still generate more FDI than they receive, but the share and value of FDI outflows from developing economies is on the rise. In addition we have to take into account some impressive holdings of USA debt by these countries, with China's bond holdings in excess of one trillion.

Even on the gold market, despite the fact that the largest transactions (considering the physical and non-physical ones) are still done on the London financial market, we see a shift of interest to the Asian market which is leading in terms of demand for physical gold and demands a more appropriate price formation based on transactions carried out there.

By 2030, seven of the world's top 10 economies will be current emerging markets, according to the latest report by London-based multinational banking and financial service company Standard Chartered. The long-term projection shows that India is likely to become larger than the US, while neighboring China will reportedly steal the crown of world's most powerful economy (currently held by the US) as soon as 2020. At the same time, Indonesia may break into the top five economies.

The question is how the structure of currencies in use for international payments and in the capacity of reserve currency reflects all these realities. As the world re-orders, this disconnect between the real and financial is likely to reduce, and in the process other currencies, with Chinese yuan to be first considered, will have to win their share.

The global importance of the Chinese yuan seems destined to rise, according to strategists and economists who say flows in the currency will grow over the long term if Beijing continues to gradually open its financial

system. The yuan will be increasingly driven by capital account flows, and not just trade-related flows.

Already, in respect of the World Currency Composition of Official Foreign Exchange Reserves, the international financial statistics of the IMF show that the shares of U.S. dollars in the allocated reserves of the states has decreased from 66.00% at the beginning of 2015 to 61.94% in the 3rd quarter of 2018. Shares of Chinese renminbi rose from 1.07% in 2016Q4 to 1.80% in 2018Q3.

## 2. The trust issue in respect to the USA dollar

The past year was full of events that inevitably split the global geopolitical space into two camps: those who still support using US currency as a universal financial tool, and those who are turning their back on the greenback. Global tensions caused by economic sanctions and trade conflicts triggered by Washington have forced targeted countries to take a fresh look at alternative payment systems and safe assets, currently dominated by the US dollar. Before looking into that, we have to address the wider issue of fiat currencies because dollar is in that position for a long time and some are asking for how long the agreement on this status quo is wise to prolong in the context of the dollar misuse.

### 2.1. Fiat currencies

Currency that a government has declared to be legal tender, despite the fact that it has no intrinsic value and is not backed by reserves is a succinct definition of fiat currency. Historically, most currencies were based on physical commodities such as gold or silver, but fiat money is based solely on faith.

What Marco Polo had come across in China in the 13th century was the paper money issued by the Yuan Dynasty under the rule of the legendary Kublai Khan. His people had been making use of paper money for several hundred years, dating back to the Song Dynasty in the 8th century. They had to take the value of the printed papers at faith, since they had no intrinsic value on their own.

In Europe the first real fiat currency didn't appear until 1661 in Sweden and then only to a limited effect. Some were tied to gold and silver; some were not. At times, both existed in some countries, with the paper money trading at a discount to the "hard money." In colonial America, individual states issues "bills of credit" and various types of currency over the years. Once again, some were backed by silver or gold, but some were not.

By the turn of the 20th century, most nations had made themselves the sole issuer of bank notes and legal tender. The economic havoc and immense cost of World War I led to the end of conversion of currencies for specie across the board, leading to an infamous example of a pitfall of fiat currencies. Between wars, currencies were extremely volatile. Hyperinflation led to severe deflation and depression. World War II brought another period of intense government intervention in economic activity, price controls, and monetary policy. As the world reemerged from the cataclysmic wars, there was broad consensus amongst the major powers that something had to be done to stabilize currencies, exchange rates, and economies, and to rebuild faith in government control of all of the above.

What emerged was the Bretton Woods System (1944), in which all of the nations tied their currencies to the U.S. dollar through fixed exchange rates. The U.S. dollar was still convertible to gold, but only for central banks. On August 15, 1971, President Nixon unilaterally ended it. It was now a pure fiat currency. The dollar plunged by a third during the stagflation of the 1970s, and currencies destabilized worldwide. What emerged has been called Bretton Woods II, although it wasn't coordinated at all. An international system of interdependency between states with generally high savings in Asia and Western states with generally high spending emerged. This paradigm lasted until about five to ten years ago.

With the global recession and currency wars raging to this day, there are renewed calls for worldwide standards for currencies and banks. Banking regulations in the U.S. and in Europe have been used to address the credit crisis during the recession, resulting in unorthodox monetary easing policies from central banks, but there are still no binding international standards for currencies.

Inflation, hyperinflation, and deflation are all still on the table as individual currencies are completely independent. Fiat currencies only work when inflation is low or moderate. Responsible management by central banks can keep the possibility of high inflation and deflation in check through interest rates and monetary supply. With the Fed's unprecedented expansion of the monetary base, and with interest rates at virtually zero percent, it has no ability to further stimulate the economy without dumping more dollars into circulation. We haven't seen the inflation and depreciation of the U.S. dollar that would be expected so far. But many worry about a delayed effect of the Fed's actions. When a currency is weak, or a central bank is using risky policies that create a loss of faith and an ailing economy, it is better to shift your money into traditional stores of wealth like gold or silver. Without a commodity or good used as a peg for value, there is a point of no return in the collapse of a government, national economy, or both that marks a point of no return for its currency.

"A truth of financial reality is that any prosperity built on paper money has usually been fun for a while, but has always ended in catastrophe" (from Jim Dines's 1975 book, The Invisible Crash). Jim Dines predicted that gold would enter into a historic bull market, rising from government-fixed levels of $35 to over $400. Not only that, but on January 14, 2005, Dines explicitly warned of the coming real estate crash of 2008, saying

it would teach a lesson in illiquidity and shake the mortgage markets to its roots.

And right now, Dines is issuing another urgent warning. Americans have been unrelentingly assured by the Washington economic establishment that the economy is still recovering from the 2008 Great Recession. But he has never accepted that there's been a recovery. All that's happened since, including the "rebound" in stock prices, has simply been the result of printing breathtakingly large amounts of money and debt. Now, America is saddled with $22 trillion in debt and that figure doesn't even take into account the "unfunded liabilities" like Medicare, Medicaid, Social Security and student loans. The debt is huge and there's no possible way to pay it down. Before long, payments on the debt will become the third-largest item in the federal budget and something is going to break.

Jim Dines has long warned that cutting the dollar's link to gold wouldn't just lead to chaos, it would be the dollar's death knell. Currencies not backed by anything tangible, like gold or silver, have always left debt and destruction in their wakes. There isn't a paper currency on Earth worth trusting as much as gold and silver. As Dines likes to point out, all countries print money with almost no connection to real wealth. Many countries back their currencies not with gold, but the paper money of other nations. He compares the world's currencies to a bunch of staggering drunks trying to hold each other up. When a key one falls, the whole group will go down. Currency crises will keep happening with increasing frequency until gold is restored as the primary monetary asset.

### 2.2. Sanctions

We can see that, based on the need of rebalancing the new configuration of economic power with the global financial system and triggered by global tensions caused by Washington, a trend has emerged across the world toward reducing the dollar's role in trade and finance.

The US uses sanctions against other nations as part of its strategy to protect the current global financial system, in which the US dollar plays a dominating role but at the same time it have forced targeted countries to take a fresh look at alternative payment systems and safe assets. Some steps are pointing to that:

a) Challenging the status of a fiat currency
b) Challenging the reserve role of the dollar
c) Challenging the petro-dollar
d) Challenging the dollar as a means of payment or as a third currency in bilateral non-oil transactions
a) Challenging the status of a fiat currency

The global debt has soared to $247.2 trillion in March 2018 (as for the Washington-based Institute of International Finance statistics of August 2018). Central banks have been printing trillions of dollars out of thin air. By the beginning of 2020, global debt could be as high as $300 trillion. According to the IMF, in 2016, the countries with the largest debts, both public and corporate, were the United States with over $48.1 trillion, China with over $25.5 trillion and Japan with over $18.2 trillion. In 2016, the global debt was already at $164 trillion, which was equivalent to 225 percent of global GDP. The global debt-to GDP ratio currently exceeds 318 percent.

"The entire planet is swimming in debt, yet no one seems to criticize the system itself as being fundamentally flawed… our current financial system enslaving the entire world is not sustainable and headed for one hell of a spectacularly ugly crash" Darius Shahtahmasebi, a New Zealand-based legal and political analyst said.

Over-indebted countries are at risk of getting into serious financial trouble.

"The last geopolitical shift that started with WWI and ended with WWII put the US in this dominant position, because they owned and stored 70 percent of the gold reserves of the free world. This was also the main reason, why the USD became the world currency reserve. Central banks moved their gold because they felt threatened by the USSR and saw the USA as their natural ally. The fact that central banks are repatriating their gold shows that this has changed. It also implies that they don't see Russia as a bigger threat than the USA any longer. Europe stands in the center of this geopolitical power shift and some countries obviously believe it's wise to store the gold in their home countries" Claudio Grass, an independent precious metals advisor said.

"Nonetheless, it is obvious that the systematic problems are not solved, on the contrary, the risks became bigger and more fragile than a decade ago," said Grass. "As you know more than 65 percent of all monetary reserves in the central banking system are held in the world currency reserve, which still is the USD. Therefore, holding physical gold is definitely the best hedge against a crash of any paper currency, and "therefore also against a crash of the USD".

Also Kim Dotcom, an American analyst and businessman is telling us straightforward: dump 'worthless' dollar in favor of gold and crypto as US debt spirals out of control.

The amount of gold bought by global central banks in 2018 reached the second highest annual total on record, according to the World Gold Council (WGC). The industry research firm said that central banks bought the most gold by volume since 1967. It was the largest amount since former US President Richard Nixon's decision to end the dollar's peg to bullion in 1971.

According to the WGC, central bank net purchases reached 651.5 metric tons in 2018, 74 percent higher than in the previous year when 375 tons were bought. It has estimated that they now hold nearly 34,000 tons of gold.

"Heightened geopolitical and economic uncertainty throughout the year increasingly drove central banks to diversify their reserves and re-focus their attention on the principal objective of investing in safe and liquid assets," said the report.

It noted that Russia was leading the way as it looks to reduce reliance on dollar reserves. The Russian central bank bought 274.3 tons of gold in 2018. Other big central bank buyers were Turkey, Kazakhstan, India, Iraq, Poland and Hungary.

Russia became the world's fifth largest holder behind the US, Germany, France and Italy.

It also said that Russia has cut the share of the US dollar in the country's foreign reserves to a historic low, transferring nearly $100 billion into the euro, the Japanese yen and the Chinese yuan. The step came as a part of a broader state policy on eliminating reliance on the greenback.

China has joined the global gold rush, increasing its gold reserves to US$79.319 billion (by more than $3 billion compared to the end of 2017) trying "to diversify its reserves" away from the greenback.

Russia, China and Turkey are leading the gold-buying spree. "They are forcing revision and re-introduction of the gold standard," agrees Max Keiser, adding that all those three countries have to do is "introduce gold-backed currency."

The latest trend among European countries of bringing home their gold reserves has been raising concerns in Brussels. According to Claudio Grass of Precious Metal Advisory Switzerland, the process means disintegration, which usually comes with instability, unrest, more government intervention and control. Analysts have pointed out that EU countries see gold as insurance in case they end up returning to their national currencies.

b) Challenging the reserve role of the dollar

In 2016, the Chinese yuan was included in the Special Drawing Right (SDR) basket alongside the US dollar, the Japanese yen, the euro, and the British pound. The move granted the yuan the status of a reserve currency.

The Chinese yuan has strengthened its position among global reserve currencies, rising to 1.84 percent in the second quarter of 2018, according to the International Monetary Fund.

Central banks held $193.4 billion worth of yuan.

The 1.84-percent share is still modest compared to other global currencies like the US dollar, euro and Japanese yen. The share of US dollar reserves decreased to 62.25 percent in the second quarter of 2018 to its lowest level since 2013.

Global financial transfer system SWIFT said in its recent monthly report on the yuan that it was the sixth most used currency in domestic and international payments value in October, just behind the Canadian dollar.

"The yuan will be increasingly driven by capital account flows, and not just trade-related flows," said HSBC. It pointed out that China's financial opening accelerated this year, with portfolio investments by foreigners reaching an all-time high. The bank expects a significant shift coming as China opens the door further: "We believe this is only the beginning of a multi-year trend for portfolio investment rebalancing, globally."

Yuan-denominated Chinese bonds were included recently (on the 1st of April 2019) in the Bloomberg Barclays Global Aggregate index. The move is expected to attract trillions in foreign inflows into China and the reshaping of global capital markets. Over the next 20 months, the index will add 364 bonds issued by the Chinese government. Analysts estimate the full inclusion will attract around US$150 billion of foreign inflows into China's bond market, which is the third-largest in the world after the US and Japan. Meanwhile, several other key index providers (including the JPMorgan Government Bond Index-Emerging Markets and the FTSE World Government Bond Index) are also considering whether to add Chinese bonds in their benchmarks. It is estimated that China would receive as much as $275 billion in foreign inflows as a result of its bonds being added to indexes by Bloomberg, JPMorgan, and FTSE. That would help increase the Chinese yuan's share in foreign currency reserves held by central banks globally. For now, despite the Chinese bond market's large size, the bonds are under-owned by global investors. Foreign holding of Chinese debt stands at only two percent of the $13 trillion in total value. Chinese central government bonds have already a foreign ownership at close to 8 percent, but that is still very low compared to 35 percent for US Treasuries and 28 percent for British government debt.

The People's Bank of China has been also regularly reducing the country's share of US Treasuries. Still the number-one foreign holder of the US sovereign debt, China has cut its share to the lowest level since May 2017.

The Central Bank of Russia has moved further away from reliance on the US dollar and has axed its share in the country's foreign reserves to a historic low, transferring about $100 billion into euro, Japanese yen and Chinese yuan.

The share of the US currency in Russia's international reserves portfolio has dramatically decreased in just three months between March and June 2018, from 43.7 percent to a new low of 21.9 percent, according to the Central Bank's latest quarterly report, which is issued with a six-month lag. The money pulled from the dollar reserves was redistributed to increase the share of the euro to 32 percent and the share of Chinese yuan to 14.7 percent. Another 14.7 percent of the portfolio was invested in other currencies, including the British pound (6.3 percent), Japanese yen (4.5 percent), as well as Canadian (2.3 percent) and Australian (1 percent) dollars.

"It is more of a game changer for the US. As soon as other nations have a real credible alternative to the US dollar, they can dump dollars and switch to the yuan which can spark a dollar crisis. If that happens, not only will there be inflation from the tariffs, but also from the flood of dollars," said Ann Lee, Adjunct Professor of Economics and Finance at New York University and

author of the book 'What the US Can Learn From China'.

c) Challenging the petro-dollar

The highly anticipated yuan-backed crude oil futures have been launched in Shanghai International Energy Exchange in 2018. China is the world's biggest oil and in 2017 it outpaced the US as the world's number one importer of oil. Thus, the contracts may not only help to win some control over pricing from the major international benchmarks, but also promote the use of Chinese currency in global trade and diminish the role of the greenback in global financial markets. The futures contract will allow participants to pay with gold or to convert yuan into gold without the necessity to keep money in Chinese assets or turn it into US dollars.

"In the short-term, we believe price fluctuations will reflect domestic crude oil supply and demand. In the long run, yuan crude price will mirror the moves of Brent," said Chen Tong, Shanghai-based senior crude analyst at First Futures. Meanwhile, the high costs of oil storage for delivery into the Shanghai Futures Exchange may scare potential investors away from the new contracts.

Stanislav Werner, head of the analytical department of Dominion, notes that the oil market is worth $14 trillion at the moment, and is bigger than the Chinese economy.

With crude oil becoming also a great chunk of international commerce (with 2 trillion worth of trade in 2017), the potential impact of the new product on oil market dynamics and on global monetary and financial systems could be correspondingly great. That is why "the US has a serious reason to get nervous, because in many ways the hegemony of the US dollar came from oil trading in dollars" Werner said.

As China is the world's biggest crude buyer, the new contract may allow exporters to avoid US sanctions by trading oil in yuan. Such countries as Russia, Iran, Pakistan, Vietnam, China and many other Asian countries are interested in that. Iran will accept renminbi from China now. China and Russia have currently swaps in rubles and renminbis. Caracas has ordered oil traders to convert crude oil contracts into euro and not to pay or be paid in US dollars anymore.

"When US dollar replaced the pound sterling, there was no one really going around trying to do it quickly. But now you have major economies like Russia, China, Iran and others that want this to happen. So, it will happen faster," Jim Rogers added.

"Ideas related to oil trade in currencies other than the dollar arose more than once. Some of them were severely suppressed by the United States, one example is Muammar Gaddafi, who proposed the introduction of a regional currency gold dinar and trading oil in the Middle East in this currency… China has a chance to finish what he started" Aleksandr Egorov, foreign exchange strategist at TeleTrade, told.

"Along with the Chinese role in the global economy and the growing interest in the renminbi, China is also protected by a nuclear shield. It can afford to try to shatter the monopoly in oil trade. This will give even more weight to the Chinese yuan. In addition, China's economy is the world's largest consumer of oil, and consequently, all world producers of raw materials will have to reckon with the strategy of the Chinese authorities," Egorov said.

d) Challenging the dollar as a means of payment or as a third currency in bilateral non-oil transactions

**China** is trying to internationalize its own currency. Beijing has recently made several steps towards strengthening the yuan, including accumulating gold reserves, launching yuan-priced crude futures, and using the currency in trade with international partners. The Hong Kong Exchanges and Clearing also launched yuan-denominated gold futures in 2017. A metals futures contract denominated in Chinese currency was expected to be launched at the London Metal Exchange in 2018, while the use of the Chinese currency as collateral was already in place.

As part of its ambitious Belt and Road Initiative, China is planning to introduce swap facilities in participating countries to promote the use of the yuan. Moreover, the country is actively pushing for a free-trade agreement called the Regional Comprehensive Economic Partnership (RCEP), which will include the countries of Southeast Asia. The trade pact could easily replace the Trans-Pacific Partnership (TPP), the multi-national trade deal which was torn up by Donald Trump shortly after he took office. RCEP includes 16 country signatories and the potential pact is expected to form a union of nearly 3.4 billion people based on a combined $49.5 trillion economy, which accounts for nearly 40 percent of the world's GDP.

A bilateral currency swap agreement worth $28.81 billion has been clinched between China and Indonesia (November 2018). China's central bank signed the similar deal with the Bank of Japan (October 2018). Moscow and Beijing are working on an inter-governmental agreement to boost the use of the ruble and yuan in mutual trade settlements (in 2017 nine percent of payments for supplies from Russia to China were made in rubles while Russian companies paid 15 percent of Chinese imports in yuan).

**India** is one of the biggest merchandise importers and is significantly impacted by sanctions applied to its trading partners. Delhi switched to ruble payments on supplies of Russian S-400 air-defense systems as a result of US economic penalties introduced against Moscow. The country also had to switch to the rupee in purchases of Iranian crude after Washington reinstituted sanctions against Tehran. In December, India and the United Arab Emirates sealed a currency-swap agreement to boost trade and investment without the involvement of a third currency.

Ankara is preparing to conduct trade through national currencies with China, Russia, Ukraine. **Turkey** also discussed a possible replacement of the US dollar with national currencies in trade transactions with Iran. In August 2018, Qatar and Turkey inked a

currency swap agreement to boost liquidity and provide financial stability due to hostile US rhetoric towards Ankara, and the economic blockade Doha faced from its Gulf neighbors led by Saudi Arabia. The Turkish economy sank after Washington introduced economic sanctions over the arrest of US evangelical pastor Andrew Brunson on terrorism charges. The lira has lost nearly half of its value against the greenback over the past year.

Sanctions have forced **Iran** to look for alternatives to the US dollar as payment for its oil exports. The latest round of penalties that went into effect on November targets Iran's energy, finance and shipping sectors. Washington also threatened to introduce secondary sanctions against countries and corporations that continue to do business with Tehran. Earlier, the White House sanctioned Iran's auto industry, carpets, metals trading and access to US dollars. Monetary transactions have become difficult for Iran after the country was cut off from the SWIFT payment system. Without access to SWIFT's interbank payment system, Iran cannot get paid for exports and pay for imports. Iran clinched a deal for oil settlements with India using the Indian rupee. It also negotiated a barter deal with neighboring Iraq. **Iraq** wants to barter food for desperately needed Iranian gas supplies.

**Russia** is among the countries pushing for "de-dollarization" (exclusion of the dollar in domestic and international financial interactions). Part of it is its record accumulation of gold reserves. Russia has developed a national payment system as an alternative to Visa and Mastercard and has managed to develop a national system for money transfers that could protect its banking from the possible cut off from SWIFT transfer services in case of tougher US penalties. Moscow has managed to partially phase out the greenback from its exports, signing currency-swap agreements with a number of countries including China, India and Iran. Russia has recently proposed using the euro instead of the US dollar in trade with the European Union.

Russia's largest energy companies preparing to substitute petrodollar in favor of the euro and other currencies in international settlements. Gazprom Neft, Russia's third-biggest oil company by output, said its contracts already have a clause to trade without the US dollar. The largest Russian oil company Rosneft is also interested in diversifying. The firm has opened banking accounts in Hong Kong dollars and Chinese yuan. Surgutneftegas is also reported to be working to reduce dependence on the dollar.

"The new US sanctions are clearly aimed at providing the US with economic advantages, including at the expense of European companies," said the chairman of the German-Russian Chamber of Commerce Matthias Schepp in December 2018. "It's time for Russia and Europe to start looking together for a way out of the sanctions regime," said Schepp.

Two-thirds of German companies doing business in Russia back the idea of setting up a dollar-free alternative payment system.

The **BRICS** countries consider switching to local currencies for mutual settlements with the Chinese yuan as the lead currency. The New Development Bank (NDB) is expected to be a substantial player in the process. The five banks of the BRICS Interbank Cooperation Mechanism have agreed to establish local currency credit lines. BRICS countries are also considering own cryptocurrency as settlement mechanism.

Russia suggests creating single virtual currency for BRICS and **Eurasian Economic Union** (EEU). Also more than 40 countries and international organizations, including China, Indonesia, and Israel, as well as some South American countries, have expressed interest in a free-trade deal with the EEU. The trade bloc is also holding negotiations with South Korea, Egypt, and India. It is expected that at least a part of trading will take place in other than dollar currencies.

Even **Europe** is working on a payment system alternative to SWIFT & IMF in order to attain financial independence from US.

## Conclusions

Two trends are to be already seen these days:

- switching to other currencies and payment systems. In the case of China this is a part of its rebalancing strategy aimed at narrowing the gap between its economic power and the role of yuan in the worldwide monetary and financial system. For other countries this emerges from the need of hedging against the sanctioning policy of the USA.
- looking for a proper anchor of value, which could be once again gold, since the main reserve currencies are fiat currencies and the huge debts and growth issues are threatening their prospects.

So, while the mainstream financial press is all sunshine about the economic and financial prospects of the USA, there is a core group of financial gurus who do not agree with it.

Ron Paul, the Libertarian-minded congressman from Texas has never been shy about his distrust of the American monetary system or about his fondness for gold, as indicated by the titles of his best-selling books: "End the Fed" and "The Case for Gold".

While some have written Ron Paul off as paranoid, he has predicted almost every geopolitical event of the last 10 years, from the Arab Spring to the financial crisis, from exploding deficits to the expansion of the Fed, and from record gold prices to the current Iranian oil skirmish (all of them in a single speech from 2002).

At the same time, Paul is no typical congressman. While a typical Congressional portfolio has an average of 10% in cash, 10% in bonds or bond funds, 20% in real estate, and 60% in stocks or stock

funds, he has about 20% of his holdings in real estate, 14% in cash and 64% in gold- and silver-mining stocks.

Peter Schiff is also warning against dollar: "It's important to know what types of investments to avoid. Treasuries, or in fact any dollar denominated debt, needs to be avoided because again, either you are not going to be paid back or you are going to be paid back in money that doesn't buy much. So, either way you are losing. So you have to protect yourself; gold/silver, commodities in general, stocks are a way to go although I like foreign stocks better than most domestic stocks, and emerging markets."

Can we see euro as a solid alternative currency? It is hard to believe that unless some serious changes are made.

The decision to create a single currency without the institutions which would make it work was "fatal" for the Eurozone, said Nobel-Prize winning economist Joseph Stiglitz, adding that the "Eurozone must ditch it now to survive".

In his book 'The Euro: How a Common Currency Threatens the Future of Europe, the economist writes the Eurozone was flawed at birth and is destined to collapse unless huge changes are made to its common currency. The structure of the Eurozone, its rules and regulations, was not designed to promote growth, employment and stability. The economist suggested the best way forward for the euro area is a 'flexible euro,' where each member country adopts its own version of the currency. A flexible euro could help southern European countries export more and import less, helping to achieve a trade balance and full employment.

The Eurozone's single currency, the euro, has been a serious drag on the economic growth of almost every member of the bloc, according to a study by German think tank, the Centre for European Politics (CEP) published in February 2019.

Germany and the Netherlands, however, have benefited enormously from the euro over the 20 years since its launch, the study showed. The currency triggered credit and investment booms by extending the benefits of Germany's low interest-rate environment across the bloc's periphery. However, those debts became hard to sustain after the 2008 financial crisis, with Greece, Ireland, Spain, Portugal and Cyprus forced to seek financial aid as growth slowed and financing became scarce.

According to CEP, over the entire period since 1999, Germans were on average estimated to be cumulatively richer by €23,000 than they would otherwise have been, while the Dutch were €21,000 wealthier. To compare, Italians and French were each €74,000 and €56,000 poorer, respectively.

Study authors Alessandro Gasparotti and Matthias Kullas said most Eurozone members had enjoyed periods during which the currency union had been net positive, but these were far outweighed by the periods when it dragged on growth. The study concluded that since the loser countries could no longer restore their competitiveness by devaluing their currencies, they had to double down on structural reforms.

In Europe we also witnessed unorthodox monetary easing policies from the European Central Bank, fortunately not to their extent in USA. The prediction of Nouriel Roubini that the Eurozone will begin breaking up could be just not out of this world. However, with no binding international standards for currencies, euro is certainly a fiat currency too. According to Claudio Grass of Precious Metal Advisory Switzerland "Our system is based on 7 percent paper notes and 93 percent digital units backed up by nothing other than central bank promises to pay back the debt in the future through inflation and taxation. It is just a matter of time before the Euro, the most artificial currency ever, is going to collapse" .

China has also to overcome a crises situation potentially endangering its national currency. Jim Dines has repeatedly predicted that "Its bear market would begin in real estate and banking." Especially considering the scope of its "shadow banking," or banking outside traditional institutions, where there is less oversight. Experts estimate that these transactions have at times been worth an astounding 87% of China's GDP.

China is also quietly desperate to stop its growing housing bubble. House prices in large Chinese cities in 2018 were among the highest in the world in terms of price-to-income ratios, with speculative demand from Chinese investors who see few other good places to park their savings. The result is a staggering 50 million empty homes. China has levied a new housing tax to try and slow the spreading of the bubble. But even if the new tax manages to temper housing prices, it's certain to suck more cash from the already debt-laden population.

London is experiencing some trouble with its pound for some time now, due to the unsolved Brexit, while other trends are also detrimental to it in a longer perspective. The role of a gold depositor is put into question as some countries, whose gold is kept in London coffers, are making the arrangements of bringing it home (see Germany, Hungary, Romania). Others, like Venezuela, are on no legal terms, refused in this respect. The physical gold transactions in London are losing ground to those in Asia where the greatest consumption is located. The derivatives transactions will follow this move. An increasing share of gold futures in London will be denominated in the Chinese yuan instead of British pounds. The Brent benchmark will lose ground to the Shanghai crude oil benchmark. More and more financial institutions are leaving London. The pound will have to mirror those changes.

We can see that, based on the need of rebalancing the new configuration of economic power with the global financial system and triggered by global tensions caused by Washington, a trend has emerged across the world toward reducing the dollar's role in trade and finance.

According to the governor of the Bank of England, Mark Carney, the transition from the dollar to another currency that could become prevailing wouldn't be quick. The greenback has been dominating over the last hundred years after it replaced the British sterling as the key reserve currency. "History suggests these transitions will not happen overnight. The US economy overtook Britain's in the second half of the 19th century, but it took until the 1920s before it became a dominant currency in international trade," Carney said.

It will take some time for the Chinese yuan to gain its fair share in international trade and finance, but the process has started and will be far quicker than the replacement of the British sterling with the dollar.

Looking for a proper anchor of value for the international monetary system is becoming an issue of a paramount importance since the trust in the main currencies is sloping down by the day. Gold is seen by an increasing number of players as a natural anchor of value and some are already preparing themselves to that by increasing their gold reserves. Holding physical gold is definitely the best hedge against a crash of any paper currency. Nevertheless, we need a trustful worldwide monetary and financial system. Paper money should be backed by gold through a comprehensive agreement signed in Bretton Woods or Shanghai. As this scenario of common sense will be strongly opposed by the "dollar establishment", we could see first a "gravitational scenario" when one or more countries will come up with gold-backed currencies, making them trustful means of value storage for those in search of minimizing the risks.

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# EUROPEAN UNION ECONOMIC INTEGRATION AND DEVELOPMENT

**Mihaela MUSAT***

**Abstract**

*At European level, the economic integration aims to achieve economic solidarity by forming a complex network of interdependent links between the economic agents of the participant countries.*

*The viability of European economic integration depends primarily on the sharing of European democratic and cultural values by a state, and then on its economic capacity and performance. To contribute to the European Union development, the economic integration contributes by developing mutual exchanges and interdependences of national economies.*

**Keywords:** *integration, development, policies, economics*

## 1. Brief history the economic integration concept

The "integration" concept was used, from its first graphic attestation, in 1620, and the beginning of our century, exclusively in the exact sciences. It was subsequently taken over and used extensively in the last half century to denote phenomena, processes, actions or states that were taking place in the sphere of politics, philosophy, culture, and, as "the economy lives in society, cultural, political and social, and these are very difficult to be dissociated from each other, as long as the real is a globality, meaning what we consider to be "the assemblies assembly ", of economy, too. In an economic sense, the term" integration "was initially used to describe the combination of sectors of production and sales units by concluding agreements between competing firms.

## 2. What is economic integration? Definition and importance.

Economic integration is defined as the main factor in eliminating economic boundaries between two or more economies. An economic boundary in this case is defined as a demarcation over which the actual or potential mobility of goods, services and production factors, as well as of communication flows, is relatively low. On both sides of an economic border, we find that the establishment of prices and quality of goods, services and factors is only marginally influenced by the flows across the border.

Economic integration involves the elimination of economic barriers between two or more states, barriers which can be defined as any obstacles that prevent or distort the mobility of the production factors. In an ideal world, where there are no nation-states or governments, economic integration could remain a mere integration of the markets without suffering any political influence. In the real world, however, economic integration is influenced by political factors, and in the case of the European integration process this aspect is quite obvious.

By economic integration, we also understand the complex process characteristic of the contemporary stage of society's development, which consists essentially in the intensification of inter-dependencies between different states, process conditioned by a cumulus of factors, of which an important role belongs to the technical-scientific revolution.

The fundamental importance of economic integration is represented by the growth of actual or potential competition. Economic integration can be regarded in different ways, depending on the context in which it is used, and can demonstrate various degrees of economic cooperation in a number of fields, such as: labor mobility and capital, payments, fiscal and monetary policies, etc.

At the same time, integration involves the action of embedding, incorporating or harmonizing into one. We understand the concept of economic integration as the need to build more and more economic spaces for the maximum use of production capacities. Economic integration aims to reduce costs for both consumers and producers and to increase trade between the countries involved in the agreement. The viability of European economic integration depends first and foremost on the sharing of European democratic and cultural rights by a state, and then on its economic capacity and performance.

The basic principles of economic integration are:

- Formation of a common economic space;
- Free movement of capital, goods, services and people,
- Legislation harmonization in the economic, monetary, financial and social field;
- Creating common institutions to which the participating countries transfer some economic competencies.

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As economies become integrated, there is a lessening of trade barriers and economic and political coordination between countries increases

It can be said that in time, through integration, it is obtained the best structure of the international economy by removing the artificial obstacles, in order to optimize its operation, but also through the introduction of all stages and desirable elements of coordination and unification.

## 3. Stages of economic integration after B. Balassa

The complexity of economic integration and its depth radically different have led to the identification of several stages of the economic integration process. The stages approach was, in the first phase, outlined by B. Balassa, and its use is very wide.

The five stages and their characteristics, as identified by B. Balassa, are presented in Table 1. Of course that the initial Balassa stages need to be modified in different ways, but the approach is indispensable for understanding the studies and key aspects of the policy making.

Firstly, in the current world economy there are a number of preferential trade regimes whose objectives fail to reach even the first step in the table.

Secondly, the definitions of FEZ (FEZ = Free Exchange Zone/ZLS = Zona de Liber Schimb) and CU (CU = Customs Union/UV= Uniune Vamala) capture the essence of the GATT definitions, being widely used, but are not applied due to the absence of positive integration. In the case of customs unions, the absence of positive integration is deceptive, and it is possible to conceive a customs union only as a tariff union.

Thirdly, Balassa's PC suffers from a lack of positive integration, and if we interpret it, we notice that PC does not involve either the amortization of national economic regulations, nor any transfer of regulatory powers to the Union or or the harmonization of direct or indirect taxation.

| Nr.crt | Stage | Definition | Characteristics/comments |
|---|---|---|---|
| 1. | Free trade area (FTA) | *tariffs and quotas abolished for imports from area members<br>*area members retain national tariffs (and quotas) against third countries | Essence of GATT definition; no positive integration |
| 2. | Customs union (CU) | *supressing discrimination for CU members in product markets<br>*equalisation of tariffs (and no or common quotas) in trade with non-members | Essence of GATT definition; no positive integration |
| 3. | Common market (CM) | * a CU which also abolishes restrictions on factor movements | Is “beyond” GATT; definition should also include services; no positive integration |
| 4. | Economic union | *a CM with’some degree of harmonization of national economic policies in order to remove discrimination…due to disparities in these policies | Positive integration introduces; extremely vague |
| 5. | Total economic integration | *unification of monetary, fiscal, social and counter cyclical policies<br>*setting up of a supranational authority where decisions are binding for the Member States | Centralist; vision of unitary state;<br>Supranationality only introduced here |

Source: B. Balassa, *The Theory of Economic Integration*, Irwin, Homewood, Illinois, 1961

Fourthly, there is a conceptual problem related to how to differentiate Balassa's common market (CM) from the economic union. In Balassa's acception, the economic union approaches the adapted definition of a CM, combining positive and negative integration.

Fifthly, there is no guarantee that the final stage is a total economic integration. The reference framework seems to be that of a unitary state, which is inappropriate for economic and political reasons. It is possible to imagine more partial unions beyond the economic union, for example, fiscal union, monetary and political union.Due to alternative political assumptions about willingness to share sovereignty, problems can be analyzed using the economic theory of federalism.

Sixthly, the introduction of supra nationality only in the final stage can not be justified by economic or empirical reasons.

## 4. Advantages and costs of economic integration at European level

The process of European construction - from an institutional, economic or social point of view, but especially from a philosophical point of view, is a unique process in the history of mankind, this process being able to offer to it on one hand, a difficult and contradictory feature, and on the other hand, providing

it with an extremely wide range of innovation at all levels.

The expression "economic integration" can have different meanings depending on the context in which it is used, and can at the same time demonstrate different degrees of economic cooperation in areas such as commerce, labor mobility, social security, or the coordination of investment plans.

The process of economic integration was not born and developed on the basis of theoretical constructions, but emerged and developed from a historical necessity, in a well-defined economically and politically bounded framework, developing simultaneously with the development of this economic plan.

In the last decades, the world economy has been deeply marked by the phenomenon of internationalization, the deepening of the world labor division and the growing economic interdependence of countries, that having both advantages and disadvantages.

By following the route, we note that the European Union wishes to promote humanistic and progressive values and to ensure that man is the master and, not the victim of the change in the world. Although the European Union was created to achieve a pacifist objective, the economic aspect was the one that managed to dynamise this European construction.

In order to establish broadly the process of economic integration at European level, in the context in which the main objectives of the European Union are to ensure peace, freedom, equality, respect for human rights, etc., we note that integration involves a permanent dialogue between the participating states regarding the procedures on harmonizing interests, obtaining consensus, developing and applying new forms of economic conduct.

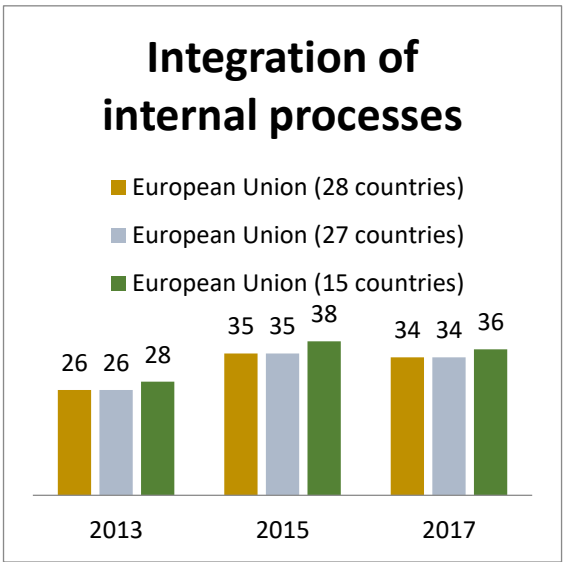
Among the advantages of economic integration, we could remember that this usually leads to a reduction in the trade cost, the availability improvement and a wider selection of goods and services, and the increase in efficiency leading to greater purchasing power, trade liberalization leads to market expansion, technology sharing and cross-border investment flows, and employment opportunities can be favored, and political cooperation between countries can be improved due to stronger economic ties that can contribute to peaceful resolution of conflicts and greater stability.

The question is: "What do the EU Member States gain if they integrate economically?" where the simplest and tangible answers refer to: raising real incomes, increasing national welfare, and immigration leading to poverty eradication.

Regarding to the costs of economic integration, the trade deviation and the national sovereignty erosion could influence the smooth running of the whole process, and goods and services can be harmful to host states, a phenomenon explained by the fact that each state has its own route through which it organizes and carries out its activities. At the same time, as a cost of economic integration at European level would be also considered the conflict of interests between different states.

## 5. Approaches to economic integration at EU level

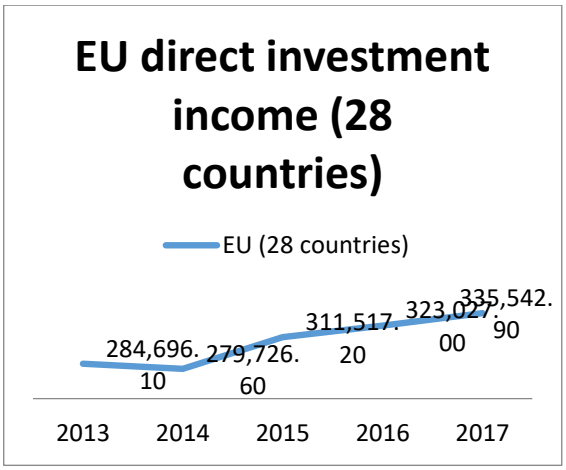
As regards the integration approach, we have identified the level of integration of internal processes at European level over a three-year period (2013, 2015, 2017), and we found that in the European Union consisting of 15 countries, which reflected the number of member countries in European Union before the accession of 10 candidate countries on the 1st of May 2004, the countries being: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and United Kingdom, integration of internal processes was higher than the European Union consisting of 27 countries or the European Union consisting of 28 countries, with a significant increase in 2015 compared to 2013 and a slight decrease in 2017.




Source: Eurostat

During the 3 years we notice that we have equality in the internal integration process between the European Union consisting of 27 countries and the European Union consisting of 28 countries, the difference being made only by the European Union consisting of 15 countries.

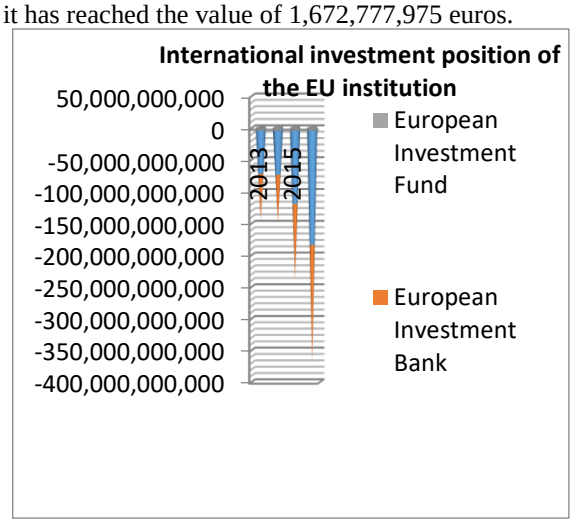
As for the development and the welfare of both the European Union and its citizens, in the process of economic integration the investments at European level are targeted.




Source: Eurostat

Following the analysis, we found that in the European Union direct investment revenue had a year-on-year growth trend. A slight decrease was recorded in 2014 as compared to 2013, but in the following years the growth was stimulated by a much higher value. If we were to explain in figures, we identify 2013, the year with 286,692.10 million and 2017 with a value of 335,542.90 million, which means that in just 4 years there was an increase of 48,850.8 million euros.

As regards the international investment position of the EU institutions, we have carried out a 4-year analysis and we have identified that the European Investment Fund has shown a year-on-year increase. If in 2013 it has a value of 1,119,370,665 euros, in 2016 it has reached the value of 1,672,777,975 euros.




Souce: Eurostat

However, following the European Investment Bank's track, we note that it has recorded the biggest losses. We have a loss in 2013 of -72,969,398,534 euros, an even higher debt in 2014, amounting to -74,831,917,604 and in 2016 it already reaches the amount of -184,726,027,800.

## 6. Conclusion

The European Union is the most advanced form of integration, it has an interstate and open nature, and it is favored by the existence of a relatively similar lifestyle due to the fact that it has the same type of civilization in most countries, to the existence of a strong political will to achieve integration and to the experience and confirmation of the possibility of advanced integration offered by other integrationist organizations for the creation of common markets in Europe.

The theory of economic integration followed the thread of the pragmatic development of the integrative process, analyzing the quantitative and qualitative transformations, the causes that determine it, the effects it is generates, the factors that favor it, but also the aims towards which it aims. The theory of economic integration is a reflection on the theoretical plan of accumulations where integration, in its various forms, has become an undeniable reality of our day.

Europe presents a unique combination of a high and rising degree of economic integration and the most volatile labor market. Adopting a single currency will remove the possibility of devaluing the exchange rate to boost competitiveness and create jobs at the risk of closing a door that might be convenient for the political system.

We talk about economic integration, and we note that precisely those countries that have not joined the Eurozone understand that they can not benefit from freely using the exchange rate to boost competitiveness.

Labor market institutions are designed to protect employees at the cost of economic efficiency, and directly, the most visible effects are poor employment, and perhaps growth reduction. Economic integration challenges these institutions by sharpening the conflict between social protection needs and economic efficiency. Analyzing things so, we find that, on one hand, each country can find that the general economic environment is more volatile, because there is also a reduced macroeconomic stabilization capacity. On the other hand, economic integration means more competition in Europe and favors countries with flexible labor markets.

We also see economic integration as a process involving a set of common policies in all sectors of the economy, free trade and free movement of people, services and capital, harmonization of legislation in the involved countries or areas, as well as the joint institutions on which the participating countries transfer some competencies of economic nature.

In order to achieve economic integration, it must be seen the fact that it also depends on certain factors such as: excluding discrimination, effective distribution of some competences, focusing on legitimate aspirations or collaborating in decision-making processes.

By economic integration, both the EU economy and the Member States' economies taken separately acquire increased dimensions, internally efficiency and

robustness. Economic integration is achieved concurrently, progressively and gradually in all areas. As a result, there are more opportunities to ensure economic stability, accelerate economic growth and create more jobs, all of which bring improvements and direct benefits to EU citizens.

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# THEORETICAL ELEMENTS OF MOTIVATION IN ORGANIZATIONS

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**Abstract**

*The motivation has been extensively analyzed over time and a set of theories and models have been formulated to find answers to the question: "Are people born self-motivated or motivation has to be induced?" Performance at individual, organizational and macroeconomic level have direct implications on the competitiveness of a firm and a country.*

*The organization can only cope with the required competitiveness changes by focusing managers efforts on what the customer wants or the market; in daily work between subordinate managers, employee motivation/satisfaction will or may not favor the firm's effort on the market. In order to succeed in daily work with subordinates, managers / decision-makers need to know, understand as fully as possible the motivation process within the organizational framework.*

*There are several theoretical developments that emphasize the organizational factors in trying to explain the motivation of the employee at work, namely the factors that predominantly belong to the company or organization (the salary system, the management team, the control-supervision system, the communication among the members teams, feedback, how to promote positions, admitting employee initiatives, participation in decision-making).*

*The aim of the research is to structure and highlight both existing and novelty concepts of motivation, to analyze their impact on employee performance within the organization, the link between motivation theory and managerial practice.*

**Keywords:** *motivational phenomenon, performance, environmental factors, motivating factors, motivation systems, non-financial motivation.*

## 1. Motivation in the organization

In global management theory, there are several attempts to explain the motivation within the organizational framework, to explain what motivates the employee to be performing in the work he has done. These theories are especially offered by psychologists, sociologists and other specialists, and are based on various hypotheses or social contexts presumed.

None of the approaches, including motivation theories, can be considered as the most correct; each contributes to the understanding of human behavior in an organization and has its limits; on the whole, they suggest what the manager needs to do to motivate his subordinates.

Scientific papers and themes that address the subject of motivation in organizations are numerous. Motivation is a much-researched research theme both in the past and present, supported by the fact that it is a basic element for the disciplines that study the organizational environment - human resource management, organizational psychology and organizational behavior (Latham, 2007) but also by the central position of motivation and work satisfaction.

In more recent approaches about employee motivation and the impact of human potential in the modern economy, we are discussing about identifying the special talents of each employee. Coffman and Molina are of the opinion that the individual's emotions are given by mechanisms that hierarchies the objectives of the human brain; the two authors propose the concept of emotional economy of a complex mechanism of motivation / empowerment of employees.

The research titled "Theoretical Elements of Motivation in Organizations" has as a subject of study the analysis of the issue of the motivation of employees in a double perspective, on the one hand it addresses the motivation through the individual's perspective and its psychology, and on the other hand the motivational practices used organizations.

From a theoretical point of view, the study aims to bring more insight into the definition and analysis of the concept of motivation. It is necessary to understand what motivates/demotes an employee in his work. People are the most important asset category that an organization can use, respectively employee's process information to value other assets; in fact, no organization can exist without the human resources that make up it. Paradoxically, however, people are the only asset that can act against the organization's goals; Simply put, if they are not motivated and interested in the objectives proposed by the company, various groups/teams in the organization will end up dismantling their efforts, generating major conflicts, acting against others and/or against the interests of the organization.

Behavior is a result of the interaction of the personality of the individual with the organizational and working environment, and man, as a social and organizational being, is under the pressure of material, physiological, aesthetic, moral, ideological needs, etc.,

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and under the pressure of some motivational factors which managers direct and direct the behavior of the individual towards the achievement of organizational goals.

Thus, only through a collaborative effort, through appropriate mechanisms to attract employees towards the objectives proposed by the firm, through mechanisms to motivate / influence them through the construction of efficient management teams can create an organizational climate that favors consumption energy and latent creativity of employees.

## 2. Criteria for defining organizations

In the perspectives of the contemporary authors "Organizations are human creations. They are entities in which individuals interact and interdependently work in a structure to achieve common goals. They are presented in many forms, and their purposes are varied and cannot always be implicitly/explicitly shared among all members of the organization "(Furnham, 1997, p. 6).

At the same time, Furnham release the opinion that "Organizations are complex systems that have inputs and outputs of many different types and paths to turn them into the last ones" (ibidem). The two French researchers Petit and Dubois use the organization cannot be summed up by the sum of individuals, groups, workshops, offices or services - these elements are in a state of necessary interdependence in order to achieve an official objective "Interdependence is the foundation of the unity of the organization, being not only operative, but also of a social nature, enrolling in the psychology of individuals and groups as well as in the relationships of these" (Petit and Dubois, 1998, p. 10 ).

In our opinion, the extensive definitions become enumerating-descriptive without surprising the defining elements of the organizations, and the restrictive ones seem to be elliptical, with many other explanations and additional information. As such, we will present the definition of organizations combining the historical criterion with the problematic one:

- stage 60s - organizations were defined in terms of goals, formal structures and in integrative terms;
- the 1970s and 1980s define organizations in terms of human activities;
- the third stage in the late 1980s and the current period in which we define organizations in terms of controlled performance.

Among the many definitions are in terms of purpose and structure. Defining organizations in terms of goals is based on a general idea present in sociology that sociologists tend to associate and assign goals to any form of social organization, and how organizations are such extremely important forms; it was considered the fulfillment of the goals for which they were created is their defining element:

- "organizations are social units (or human groups) built and rebuilt intentionally to pursue specific objectives" (Etzioni, 1961, p. 207);
- "organizations are structured to achieve a particular type of objective" (Parsons, 1964, p. 118);
- "organizations have explicit, limited and formal objectives" (Udy, 1965, p. 51).

It can be concluded that there are at least two essential characteristics of the organizations: the first - the presence of the purpose as defining notes, and the second characteristic the presence of collective, specific, explicit, limited, official goals, etc.

The major advantage of defining organizations in terms of purpose is that we are provided with information about the specifics of the organization, the purpose of which is to specify the nature of the organization. Then, depending on the degree of achievement of the goal, we can know the level of efficiency or development of the organization. An organization that achieves its intended purpose at a maximum level can be considered as mature, efficient, while another that achieves its goal at a minimal level or even at all will certainly be a troubled organization. Organizational success or failure is therefore directly proportional to the degree of goal completion.

## 3. Theories about motivation

The human resource is one of the most important resources of the organization (Burlea-Șchiopoiu, 2008). Therefore, one of the factors influencing the quality of human resources is motivation.

From the definition of the motivation concept to the elaboration of human resources motivation strategies in organizations, a series of stages have been carried out and more motives have been developed. Ancient Greece was the cradle of hedonism, through which philosophers explained what motivated human behavior: in pursuit of pleasure, with the least effort, individuals headed for things that would produce comfort and satisfaction (Cherrington, 1989, p. 167-168). The complex issues of the field of motivation generated the formulation of a large number of theories, whose competition and limitation, together with controversies regarding the concept of motivation, are also transferred to the attempts to classify or systematize them.

By chronologically approaching the concept of motivation, it can be seen that, even with Frederick W. Taylor, all authors have attempted to explain the factors that motivate people, but have shown less concern about the causes and ways in which it occurs and sustains motivation in time. Thus, Nicolescu and Verboncu (1999, p. 474) present three categories of theories, delimited by the Spanish professor Juan Pérez Lopez, depending on the hypotheses regarding the nature of the motivation of the staff:

- mechanistic theories, which presuppose that employees are motivated only by extrinsic motivations, human behavior being conceived as a mechanistic system in which a person receives from the outside any stimulus - salary, prize, social status - in exchange for

the action he made;

− psychosocial theories, in which human behavior is conceived as a biological system, which considers that employees are motivated by both extrinsic and intrinsic motivations, the latter through the development of abilities, the enrichment of knowledge, the pleasure to perform a certain work generating the satisfaction of needs or desires the person concerned;

− anthropological theories, which also take into account the transcendent motivations besides the extrinsic and intrinsic ones. Transcendent motivations mean those consequences that a person's action generates over others or others, positive consequences that are related to the assumption of satisfaction of needs.

Mathis et al. (1997, p. 40) propose the classification of the main motivational theories into three main groups: content theories, process theories and cognitive theories, whose presentation is in Table no. 1.

Table no. 1. Classification of motivational theories

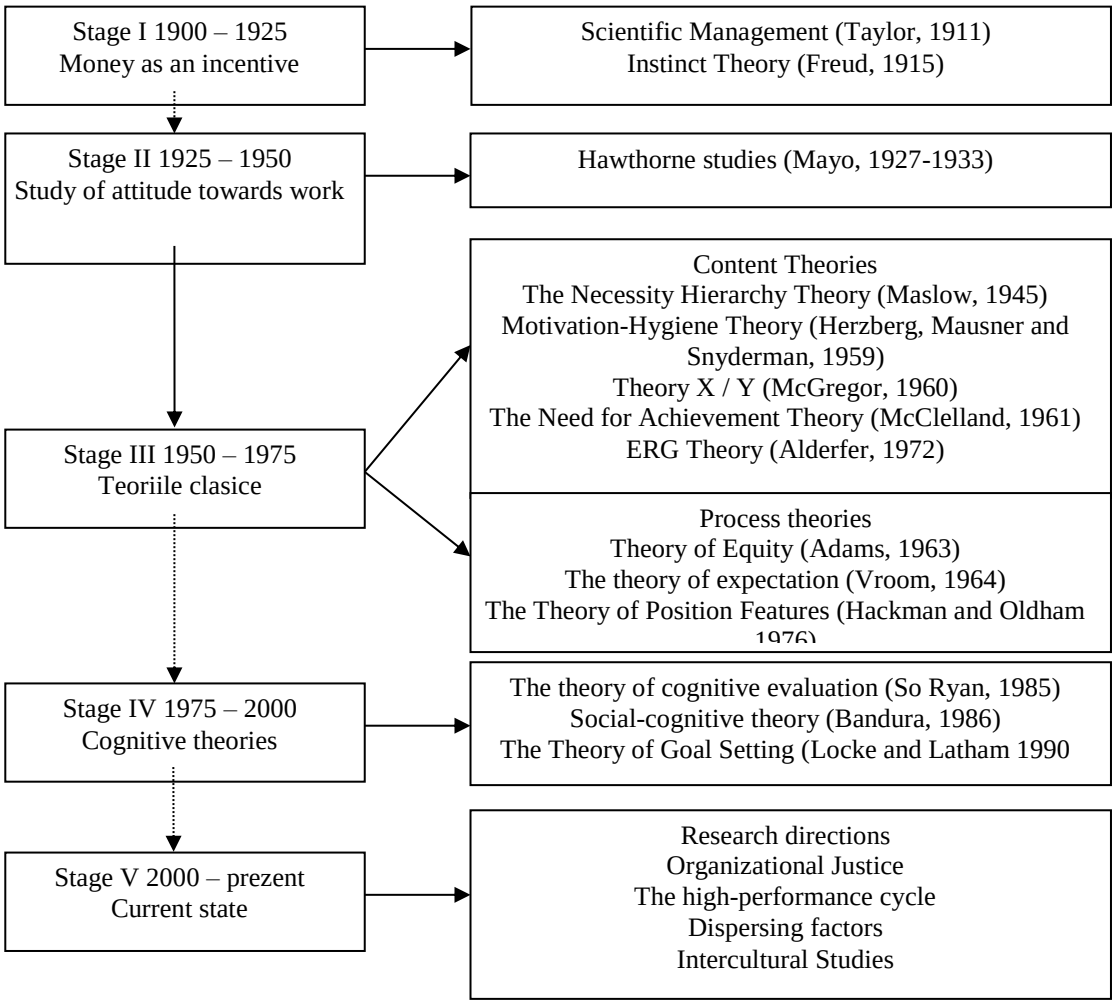
| Categorii | Caracteristici | Teorii | Exemple |
|---|---|---|---|
| Content Theories | refers to factors that incite or initiate motivated behavior | Need hierarchy (Maslow)<br>X - Y (McGregor)<br>Bifactorial (Herzberg)<br>ERD (Alderfer)<br>Acquisition of successes (McClelland) | motivation through money, social status and achievements |
| Process theories | addresses the factors that direct the behavior | Expectation (Vroom)<br>Equity (Adams)<br>Goals (E.A. Locke) | motivation by the inner start of the individual for work, performance and recognition |
| Theories of strengthening | addresses the factors that lead to the repetition of a behavior | Strengthening (Skinner) | motivation by rewarding behavior |

Source: Adaptation and Processing by Mathis R.L., Nica P.C., Rusu C. (1997), Human Resources Management, Economic Publishing House, Bucharest, p.40.

Motivation is an essential element of success combined with competence; it allows individuals to accomplish what they have proposed. Motivation means working smart, not just working hard. In essence, motivation is the engine, the energy that starts the action. It is also often said that a motivated man is a happy man. However, we must not confuse motivation with satisfaction. Even though the two notions can often be associated, it also happens that dissatisfaction may give rise, due to the state of dissatisfaction it creates, to a great motivation to achieve the set goals. There may also be a link between frustrated degree and motivated degree; as the actual situation of the individual is difficult to bear, even producing frustrations, the more the desire to achieve the goals that allow him to achieve satisfaction is great.

Another interesting proposal found in the literature is Buzea (2010, p. 26) and is based on the combination of two criteria - the chronological evolution in the field of motivation proposed by P. Latham (2007) and the evolution of the organization management theory of the human resource - based on them, resulting in the diagram of the development stages of the work motivation research presented in Figure 1.

Figure no. 1. Systematization of motivation theories (after Le Saget)




Source: Buzea (2010), Motivation. Theories and Practices, European Institute, Iasi, p. 26.

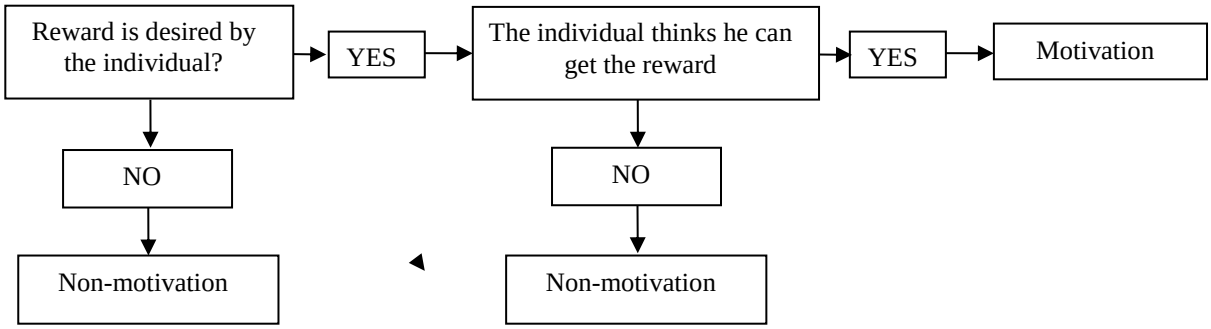
However, the most significant theories can be grouped into two categories, based on the thematic criterion and agreed by many researchers (proposed in 1970 by Campbell, Dunnett, Lawler and Weick), depending on the focus on either the causes of motivation, or on the actual behavior:

- motivation content theories that address the issue of motivation in a traditional manner, addressing the factors that motivate people, direct, support, and stop behaviors;
- theories of the motivation process that promote the approach from a dynamic perspective of work motivation, the way in which behavior is committed, directed, sustained and stopped, and targets the motivational mechanisms that drive human behavior.

As far as we are concerned, we consider it appropriate to analyze the motivational theories according to this final criterion, the thematic one, here being the most influential and presented the theories in the field studied, with implications and applicability in the organizational environment, together with the representative approaches of at the beginning of the last century (scientific management and the school of human relations), which illustrates the issue of motivation.

The theory of expectation or expectation theory was developed and presented by Victor H. Vroom in his work called "Work and Motivation" (1964), being the most well-known process theory and a model developed in the rational choice paradigm. Vroom argues that employee motivation is the result of three key variables, expectation, instrumentality and valence, and has as its starting point expectation or hope - as energizing forces of motivational behavior. In this theory it is stated that motivation depends on the extent to which people want something specific and the degree to which they think they can get it.

Figure no. 2. The theory of expectation




Source: Burciu, A. Introduction to Management, Economic Publishing House, Bucharest, 2008, p.394

Waiting is an action-outcome association; it has a subjective dimension, as it is the result of a cognitive process of assessing the relationship between behavior and outcome, and expresses the employee's belief that engaging in an action will lead to a certain outcome. Waiting can take different forms of intensity, taking the maximum intensity (value 1 - the action is followed by a result) when the employee is convinced that a certain level of effort will lead to a certain result and the minimum intensity (value 0 - the action is not followed of a result) when the employee is not perceived as capable of successfully pursuing an activity (either due to his / her deficiencies in certain qualifications or abilities required by the activity or due to organizational deficiencies linked to the lack of technical endowment, lack of information or appropriate equipment, etc.), or if the employee expects to be rewarded even if he has successfully completed his work.

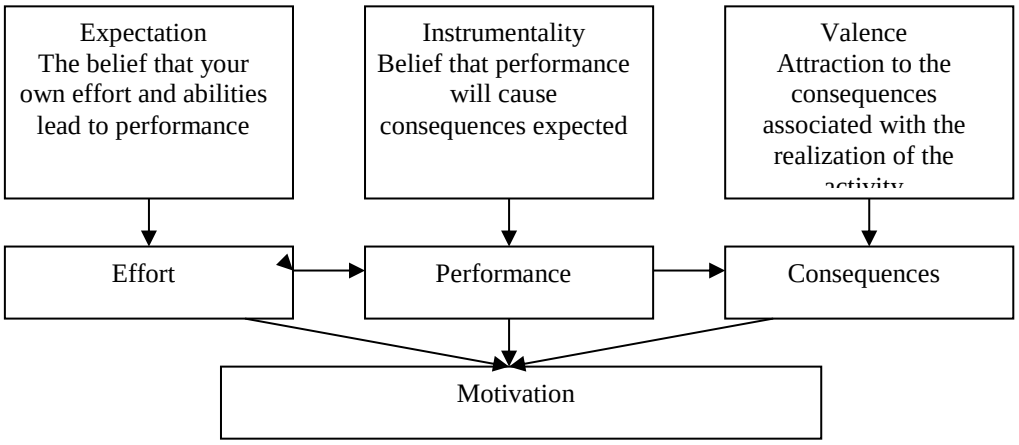
Instrumentality is a result-result association and expresses the employee's belief in the likelihood of obtaining rewards commensurate with his performance or contribution to work.

Valence represents a person's preference (desire, attraction) to certain results and is reportable to his or her own work valorization system. Thus, the individual associates work, specific attributes depending on context, from positive to negative, which enhances his attraction, indifference or rejection of engagement in a given work action. Valencia can be: positive when the person prefers to get the expected result of his engagement; null, if the person is indifferent to whether or not he obtains the result; negative, when the person does not want to get the expected result.

Vroom approached his problem theory and the problem of work satisfaction, considered as a dimension of motivation, which he considered to be the conceptual equivalent of labor valence. Thus, he considers that the employee's desire to achieve a positive outcome (positive valence) or to avoid it (negative valence) is not based on the intrinsic value of the outcome, but on the anticipated satisfaction or dissatisfaction associated with the achievement of the results.

Thus, the model proposed by Vroom is shown in Figure no. 3. taking into account that motivation is a resultant combination of the three variables.

Figure no. 3. Motivation model as a result of three variables.




Source: Burciu, A., Introduction to Management, Economic Publishing House, Bucharest, 2008

The theory of expectation is a complex theory because it takes into account the fact that each action (behavior) of an individual is the result of an individual decision-making process, based on subjective perceptions about the relationship between behavior and outcome. The theory implies that employees have

the choice of possible actions that can lead to more results different from each other, some that the individual wants, and others he does not want, those that have the most intense positive force. In this respect, the fundamental question of motivation at work, "why do people work?", Vroom's theory states that "a person will choose to work when the valency of the results he expects as a result of work has a value more intense than the valency of the expected results in the situation when it does not work "(Vroom, 1964/1995, p. 35).

Also, some elements of motivation are treated and felt differently by each individual: thus, for one person, promotion can be primordial, wage growth and gaining experience - very important - and the sacrifice of family and social life can be of negligible importance; for another person, family and social life may be the most important, wage increases may be of medium importance, and promotion may be undesirable because it involves overtime or some additional responsibilities and tasks. In the first case, the individual may be motivated to work a lot and work long hours over the program, while in the second case, the individual may not be motivated to do so.

In essence, motivation is determined by the whole set of outputs, as well as the importance that each individual attaches to each exit, and the force or intensity of motivation according to Vroom's opinion results from the product of differentiated values of valence and expectation:

*Force (motivation) = Valence * Waiting*

The theory of expectation suggests that managers need to be aware of the fact that employees work for several reasons, that these expected reasons or rewards may change over time, so employees need to be clearly shown how they can get the rewards they have I want. It should also be borne in mind that performance depends on abilities and motivation (Performance = Ability * Motivation), and when one of them has low values, then the performance at work will be low. Thus, the theory suggests to managers that they should set up an effective reward system to consider linking rewards to performance levels and personalizing rewards. At the same time, this theory explains motivation as a complex process, in which individuals analyze their chances of obtaining certain results in their work and appreciates the extent to which these results are appealing and useful to them.

## Conclusions:

Due to the complexity of motivation and the fact that there is no single answer to the question "what motivates people to work", we analyzed in the second part of the paper the different theories formulated by a number of researchers. We have emphasized that there are many reasons that influence people's behavior and performance. All of these theories provide us with a framework within which we will focus our attention on how we can motivate employees to work efficiently. It is essential for the manager to understand the basics of motivation, given that a highly motivated employee has a greater chance of reaching a higher quality product or service than an employee who is lacking motivation.

In an organization, the success of the the qualitative side of the human factor and his motivation towards the work performed are ensured to the greatest extent. Satisfaction with work is associated with performance up to a point, from which performance influences satisfaction. The direct link between performance and work satisfaction is mainly provided by the feedback and reward system.

Motivation has an essential role in preparing the action we are going to take; is the basis for the choices we make; is the sentiment generated by viewing the purpose of our action.

We found that the majority of theoreticians who developed the motivational theories, approached the motivation from different points of view, generated by the diversity and evolution of socio-cultural conditions, the theories and motivation models of the employees cannot be applied by the managers, they are correlated and combined into a reward system that will have a positive impact on employees' morale and satisfaction, increasing their motivation and involvement in the work done and implicitly in achieving the organization's goals. Only through collaboration effort, through appropriate mechanisms to attract employees to the objectives proposed by the firm, through mechanisms to motivate / influence them through the construction of efficient management teams can lead to increased performance.

From our point of view, a sufficient / appropriate, pre-neuronal or non-precursor motivation of the company's human resources, accompanied by a well-thought-out marketing policy along with appropriate management strategies at the top of the organizational chart, can ensure the success of the business in perspective. In the company's management, the real meaning of an employee's action or behavior, the attitude adopted by him in a given context cannot be perceived without understanding the reasons that have generated them. Thus, behind the action of the individual there are usually some reasons; knowledge of the reasons supports the attempt to predict human behavior, supports the attempt to unify the efforts of an organization aimed at achieving clearly defined objectives.

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# EXPLORING THE INFLUENCE OF ONLINE CONSUMER BRAND BOYCOTTS ON BRAND EQUITY

**Otilia-Elena PLATON**[*]

**Abstract**

*When something detrimental to consumer's principles occurs, they tend to criticize the situation and to take up action, using the Internet to virally spread their opinions and adopting a resistance behavior, thus punishing the company and refusing to buy its brands. On social media platforms consumers can become increasingly vocal through boycotts and consumers dissatisfactions spread almost instantaneously on the Internet. Such consumer-led boycotts can affect a company's long-term branding efforts. In this context, the management of brand equity, and especially of brand trust, brand affect and brand loyalty, poses a challenge for companies that do not act or communicate in a suitable way. This paper tries to identify the types of consumer boycotts, the reasons why boycotts can occur, their impact on brand equity and it aims at presenting some reccomendations for managing consumer boycotts.*

**Keywords:** *brand trust, brand affect, brand loyalty, boycott, social media.*

## 1. Introduction

A consumer boycott is an important issue for every company because it can affect its general development in a negative way in the long term. Since nowadays consumers can almost instantaneously spread negative information about a brand or a company on social media, it is important to immediately react and solve any problem that can lead to a crisis. Ignoring consumers' complaints can have a great impact on a company's branding efforts. When consumers are deceived by a company or a brand, they distrust the company and its brands and their attitude changes. Consumers are usually involving themselves in boycotting activities as a sign of disapproval and protest and they can refuse to buy certain brands when something detrimental to their principles or beliefs occurs. Although the operationalization of a boycott is represented by the refusal of purchasing a certain brand, the implications of a boycott are much broader. All these actions may have serious consequences, triggering a crisis of brand image, brand trust, brand, affect, brand loyalty or even brand equity overall.

The reasons why consumers engage in boycotting actions are numerous and it is important to identify each driver. This paper aims to form the basis for investigating the factors prompting consumer boycotts and for analyzing the relationship between consumer brand boycotts and brand equity. This paper also aims to identify the reasons why consumers engage in boycotts, to study their potential harm to brand equity and it aims to emphasize the important of adopting a suitable strategy for managing consumer boycotts and protecting the brand against future boycotts.

## 2. Consumer brand boycotts

The term *consumer boycott* was defined by Friedman (1985) "as an attempt by one or more parties to achieve certain objectives by urging individual consumers to refrain from making selected purchases in the marketplace"[1]. According to Kozinets and Handelman (1998) a boycott appears when it exists an actively organized and collectively encouraged behavior to punish a company by refusing to buy its brands[2]. Thus, a boycott can be an individual act of resistance and unwillingness to buy a certain brand, but it usually takes the form of a collective activity or reaction.

On social media individuals can be easily influenced and usually a boycott becomes a collective refusal or resistence to purchase certain brands. Consumers' attitude can be easily influenced on social media because the sense of community makes the individuals to feel bonded. The social influence is an important factor involved in this process. Opinion leaders have the capacity to voice opinions and influence others to perform certain behaviors, including calling for boycott campaigns. Although on social media people generally express their personal opinions, their actions are a result of a collectively reaction created around a certain subject of discussion.

An important aspect of consumer boycott is the boycott attitude. The term *boycott attitude* refers "to the opinions and feelings that a consumer has regarding

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[1] Hsien-Kuei Chiu, "Exploring the Factors Affecting Consumer Boycott Behavior in Taiwan: Food Oil Incidents and the Resulting Crisis of Brand Trust", *International Journal of Business and Information*, Vol. 11, No. 1 (March 2016): 51.

[2] Carmen-Maria Albrecht, Colin Campbell and Daniel Heinrich, "Exploring why consumers engage in boycotts: toward a unified model", *Journal of Public Affairs*, Vol. 13, No. 2 (2013): 180.

boycott activities"[3]. As it can be seen, the boycott attitude involves both rational and emotional aspects. According to Chiu (2016), boycott attitude can be driven by: perceived deception, animosity or emotional factors (anger, contempt and umbrage), altruism, and perceived risk. According to Albrecht et al. (2013), other factors that can motivate a consumer to engage in a boycott are: "the perceived success likelihood of a boycott, a consumer's susceptibility to normative influences, the costs associated with the boycott, such as availability of substitutes or preference for boycotted products, instrumental and clean hand motivations, expressive motivations, the desire for social change, self-enhancement, and the perceived egregiousness of the company's actions"[4].

Besides adopting a boycott attitude, consumers involve in the actual boycott due to many reasons. Consumers' involvement "implies that a boycott topic represents an exciting and therefore motivating issue"[5] for them. "Boycott effectiveness is highly reliant upon consumer willingness to engage or disengage in the boycott activities"[6].

Chiu (2016) mentions that consumers tend to participate in a boycott action because they believe that they can cause change. Consumers are becoming more socially aware that their opinions matter and that their behavior and attitude can affect companies. Thus, according to Paek and Nelson (2009), boycotting is perceived by the individuals as a form of socially responsible consumer behavior. Consumers are generally boycotting in order to push companies toward more ethical or responsible practices. Adopting a boycott attitude is considered an altruistic behavior by some consumers because "it is driven by a motivation in which consumers perceive themselves as helpers who can protect others from harmful causes"[7].

According to Sen et al. (2001), boycotts can be classified in two main categories[8]:

- *economic boycotts:* they occur when consumers intend to change the unfair marketing or business practices of companies,
- *social/ethical control boycotts:* they occur when consumers try to force companies toward specific ethical or socially responsible behaviors.

In today's marketplace, consumers tend to judge companies against social responsibility criteria and, according to Klein et al. (2004), they "expect companies to act in an environmentally and ethically responsible manner"[9]. If companies ignore these expectations and fail to act in a socially responsible way, they can easily become the target of consumer resistance behavior.

According to Fazel (2015)[10], boycotts are usually triggered for two main purposes, therefore they can be also classified in two main categories:

- *instrumental boycotts:* they occur when consumers intends to force a company to change a disputed procedure or policy,
- *expressive boycotts*: they occur when consumers are displeasured by the actions of the company.

Consumers can exert a social control over companies through the collective power that they gain when they decide to engage in a boycott. By their decision to buy or not to buy certain brands "boycotters intentionally use their 'purchase votes' to favour (or disfavour) firms that make (or do not make) positive societal impacts"[11].

## 3. Brand equity

It is already well-known that brand equity is one of the most valuable assets a company can possess. When a call to action request appears in the form of a boycott much of the branding effort can be affected. In traditional marketing, "the marketer has enormous control over the use of one-way communications that build and enhance brand equity"[12]. But the growth of social media changed the way consumers communicate and poses some important challenges in the management of brand equity, especially of brand trust, brand affect and brand loyalty. In this context, marketers need to become proactive in protecting their brand equity. Any type of information, detrimental to consumer's principles or beliefs, can easily make a brand vulnerable to online consumer boycotts.

Although it is well-known that consumer boycotts have an impact on brand equity, it is very difficult to establish the value of the financial losses attributable to online consumer boycotts because "there are no publically known metrics that help firms measure the discontent and actual boycott behavior"[13].

In general, on social media consumer brand boycotts have a short-term manifestation, but some of

[3] Chiu, "Exploring", 53.
[4] Albrecht, Campbell and Heinrich, "Exploring", 181.
[5] Albrecht, Campbell and Heinrich, "Exploring", 181.
[6] Hesham Fazel, "Brand Credibility to Mitigate Brand Boycott Preventive Strategy of Brand Globalness and Brand Endorsement: Theoretical Perspective", *Journal of Economics, Business and Management*, Vol. 3, No. 7 (2015): 694.
[7] Hye-Jin Paek and Michelle R. Nelson, "To Buy or Not to Buy: Determinants of Socially Responsible Consumer Behavior and Consumer Reactions to Cause-Related and Boycotting Ads", *Journal of Current Issues and Research in Advertising*, Vol. 31, No. 2 (2009): 77.
[8] Albrecht, Campbell and Heinrich, "Exploring", 181.
[9] Albrecht, Campbell and Heinrich, "Exploring", 180.
[10] Fazel, "Brand", 695.
[11] Fazel, "Brand", 694.
[12] Joyce A. McGriff, "A conceptual topic in marketing management: The emerging need for protecting and managing brand equity: The case of online consumer brand boycotts", *International Management Review*, Vol. 8, No. 1 (2012): 49.
[13] McGriff, "A conceptual", 49.

them "have the potential for greater long-term harm"[14], influencing consumers' trust or even loyalty.

A significant competitive advantage for many companies, with strong effects on their commercial success, is the consumers' brand loyalty. The customer's loyalty is considered a key factor for long-term success of companies and, because of this, brand loyalty came to be compared by Kapferer (2005) to "a Holy Grail for marketers"[15]. Loyalty is a complex concept and two of the main perspectives from which it is usually approached are: *the behavioral brand loyalty approach* (the action or intention to repeat the purchase of a certain brand) and *the attitudinal brand loyalty approach* (the consumer's psychological involvement and commitment towards a certain brand)[16]. As presented in the specialized literature, the main determinants of brand loyalty are *brand trust* and *brand affect*[17].

Brand trust is one of the most important elements that form brand equity. "Brand trust involves the credibility, integrity, and benevolence that a consumer attributes to the brand"[18]. In order to build trust, companies have to communicate in a transparent manner with their consumers, in both favorable and unfavorable contexts, and to provide a sense of honesty, openness, respect, responsibility and reliability.

Like brand trust, brand affect is another important element that leads to the development of brand equity. Brand affect represents a consumers' emotional response towards a certain brand. A consumer becomes emotionally and psychologically attached to a brand following positive experiences with it. The main effect of this type of commitment and attachment "is to make consumer behavior more resistant to change by fixing brand choice in the minds of consumers"[19]. For companies and their brands it is very important to ensure positive experiences for consumers. This way, in time, they can develop a close relationship between the brand and consumers. Long term consumer-brand relationships and loyalty are "built on the foundation of brand affect"[20].

## 4. The influence of online consumer brand boycotts on brand equity

When linking online consumer brand boycotts and brand equity it is important to analyze the effect of the factors prompting consumer boycott attitude on some of the most important elements of brand equity, namely brand trust, brand affect and brand loyalty.

In general, if a company or a brand deceives consumers through a certain type of behavior or attitude, consumers will start to distrust it. The lack of trust further affects consumers' purchase intentions. Building brand trust takes a lot of time and effort, but its collapse can be instantaneous. "Brands failing to earn or maintain trust will inevitably find themselves out of favor"[21] and in the case of a boycott, companies risk to diminish their brand trust.

In this context, the factor that could help a brand is the consumers' attachement towards it. A strong brand affect from a highly committed customer "might be a protective barrier to boycott calls"[22].

Considering that brand trust and brand affect represent the basis of a strong brand loyalty, it is also important to determine whether an increased loyalty makes a customer less likely to participate in a boycott activity. "With respect to boycotts, increased loyalty to a particular brand should increase the psychological 'cost' of engaging in a boycott"[23].

Taking into consideration the main four drivers of a boycott attitude, proposed by Chiu (2016), namely: perceived deception, perceived risk, emotional factors and altruism, and the two main drivers of brand loyalty, namely: brand trust and brand affect, a conceptual model regarding the relationship between all these elements is presented in figure 1.

[14] McGriff, "A conceptual", 49.

[15] Hossein Nezakati, Chua Pool Yen and Maryam Akhoundi, "Antecedents impact on brand loyalty in cosmetics industry", *Journal of Applied Sciences*, Vol. 13, No. 1, (2013): 126.

[16] Geok Theng Lau and Sook Han Lee, "Consumers' trust in a brand and the link to brand loyalty", *Journal of Market Focused Management*, Vol. 4, No. 4 (1999): 341.

[17] Gheorghe Orzan, Otilia-Elena Platon, Cristian Dragoș Ștefănescu, Mihai Orzan, "Conceptual Model Regarding the Influence of Social Media Marketing Communication on Brand Trust, Brand Affect and Brand Loyalty", *Economic Computation and Economic Cybernetics Studies and Research*, Vol. 50, No. 1/2016: 144.

[18] Chiu, "Exploring", 52.

[19] Albrecht, Campbell and Heinrich, "Exploring", 182.

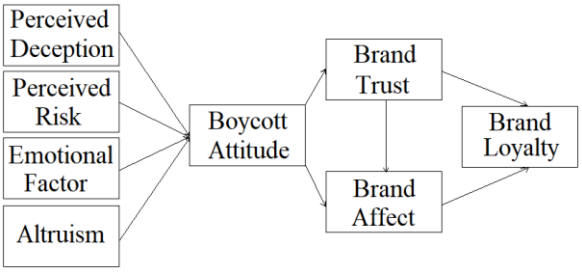
[20] Ebru Tümer Kabadayi, Alev Koçak Alan. "Brand trust and brand affect: their strategic importance on brand loyalty", Journal of Global Strategic Management, Vol. 6, No. 1 (2012): 80;

[21] Chiu, "Exploring", 52.

[22] Albrecht, Campbell and Heinrich, "Exploring", 187.

[23] Albrecht, Campbell and Heinrich, "Exploring", 182.

Figure 1. Conceptual model regarding the influence of boycott attitude on brand loyalty




Source: the author

The model poposes the hypothesis that a consumer's boycott attitude influences brand trust and brand affect. The model also wants to analyze the direct effect of consumer's brand trust and brand affect on brand loyalty and the indirect effect of brand trust on brand loyalty through brand affect. Model validation will be conducted through a future research.

## 5. Case study: Gillette campaign "We believe: The Best Men Can Be"

As it has been presented, consumers are generally boycotting in order to push companies toward more ethical or responsible practices. But what happens when a company decides to communicate a socially responsible message and the result is consumer resistance behavior and a boycott threat?

The newest Gillette campaign managed to be both appreciated for speaking up about redefining masculinity and also criticized for this attempt at the same time. The campaign called "We believe: The Best Men Can Be" was launched on January 13, 2019 and it was based on an ad addressing the issue of toxic masculinity. The central message of the campaign was that men must change their behavior in order to stop unacceptable behaviors like bullying, fighting and sexual harassment. A part of the message that Gillette posted on its official webpage in order to support the campaign was: "It's time we acknowledge that brands, like ours, play a role in influencing culture. And as a company that encourages men to be their best, we have a responsibility to make sure we are promoting positive, attainable, inclusive and healthy versions of what it means to be a man. With that in mind, we have spent the last few months taking a hard look at our past and coming communication and reflecting on the types of men and behaviors we want to celebrate. We're inviting all men along this journey with us – to strive to be better, to make us better, and to help each other be better"[24].

Although the company intended to communicate a positive message about a social problem, the result managed to polarize the audience in two sides: those who supported the campaign and those who called for the brand boycott.

Gillette started using the tagline "The Best a Man Can Get" since 1989 and for almost 30 years the brand successfully built its communication strategy around this statement. A reason why Gillette created this new campaign was that "there is recent research suggesting that millennials give more credit to brands using corporate social responsibility appeals"[25]. Unfortunately, the overall reaction on social media was overwhelmingly negative. After this campaign was launched, the hashtag *#boycottgillette* was used by numerous social media users on Twitter and other social media platforms. Many consumers criticised the message, claiming the brand was attacking masculinity. Consumers "slammed the company's marketing strategy and said the ad alienated its entire customer base"[26].

This situation was generated due to the fact that although the brand's intent was right, addressing a key social issues, the execution of the ad was problematic, causing some men to feel insulted by the spot and to consider it offensive and sexist.

Fortunately, the backlash didn't influenced the market share of the brand's parent company P&G and the shares were up by 0.9 percent the day after the campaign was launched (as it can be seen in figure 2), as controversy still rumbled on. Although at the financial level the company wasn't affected, it is important to determine to what extent the brand trust, brand affect and brand loyalty were influenced. It is important to watch over time if the ad has affected the sales and if Gillette somehow has alienated its longtime customers with this social message. Therefore, much more needs to be learned about the nuances of what is right and what is wrong when a brand decide to address a sensitive social problem.

Figure 2. Procter&Gamble's market share on January 15, 2019


Source: Jennifer Smith and Erica Tempesta, "I just want to shave".

[24] https://gillette.com/en-us/the-best-men-can-be
[25] Charles Taylor, *Why Gillette's New Ad Campaign Is Toxic*.
[26] Jennifer Smith and Erica Tempesta, *"I just want to shave".*

## 6. Conclusions

For every company the achievement of its objectives is dependent on the consumers' reactions and consent to their business and marketing practices. From an economic perspective, every unfair practice of a company will be immediately punished by the consumers through their refusal to buy certain products or services. From a social perspective, the companies that don't act in a socially responsible way, can easily become the target of a consumer boycott, thus being forced to adopt a specific responsible behavior. The consequences of a consumer boycott can be represented by a loss in sales or even an important damage of brand equity. Therefore, for companies it is important to identify the possible drivers of a consumer boycott and to prevent this kind of actions to happen.

In order to prevent a possible consumer boycott, companies must maintain trust among their consumers. Every perceived deception or inconsistency can make the consumers no longer trust the brand. Ignoring the consumers' interests can lead to protests and boycotts.

Building a strong emotional connection between brands and consumers can also help to prevent a possible boycott.

To enable boycotting to become less harmful, marketers need to understand what makes consumers engage in boycott activities. Also they need to understand the relationship between consumer boycott attitude and three of the main element of brand equity: brand trust, brand affect and brand loyalty.

The proposed model, which will be analysed and validated through future research, aims at offering an input for a strategic analysis of the boycott situations. Researchers in marketing need to understand consumer protest behavior in order to assist managers who wish to develop appropriate strategic responses.

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# WAYS OF ENHANCING COMPETITIVENESS WITHIN A NATIONAL MEDICAL INSTITUTE

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**Abstract**

*The interest of the specialized literature for the competitiveness of the organization has derived, on the one hand, from the studies on countries and regions competitiveness and, on the other hand, from the concern of both managers and researchers about identifying effective ways of meeting customers needs and of dominating competitors. Basically, the competitive advantage could aim at either reaching a low cost of products or services or differentiating them in one or several ways against the competitor products.*

*The competitiveness of an organization derives from the price / performance attributes of the existing products. An organization attains sustainable competitiveness if they succeed creating and maintaining several core competencies that would generate effects through replication and innovation. This approach may be adopted and applied as a specific definition of healthcare organizations competitiveness, as practice shows us that core competences become the fundamentals of the strategy and even competitive advantages and sources of key success factors.*

*This paper aims at reviewing a healthcare unit having a single specialty providing high-performance and very high difficulty medical services. The original idea was to obtain a competitive advantage by introducing an entirely new, innovative treatment method to the clinic, which is also complementary to the medical services traditionally offered.*

**Keywords:** *Competitiveness, competitive advantaje, endovasculartreatment, resources, project*

## 1. Introduction

The Organization for Economic Cooperation and Development (OECD) defines competitiveness as "the capacity of competing organizations, branches, regions, and states of sustainably ensuring a high yield from the use of production factors, as well as a high income resulting from the efficient use of the labour force".[1,2]While competitiveness at national level is most often seen as a means used to improve public services for enhancing quality of life based on a rational use of the country's resources, competitiveness at organization level focuses on the capacity of companies of understanding the competition environment and of adjusting to the market needs.

As a matter of fact, Michael Porter shows that productivity is an essential factor in determining long-term quality of life, as this is the basis of the national income, while national competitiveness is expressed by national productivity[3]. This approach could bring in the idea that countries enter competition to ensure a quality of life as good as possible for their citizens, while naturally searching for increasingly high productivity. In today's age of Globalization, the performance of a state is increasingly linked to the contribution companies bring to the national budget. Krugman considers that, in fact, "companies rather than states are the ones competing against each other"[4]. His reasoning is related to the competitiveness outcome: if a non-competitive company cannot pay their employees, suppliers also become bankrupt; not the same applies for a state. Therefore, public policies become extremely important in shaping the companies' competitiveness drivers by means of competition policy, tax system, subsidy award, etc. On the same page, we can also consider the opinion of the Competitiveness Advisory Group[5] (a group of 13 experts appointed by the European Commission in 1995 whose purpose is to study the European Union competitiveness) according to which the competitiveness concept involves productivity, efficiency, and profitability and it's a means of achieving social wellbeing without increasing inflation. Michael Porter provides a clear delimitation: productivity is mainly the prerogative of national competitiveness, while efficiency, profitability, and

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[5] Competitivness Advisory Group (UE). Enhancing European Competitiviness. First report to the President of the Commission, the prime Ministers, and Heads of States, June 1995

achievement of market targets are related *par excellence* to the companies competitiveness[6].

## Literature Review

The current competition context shows a clear distinction between static and dynamic competitiveness. Static, conventional competitiveness focuses on competition by price, as companies rely on the low cost of the labour force and of the resources, which enables them to maintain good competitiveness by keeping or reducing production costs[7]. Dynamic competitiveness is associated with the fluctuating nature of the competition environment that not only focuses on the relationship between costs and prices, but also on the capacity of companies to think strategically, to learn, to rapidly adapt to the market conditions, and to innovate. Considering this, competitiveness is defined as the capacity of companies to permanently upgrade their technological facilities in order to manufacture competitive products (Berinde, 2006). Considering the economic reality in most fields, we are entitled to state the dynamic competitiveness approach is much more appropriate nowadays. An organization attains sustainable competitiveness if they succeed creating and maintaining several core competencies that would generate effects through replication and innovation. The factors that could contribute to the correct identification of dynamic competitiveness of an organization include: the leadership, the competences, and the resources of the organization, the strategic options and actions of the organizations and of their competitors, the current competitiveness level, the opportunities, and the threats within the competition environment[8].

The success of the organization mostly depends of the competitive advantages of the organization in relation to their competitors. The need of permanently assessing the competitive position of the company is essential for two reasons: (a) to assess their own capacity of entering and staying on the market (b) to achieve competitive positioning against their competitors, thus achieving competitive advantage.

Peter Drucker[9] has identified eight performance areas with a determinant role for the long-term success of an organization: positioning on the market, innovation, productivity, physical and financial resources, return, managers performance, employees performance and attitude, public responsibility. The achievement and/or maintenance of competitive advantages are considered core priorities for the management of the company. All managers should ask themselves questions regarding the advantages that have enabled their success previously, the advantages currently supporting their business in order to determine the competitive advantages that will ensure their further success.

According to Porter et al.[10], the competitive advantage of a company basically relies on ensuring a low cost of a product or service whose features differentiate it from similar products supplied by the other competitors. Innovation is the main source for effectively achieving competitive advantage. Schumpeter[11] defines innovation as one of the following:

- the emergence of a new product
- the emergence of a new market;
- the introduction of a new manufacturing method;
- the procurement of a new supply source
- the generation of a new form of organization of the specific industry.

The competitive advantage could essentially focus on the following two aspects:

- the cost advantage is to achieve production costs below those of competitors by exploiting economies of scale, gaining experience or any other source of unit cost reduction, maintaining a certain parity or proximity in terms of quality. If cost reduction has a negative impact on quality, this competitive advantage becomes both inoperative and harmful. If buyers don't notice a big difference between the quality of the competitor products and the company's products, the company's profit will exceed the average.
- differentiation generates an above the average rentability of competitors if it enables the company to achieve a bonus in relation to the market price. The organization aiming at differentiating should have to carefully select the product attributes they wish to upgrade in order to pass the "originality test". Additional profit will only be obtained if differentiation does not involve an increase of the manufacturing costs that exceeds the potential price increase.

Nowadays, the reviews on the competitive advantage are less dogmatic, as the idea that this results from a multitude of factors (without emphasizing the special importance of one or another) is accepted. M. Porter[3] has suggested the "value chain" model that has already been adopted by many specialists, despite a few disadvantages it shows.

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The value chain consists of breaking the activity of the companies into strategically relevant activities for the purpose of understanding the behavior of costs and of identifying the potential differentiation sources. It consists of two categories of activities:

- primary activities, i.e. the ones directly related to the manufacture of the product / service and its selling, including the post-sale services;
- support activities that ensure material, technological, and work force entries necessary to perform primary activities.

The possibility of increasing competitiveness within a National Medical Institute (INNBNV) whose main activity is specialized healthcare in the field of neurology, neurosurgery and neurovascular emergencies, developed within an integrated program with higher medical education and high-level scientific research, by setting up a department of endovascular interventions, is further analyzed. The goal is to treat, as a matter of urgency, all patients with a pathology whose impact on the population is very high in terms of mortality and morbidity. Studies conducted in European countries that already have neurovascular emergency diagnosis and treatment units show that the economic loss caused by severe debilitation or death resulting from these neurovascular emergency cases not treated in a timely manner amounts to hundreds of thousands euros[12,13].

The social and economic impact of neurological up to the most severe disabilities affecting an active population is very high. The establishment of an emergency service that can also provide quick endovascular treatment in addition to microsurgical treatment aims at significantly reducing major neurological sequelae.

**As regards the SWOT analysis of the project**, the internal environment factors, the external environment factors as well as the threats to the project for the development of an intervention department within the above-mentioned institute have been analyzed.

Overall, **the internal environment** has more strengths than weaknesses. This is due to the fact that the unit is recognized throughout the country for the outstanding results obtained in the microsurgical treatment of cerebral aneurysms. This provides a very rich and varied case database that can be treated by endovascular treatment with very good results.

**The external environment** comprises many more variables, both as opportunities and as threats. This causes most threats, and these are more difficult to control and anticipate because they are external. These are usually related to the economic environment, mentalities, and unfortunately, even to the political environment in our country.

The external factors that positively impact the project are:

1. The evolution of the healthcare system in the EU countries, and not only the ones in the developed West European countries, but also the neighboring countries have such emergency units for neurovascular pathology. For example, Hungary has two such units (Budapest and Szeged) with outstanding results.
2. The medical technology permanently and spectacularly progressing. While new developments in microsurgical treatment do not occur so quickly, materials used in endovascular treatment are developing much quicker.
3. The adjustment of services to the population requirements. Patients are increasingly informed, as mass media and the internet are now available to anyone. Everyone wants to benefit from the most modern techniques, within the shortest time, and as minimally invasive as possible.
4. Many Romanian patients with a very good financial status go the other European Union countries for treatment. Some of these patients pay the treatment themselves, others use the forms of the National Health Insurance House that reimburses the cost of the treatment, justifying that the specific therapeutic intervention cannot be performed in our country. It is easy to understand that the NHIH would prefer to reimburse the costs of these medical interventions carried in Romania, where prices are lower and thus, they would be interested in investing in the establishment of these neurovascular emergency care units.
5. Mass media support that usually promote the establishment of units aligned to the European standards and which are expected to provide positive outcome.
6. Access to European funding has become increasingly easy from a technological point of view; a consistent, well-documented, with predictable and well-grounded results would have high chances of receiving financial support from European funds.

**However, there are several external factors that negatively impact the project:**

1. The lack of financial resources - the main obstacle in starting any healthcare project.
2. The National Health Insurance House does not reimburse endovascular interventional procedures for the treatment of cerebral aneurysms. This hinders the quick implementation of this procedure within the neurovascular emergency unit. The only

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money provided by the system for this specialty are obtained through a national program run by the Ministry of Health.

3. Reluctance to new things in the current healthcare system. There is an inertia in the implementation and application of new structures, even if they have been existing for a long time within the healthcare system of civilized countries. The implementation of healthcare policies on an long- and medium-term is difficult.

**Key factors** that could impact project execution

| DECISION MAKERS | INTERESTS | IMPACT ON THE PROJECT | POWER (1-5) |
|---|---|---|---|
| 1. The Ministry of Public Health | ❖ achieving the result<br>❖ the control of funds and activities<br>❖ avoiding responsibility in the event of a failure or even negative feedback<br>❖ obtaining political or electoral support | +<br>-<br>-<br>+ | 5 |
| 2. The National Health Insurance House | ❖ decreasing the hospitalization time and the related costs<br>❖ solving cased that would require the same treatment in another country with much higher costs<br>❖ co-financing the funds paid by the MPH (Ministry of Public Health) | +<br>+<br>- | 4 |
| 3. The local authorities (the city hall) | ❖ improvement of public image<br>❖ winning electoral support | +<br>+ | 3 |
| 4. The hospital | ❖ improvement of treatment quality, resulting in a lower mortality and morbidity index<br>❖ cost reduction<br>❖ improvement of MCI (mixed complexity index for the treated case)<br>❖ improving the prestige of the institution by creating a high-performance unit | +<br>+<br>+<br>+ | 2 |
| 5. The Ministry of Labour | ❖ decreasing the number of persons with severe disabilities (grade I), thus reducing the costs of their premium<br>❖ reducing temporary work incapacity | +<br>+ | 2 |
| 6. Healthcare materials and medicinal products companies | ❖ increasing the sales and profit<br>❖ image leverage | +<br>+ | 2 |

| | | | |
|---|---|---|---|
| 7. The Association of Romanian patients | ❖ high-performance treatment, i.e. improvement of the quality of life and the patients satisfaction<br>❖ saving money necessary for healthcare materials that is now supplied by the MPH | +<br>+ | 2 |
| 8. Non-governmental organizations | ❖ reducing the number of disabled people within the population | + | 1 |

The department to be created has well-established organizational strategies regarding the healthcare services provided and the personnel-related aspects, and these must be entirely complied with.

Organizational and behavioral strategies, skills and competences of employees

1. Innovation - overspecialization and expertise acquired in similar services abroad
2. Quality - ongoing training of medical staff
   - thoroughness and dedication for the work carried
   - teamwork
   - communication skills
3. Decrease of hospitalization time
   - emergency treatment
   - high qualification of the personnel
   - teamwork
4. Cost reduction
   - avoiding wastage
   - multiple qualification
   - strictness and thoroughness
5. Personnel training
   - mastering the use of information technology
   - foreign language proficiency

Stakeholders involved in the operation of this unit have been identified, their interests and power regarding the application of such a project are established in order to draw up a strategy where these factors can be stimulated

Stakeholders analysis

| Internal stakeholders | External stakeholders |
|---|---|
| Doctors - high interest, low power | Patients - high interest, decreased power |
| Healthcare personnel - decreased interest, decreased power | The neurology society – decreased interest, low power |
| Auxiliary and maintenance personnel - decreased interest, decreased power | Companies supplying medical equipment and healthcare materials - high interest, low power |
| Hospital managers - increased interest, increased power | The society of neurosurgery and neuroradiology - high interest, low power |
| Heads of departments - increased interest, low power | Press and mass media - low interest, high power |
| The Ministry of Health | MPH, NHIH, local authorities - low interest, high power |

After identifying the stakeholders involved in the project and the potential reluctance reasons of each of them, a settlement plan can be developed for conflicts that can arise due to changes, new situations, fatigue, unpredicted expenses, etc. Stakeholders are, on the one hand, part of the hospital staff and, on the other hand, the governmental institutions managing the activity and that can assign important financing sources.

| Stakeholder | reason of challenging | plan for conflict settlement |
|---|---|---|
| Doctors | Intrapersonal – high amount of work, stress<br>Interpersonal and intra-group – treatment failure in emergency cases<br>Inter-group – the introduction of a new therapy concept (endovascular embolization) will result in adversity and resilience from neurosurgeons | Accurate scheduling of the monthly working time<br>The establishment of a behavior code within the group and enhancing trust between the members of the group<br>The development of unitary practice protocol, upon the agreement of both groups<br>Attracting the groups in the program extension |

| | | |
|---|---|---|
| Healthcare personnel and auxiliary personnel | Intrapersonal – the increase of the amount of work, high and sustained qualification requirements<br>Interpersonal – controversies related to the manner the tasks are fulfilled<br>Intra-group – disagreements in relation to responsibilities and duties | Obtaining salary bonuses and organizing EMC (ongoing medical education) courses<br><br>Strict assignment of tasks and work schedules |
| MPH, NHIH, local authorities | Increased costs | Explaining the advantages related to the establishment of such a service through the decrease of morbidity and mortality rate that in the end result in cost reduction |
| | Unsatisfactory results create an unfavorable public image<br><br>The existence of other priorities within the healthcare policy | Promoting the good results obtained and highlighting the support received from local and central authorities<br>Lobby for prioritizing the program |

**A GANT chart was also created for the specific project**

| Activities | L 1 | L 2 | L 3 | L 4 | L 5 | L 6 | L 7 | L 8 | L 9 | L 10 | L 11 | L 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1. Determining the project team, responsibilities assignment, setting up the existing location | | | | | | | | | | | | |
| 2. Staff recruitment | | | | | | | | | | | | |
| 3. Purchasing healthcare materials necessary for interventional procedures | | | | | | | | | | | | |
| 4. Training sessions for members of the unit – Romanian expert (18 sessions) | | | | | | | | | | | | |
| 5. Conducting 2-3 training sessions for members of the unit – foreign expert | | | | | | | | | | | | |
| 6. Training in similar units within the EU – 10 persons | | | | | | | | | | | | |
| 7. Starting permanent emergency care activity | | | | | | | | | | | | |
| 8. Information of ambulance dispatches, SMURD, hospital emergency rooms about the opening of our unit | | | | | | | | | | | | |
| 9. Promotion in mass media, magazines, medical congresses, posters and boards, and press conference | | | | | | | | | | | | |
| 10. Review and assessment | | | | | | | | | | | | |

**The establishment of this department could be financed by:**

- The Ministry of Health through the National Program of Cerebrovascular Disease and through programs intended for healthcare emergency units
- The Ministry of Labour and Social Protection through European programs aiming at decreasing the number of people unable to work and who require special social conditions
- European structural funds
- Multinational manufacturers of instruments and equipment used for the diagnosis and treatment of neuro cerebrovascular disease.
- Foundations and non-profit organizations whose activity covers the submitted program.

**If such a department would be established, the expected results refer to:**

- Improving the performance of the hospital by increasing the efficiency, effectiveness and quality of medical services;
- Wide coverage, as this would be an unique department specialized in the simultaneous surgical and

endovascular treatment of cerebrovascular diseases;

- Increase of the institute's own income through payments per service;
- Decreasing the average time of hospitalization, the patients being discharged after a few days;
- Selection and differentiated approach towards neurovascular emergencies that will be quickly admitted, examined and treated;
- Intervention in the acute phase, that is within the first few hours after a stroke, that could save many lives.

## Conclusions

The establishment of units for the diagnosis and treatment of neurovascular emergencies is extremely important for our country given that we are discussing a pathology that results in high mortality and morbidity rates, with significant social and financial costs, if not treated in a timely manner. We are among the last countries in the EU not having this type of units within the healthcare system.

It is true that the establishment of such units involves costs, and these could be too high for a system where investment in healthcare is always scarce. But benefits throughout time are extremely important. In addition to being a major cause of mortality, the neurovascular pathology that is not appropriately treated results in the most severe disabilities. And this means a substantial financial burden for the government, considering that it affects a relatively young population, thus with a high life expectancy. If treated in a timely manner and by experienced doctors, the neurovascular pathology could lead to spectacular results.

Nowadays, a modern diagnostic and treatment unit clearly involves an endovascular embolization service rather than just a micro-neurosurgical service. Ideally, this project should be a pilot for further development of such emergency care units across the country, covering evenly the Romanian territory and meeting 24/7 requirements when it comes to neurovascular pathology. But the project has to adapt to the economic realities and aims at showing the easiest way in terms of financing, viability and speed to put into practice for a neurosurgical service in Romania.

Considering the specificities of the mentioned institute, the endovascular embolization department complements the treatment of this pathology specifically in cases where neurosurgery cannot offer the best treatment solutions.

The learning curve and the development of authentic specialists are not easy to achieve and they require time, but benefits are outstanding. This trend is irreversible and in the shortest time we will surely become an European state in terms of emergency treatment of neurovascular pathology.

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# THE REFRACTION STATE OF THE PROFESSIONAL JUDGMENT AT A CONCEPTUAL LEVEL

**Viorica Mirela STEFAN-DUICU**[*]

**Abstract**

*The conceptual and material construction of the present article involves a high degree of originality and conceptual innovation, the ideas stated here are not to be found anywhere in this world as we know it and it represents the proof of dedication into research, of the will to be involved in the growth of the content and notions regarding the professional judgment.*

*This article is centred on the description of the professional judgment taking into account its refraction state. In order to explain this posture we have used several concepts and took the following steps: defined the professional judgment, used the specific literature for widening the research area, used analogies and connections with other domains and finally placed the professional judgment in the current organizational environment and explained its refractivity state through the components and existing influence factors.*

**Keywords:** *professional judgment, refraction state, innovative concept, factors, organizational environment*

## 1. Introduction

The general concept of refraction state refers to the process of sudden change of a pre-established direction.

Particularizing this concept on our research theme, we can state that the refraction of the professional judgment underline and highlights the mechanisms and processes of the trajectory modification of the professional judgment at a complex level, within an exigent format, in an unexpected mode, having as result new processes owed to the application of the new emerged factors.

When we mention a refraction state of the professional judgment we actually refer to the sudden and fast changes of the outline and formation of it and to what generates this unforeseen changing process.

In an extended survey that we realized having as subject 229 respondents, "at a general level, almost half of the questioned population (48%) considers that the professional judgment is a set of logical judgments linked together in order to obtain concluded results for the activity carried taking into consideration certain circumstances, knowledge, evidences, methods, criteria and proper regulation. The second preference among the respondents has labelled the professional judgment as being the mechanism that forms an opinion and decision making taking into consideration the interaction between the accumulated experience in the domain, the assimilated knowledge and circumstances in a percent of 26.2%. With approximately 13 percent the professional judgment's definitions were a process that intervenes when the domain's legislation does not cover all the situations encountered in the activity carried and as a cognitive process that takes into consideration ethical codes, knowledge, circumstances but also by the employee's behavioural structures.[1]

Prof. Herb Miller defines the judgment as a result that appears after the interaction between education and experience.[2]

## 2. Influencing factors

Factors that influence the professional judgment are both internal and external, implied and explicit, with a positive or negative impact, with provisory or permanent effect, factors that get to activate the formation and application of the professional judgment at an organizational level. From within these factors, we name: the professional training under all aspects (both by the accumulation of experience by the employee from self-training and by taking several courses and training sessions for the development and assimilation of knowledge in the required field), the economic and social environment that positions the organization under the influence of the economy in which it operates and under the influence of the interaction with the countries from the economic space, access to current information and new technologies, the alignment and the obligation to apply predefined norms of conduct (ethical codes, working procedures, standards, regulations, procedures, referential, working methodologies, internal procedures, manuals) etc.

The accumulation of knowledge is to be considered a premise of a good use of the professional judgment.

The professional training takes a temporal classification that reveals, on one side a general

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[1] V. M Stefan-Duicu, A. Stefan-Duicu – „Professional EXO-JUDGMENT Perception – a Quantitative Research Based on an Innovative Conceptual Structure", Global Economic Observer, 6(2), 2018; V. M Stefan-Duicu – „Conceptual and regulatory delimitations of the professional judgment within an economic environment", Challenges of the Knowledge Society, 2017.

[2] H. Miller, „Collectivization of Judgement", The Arthur Andersen Chronicle, 1974.

professional training and on the other side a specialized professional training.

The general professional judgment brings into our discussion the stages of intellectual formation of the individual. From this category we name: profile high school studies, diplomas, the experience from international mobility, scholarships, practice and internships within the big companies, university studies etc.

The professional training based on the attendance and pass of accredited studies at a national and international level provides a detailed optic of construction of the formalized informational system by the assembly of knowledge needed for the use of the professional judgment.

The specialized professional training refers to knowledge gathered by filling a post within a company, by fulfilling all the obligations stated in the job description, by overcoming all obstacles and recession or decline periods and also by the valuable positioning of the knowledge into the growth of the company.

The gathering of knowledge conducts to an optimal use of the professional judgment and to the seizure of an extremely important know-how. Within this category the employee gets an experience formalized on the specificity of the job through advanced domain trainings and circumstantial situations solved and also through understanding the causal elements generated by the particular interactions on the company. Within the specialized professional judgment are also included the masters degrees that have as purpose the thoroughgoing of knowledge and the specialization on the designated domain, studies with particularization on the working place etc.[3]

Professional training, under its two particularities, general and specialized, represents a factor of qualification in the determination of the professional judgment and it's found in the important points of its formation.

Shaping the professional judgment with the influences of the psychological factors is realised in a segmented manner through the behavioural structure of the employee, through the environment sub-factors and familial sub-factors.

A determining factor in the use of the professional judgment is the "behavioural structure" because at a conceptual level the discussed judgment is a cognitive process that takes into consideration the ethical codes, knowledges, circumstances but also the behavioural structures of the employee through the highlight of the human characteristics engaged in this process.

In the shaping process of the professional judgment, the inter-disciplinarily of domains is being taken into consideration, also the specificity of the company in which the employee is working and by a o plethora of psychological direct and indirect factors that generate as a final result a multitude of important notions regarding the assembly of information reported to behaviour and to professional judgment.

At a professional level, the conduct implies strict general rules that are subject to certain particularization that appear as a positioning of the human social nature jobs within a micro-economic environment.

The professional judgment, in accordance to Paul Gagnon, is described as an "un-estimable mental power". [4]

Yankelovich Daniel, a renowned opinion analyst transmits the fact that a correct, strong judgment must be used all the time attracting a sustained effort and a whole series of abilities. This type of judgment doesn't exist by its own, doesn't automatically appear, it must be created.[5]

Behavior, in accordance to A. Tilquin, represents "the cumulus of adaptation reactions, objective-observable, that an organism that has a nervous system, is executing as a reaction to the environmental stimulus, which, are also objective-observable". [6]

Fitting a judgment into an organizational environment draws after it written and unwritten rules of the professional circuit.

As example," promoting of the financial and accounting services must respect the limits of professional ethics, as required the rules of professional organizations. Promoting services must respect the principle of professional correct behaviour and not to compromise the profession. According to the National Code of Ethics for Romanian Professional Accountants, the publicity means to communicate to the public the information about the accounting services offered and the skills that has a professional accountant, in order to get works contracts."[7]

Taking into consideration this example or any other examples we can state that access to information influences and directs the professional judgment. In this kind of situations the organizational environment seeks to adapt to the global dimension, social and economic even though "the economy of information is neither perfectly shaped nor perfectly satisfactory"[8], this way leading to an update of general sustained norms by both practitioners and theoreticians from the legislation domain, on which the professional judgment and its use relies implicitly and also explicitly.

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[3] V. M Stefan-Duicu, Contabilitatea și raționamentul profesional, Nemira Publishing House, București, 2016.

[4] P. Gagnon, Madison Conference of the Committee of Ten (the report), 1892.

[5] D. Yankelovich, „Coming to public judgment: Making democracy work in a complex world", Syracuse University Press, 1991.

[6] A.Tilquin, „Le Behaviorisme: origine et développement de la psychologie de réaction en Amérique: thèse pour le doctorat és lettres présentée à la Faculté des Lettres de l'Université de Paris (Doctoral dissertation, Librairie Philosophique J. Vrin), 1942.

[7] Sudacevschi, M., The promotion of the accounting services within the limits of professional ethics. Challenges of the Knowledge Society, 2016, pg. 719.

[8] Grigore, M. Z. (2009). Economia informației, instrument de analiză al noii microeconomii. Getting the Internal CNCSIS Accreditation B LESIJ is indexed BDI by EBSCO-CEEAS Database, pg. 374.

Referring to the written rules, in a deontological vision of professional judgment we state the existence of an assembly of documents that guide the deciding mechanism and implicitly the professional judgment. Among it, we state various ethical codes, working procedures, standards, regulation, procedures, referential, instructions, working methodologies, internal policies, manuals etc.

The professional judgment and the decisional process are the essence of many professions. Through its understanding and the communication of the purpose of the decisional factors, valuable contributions are brought both in the domain and the extended professional community. [9]

Our vision of the professional judgment contains the traditional side of judgment with focus on the conclusive reasoning of a demarche and also the general pro-economic side that brings the multitude of progressive effects of the professional environment.

## 3. The results of exposing the refraction state condition of the professional judgment

### 3.1. The refraction state of the professional judgment in a straight angle

The doctrinal description of this innovative and original concept refers to presenting a perfect situation in which a perfect fusion is realized between the professional judgment existing at a dogmatic and dialectic level and its organizational modelling factors, obtaining in this way a professional judgment with a flexible character, perfectly integrated at an organizational level. The resulted effect is useful and positive, the refraction state of the professional judgment became a homogenous one by incorporating the new elements in the existing status of the theoretic and practical corpus of the professional judgment.

### 3.2. The refraction state of the professional judgment in a right angle

The doctrinal description of this concept – this mechanism divides the development of the professional judgment in two categories after the impact of influential organization factors and it refers to the different development of the professional judgment in intrinsic uncontrollable conditions (the type of the organization, existing economy, environmental factors, etc.). The possibility of overlapping the final refraction state imagistic of the professional judgment in the right angle is mostly zero.

### 3.3. The refraction state of the professional judgment in an *obtuse angle*

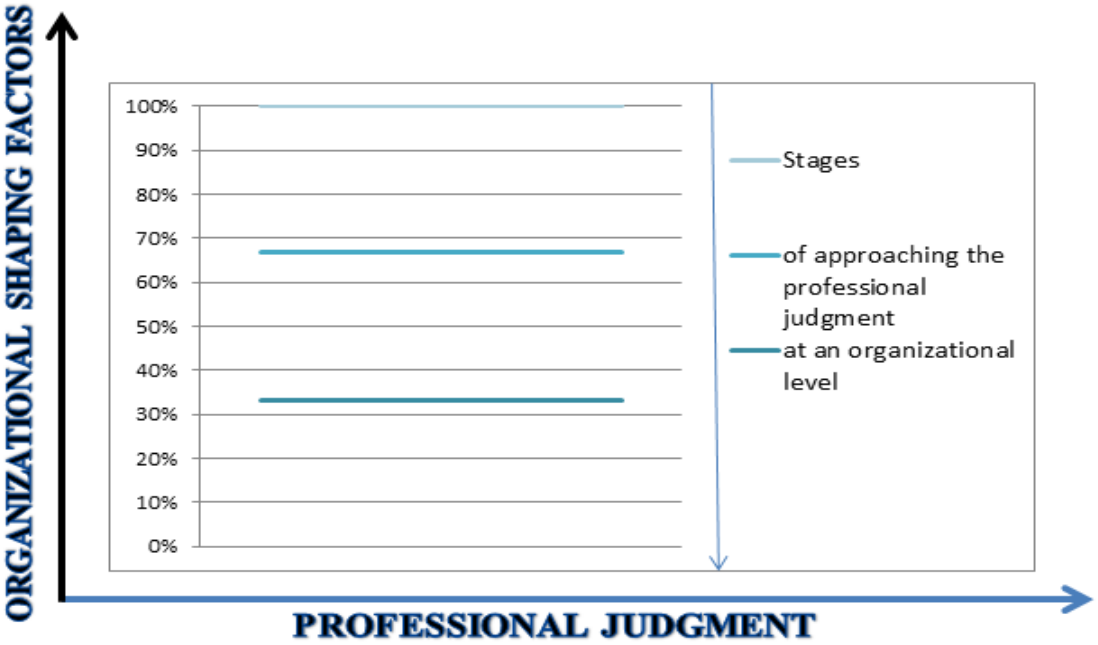
The doctrinal description - the refraction state of the professional judgment in such a conjuncture reflects the expansion of the application of the influence and decisional factors at an organizational level over the existing policies in the company's routine, implementing this way an extensive vision that seeks to adjust the policies and existing means of thinking and to suppress the resistance to new of policies applied until that moment. A positive ending of the refraction state of the professional judgment in an obtuse angle is represented by the passing into the condition stage of the refraction state of the professional judgment in a straight angle.

### 3.4. The refraction state of the professional judgment in an *acute angle*

The doctrinal description – this condition of the professional judgment represents a first step of implementing some innovative organizational factors, generating a prior stage to all refraction states above stated and requires the application of a consistent know-how in the management domain and in the collective professional thinking. The integration capacity of the influence factors starts from a low level of homogeneity so next will appear the trajectory given by the refraction states of the professional judgment described above.

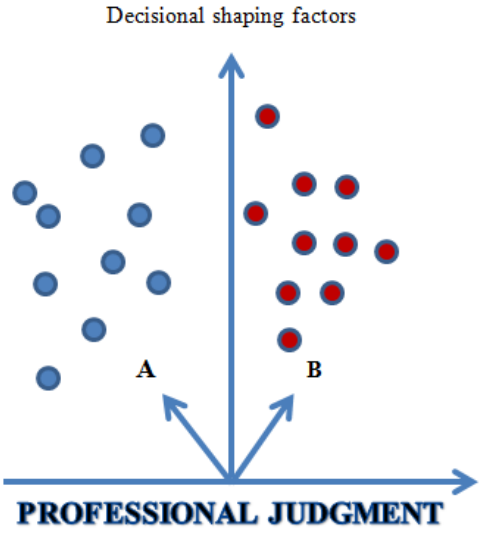
[9] K. Smith, J. Shanteau & P. Johnson, „Psychological investigations of competence in decision making", Cambridge University Press, 2004, pg 4.

*Figure 1* The refraction state of the professional judgment in a straight angle




Source: issued by the authors

*Figure 2* The refraction state of the professional judgment in a right angle




Source: issued by the authors

*Figure 3* The refraction state of the professional judgment in an acute angle


Source: issued by the authors

## 4. Conclusions

The professional judgment "is not a matter of simple general rules application towards particular cases on certainly not a simple matter based only on intuition but rather a process that gives a coherence note to the conflictual values from within genera rules and that treats with sensitivity the facts and circumstances extremely contextualized". [1]

The concept of professional judgment represents a centre of interest to us, on which we have concentrated a high level of research, we have invested time and all types of resources and we've concretized the results into a high level research and namely within a PhD thesis in the domain and we further disseminated the research with the help of written articles and studies. We used and perfected starting from the speciality literature and current documentation the concepts involved in the construction of the professional judgment and we introduced pilot concepts where the originality and emergence of ideas permitted so. We treated the professional judgment starting from all the visions that could be started from, taking into consideration both the philosophical side and also the other sides that can be generally more or less accessible: accounting, economic, social, practical, theoretical, administrative, regulating and ruling, juridical, fiscal, historical and deontological sides. We desire, in the future, to consolidate these pilot concepts that we created, to introduce it to qualitative and quantitative studies of maximum importance and to transfer all that is found at a theoretical level into an useful practice, with well-established instruments and with results to enhance the quality of writing into the domain and furthermore to overcome the barrier fixed onto a single domain and find applications of these concepts in various situations and domains that are not necessarily connected with our original starting point.

The professional judgment, under all its conceptual aspects, has been our study subject within the research carried in the last 8 years and will continue to be in our attention.

The concepts highlighted within this article describe various ideas in the casuistry of the research carried so far, ideas that are meant to overcome the linguistic and scientific barriers when talking about creativity and exposure of certain innovative structures of the professional judgment.

The professional judgment, through its refraction state, shows us the assimilation or quality of this system of connected judgments of incorporating the existing influence factors and in the creation of applied policies of a professional judgment and the final outcome after the explosion and taking into account all modelling stages.

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# THE ROLE OF SOVEREIGN DEBTS IN THE DEVELOPMENT OF THE ACTUAL MACROECONOMIC ENVIROMMENT

**Emilia Cornelia STOICA***
**Nicoleta Georgeta PANAIT****

**Abstract**

*Globally, the volume of public debt, most of which is sovereign debt, has increased significantly and although the macroeconomic development of most states has made good progress since the consequences of the global financial crisis triggered by the United States since 2007, their share has become a major concern for global financial equilibrium.*

*In this context, the analysis of the evolution of public debt in each country as well as in the geographic areas of strategic importance for the international economic conjuncture is an imperative for international financial analysts and institutions as well as for those who develop forecasts and propose economic-financial policies in the short term, and especially in the medium and long term.*

*The analysis of public debt in each country, region or community / association of sovereign states is of major importance both for assessing the financial stability and, implicitly, the economic at national, global as well as presently when capital, as well as goods and services circulate with great ease between countries and continents to identify potential risk factors that may affect the macroeconomic development and social life of the communities involved.*

*The aggravation of free movement, along with the increase in public debt, along with other factors of an economic, political and social nature, contributes to the establishment of a new world economic order characterized by a new hierarchy of world states, new economic and financial relations between countries with a developed economy and those with important natural and human resources, but whose level of macroeconomic performance is well below the level of developed ones.*

**Keywords:** *public debt, gross public debt, net public debt, public debt ratio, budget deficit, public finance, negative balance.*

## Introduction

The purpose of public debt contracting may have two different directions: on the one hand, balancing public finances, covering current and / or accumulated deficits in previous years, and, on the other hand, funding of investment programs / projects of major importance great for the community, both from the social point of view and as producing added value.

At the same time, the position of the state towards its debtors, especially foreigners, allows analysts to assess the country's financial standing. Thus, international rating agencies, such as Moody's, Standard & Poor's, Fitch, etc., embrace the national economy on a specific risk scale, which has an immediate impact on the behavior of economic agents, both internal and external. Risk degradation causes a decline in national macroeconomic developments caused by the diminished investment activity of domestic entrepreneurs, as well as external capital flows for business financing, so-called foreign direct investment. Also, the international financial environment borrowing funds is worsening in the direction of rising real interest rates, all of which exert an increasing pressure on the domestic currency exchange rate, which makes it even more difficult to pay public debt service, affecting even the sustainability of public finances.

The theoretical approach, in order to evaluate how the evolution of public debt influences macroeconomic development, as well as the social life of a country, takes into account the internal and external conjuncture characteristics as well as the specificity of the respective economy.

There are many currents of thought, but according to the assessment of the consequences, especially in the medium and long term, and the proposed strategies to be applied in the management of public debt and the national economic and financial balance, they can be divided into two distinct categories: classical and neoclassic currents, which argue that the public deficit is damaging to the national economy, and its borrowing funding leads to a drain effect - the crowding-out effect of credit to the private sector means that it is declining due to the targeting of capital temporarily free to the public sector, which has the zero risk, to the detriment of credit to the private sector - the financing of private investment, with immediate consequence in the diminishing of domestic demand, which will lead to the decrease of the domestic productive activity and the accumulation of the added value in the economy. As a consequence, public revenue resulting from taxation, being mandatory levies from the newly created value, will decrease, deepening the primary budget deficit, i.e.

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the negative balance between revenues and expenditures of the budget, which decrease the expenditures related to the public debt.

Financing of the deficit by loan will involve contracting new loans, the pressure exerted by the increase in the public debt service - especially as the real interest rates will increase and the national currency will depreciate as a result of the deterioration of the country rating - will contribute to unbalance of public finance.

International financial institutions support these theories, considering that they apply especially to developing countries with a high leverage ratio, their economies being more vulnerable to economic or financial shocks than developed economies.

In the table below, we selected a few countries classified according to the position of the GDP per capita indicator as compared to the world average, eight years after the financial crisis. This indicator shows the level of development of the national economy and the information in the table shows the very large differences between the states of the world, and consequently the degree to which each economy feels the pressure exerted by the public debt. It shows the place that our country occupies in the world hierarchy, which means that together with a sustainable rate of external public debt, it gives the Romanian economy an average level towards low financial risk.

Per capita GDP (current USD) selecting a few states

- % of the world average-

| Conutry | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 |
|---|---|---|---|---|---|---|---|---|---|
| Luxembourg | 1172.9 | 1103.2 | 1107.6 | 1010.6 | 1058.9 | 1094.8 | 996.3 | 986.8 | 971.0 |
| US | 534.2 | 508.4 | 476.4 | 487.1 | 491.9 | 502.2 | 554.3 | 564.1 | 555.2 |
| Germany | 474.3 | 439.2 | 447.9 | 417.2 | 433.6 | 441.1 | 405.8 | 413.7 | 414.8 |
| UK | 434.9 | 408.8 | 396.2 | 395.6 | 398.2 | 429.6 | 435.1 | 395.8 | 370.5 |
| France | 472.5 | 427.1 | 419.0 | 387.0 | 396.9 | 394.9 | 359.6 | 361.2 | 358.9 |
| Japan | 464.3 | 467.8 | 460.9 | 460.1 | 377.0 | 349.9 | 339.5 | 381.7 | 358.4 |
| Republic of Korea | 207.9 | 232.1 | 230.4 | 230.6 | 241.3 | 255.4 | 266.2 | 270.4 | 277.4 |
| Czech Republic | 224.4 | 208.2 | 207.8 | 186.8 | 185.6 | 181.3 | 174.0 | 181.1 | 190.0 |
| Greece | 337.7 | 282.9 | 248.0 | 210.6 | 203.9 | 199.8 | 177.5 | 175.2 | 173.6 |
| Hungary | 148.1 | 137.6 | 135.1 | 122.0 | 127.4 | 130.4 | 122.6 | 125.6 | 132.7 |
| Poland | 131.0 | 132.4 | 132.9 | 124.4 | 128.4 | 131.7 | 123.3 | 121.8 | 129.3 |
| Romania | 96.3 | 86.3 | 87.1 | 80.8 | 89.0 | 92.1 | 88.2 | 93.7 | 100.9 |
| The Russian Federation | 97.3 | 112.2 | 137.3 | 146.1 | 149.2 | 129.7 | 91.8 | 85.8 | 100.2 |
| World Media | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| Turkey | 102.7 | 112.2 | 108.5 | 111.0 | 116.9 | 111.4 | 107.9 | 106.4 | 98.4 |
| China | 43.6 | 47.9 | 53.9 | 60.0 | 66.0 | 70.6 | 79.2 | 79.5 | 82.3 |
| Bulgaria | 79.2 | 71.9 | 74.8 | 69.8 | 71.3 | 72.2 | 68.7 | 73.2 | 76.7 |
| Moldavia | 17.3 | 17.1 | 18.9 | 19.4 | 20.9 | 20.6 | 18.0 | 18.7 | 21.4 |
| Burundi | 2.4 | 2.4 | 2.4 | 2.4 | 2.4 | 2.5 | 3.0 | 2.8 | 2.7 |

Source: https://databank.worldbank.org/data/reports.aspx?source=2&series=NY.GDP.PCAP.CD&country=, prelucrarile autorilor

The public debt ratio is determined as a ratio between the actual public debt (contracted and drawn debt minus the reimbursements from it up to the moment of the statistical registration) and the GDP, and the level considered excessive differs according to the appreciation of the analysts and / or international institutions (or regional, in the case of the European Union). Thus, some analysts believe that for the developed countries the excessive level of over-indebtedness would be 90% (Reinhart C. and Rogoff K. (2011)) or even more than 100% (eg. 115% Minéa A.and Parent A. (2012)).

In the Stability and Growth Pact in the EU Treaty, the leverage threshold, established without a statistical basis under the Maastricht Treaty Defined Criteria, is 60%, but most developed Euro zone countries go beyond this threshold.

Interventionist thought patterns originally formulated by J.M.Keynes and continued by neo-Keynesians, claiming that debt contributes to the revival of domestic demand through the financing of new investment programs / projects, the multiplier effect of which increases the value added in the economy.

The positive effects of public debt are felt, according to Keynesian theory, in economies that are experiencing a slowdown or even decline in economic development marked by a significant public deficit. Conversely, if the economy is in a full-time employment cycle, or when demand for money on the domestic market leads to an increase in the interest rate, it is estimated that public debt will have a negative impact on macroeconomic development.

The theories and strategies proposed by both national authorities and international institutions, such as the International Monetary Fund (IMF), the World Bank (WB) and the European Union, rely on several

factors considered relevant to economic growth, among which the most important are:

- the rate of investment, in direct (positive) correlation with the macroeconomic development rate;
- the population growth rate, which is analyzed according to the economic and social specificity of the country and according to the internal and international situation.

Thus, the negative growth rate of the active population in most developed countries in Europe and North America is considered a negative factor for economic growth. A large number of the active population - the definition of the active person is in accordance with the national law, namely the person in good health, between the minimum and the maximum working age - who has the professional skills appropriate to the current activity is a factor favoring the growth economic development in developing countries, especially in emerging countries (China, India, etc.).

If the population does not have the necessary professional skills and / or the age structure, i.e. the population above the working age, shows the necessity of supporting this category of public funds, the impact on the public finances, respectively the budget deficit and, consequently, the indebtedness is negative . This is the case for many developed European countries, Japan, etc.

## 1. Theoretical Approach To Public Debt

### 1.1. Definition of public debt

The terms expressing public debt are numerous and show different structures and compositions, as well as spheres of coverage, depending on the purpose of the analysis for which they are used.

There are two broad categories of public debt: gross public debt and net public debt, and the references that they define are global statistical approaches such as the National Accounts System (SCN) or economic and / or financial institutions which performs macroeconomic analyzes to examine national or regional circumstances and to propose appropriate policies for balancing and economic development. Among the most known such institutions are the IMF and the BM, the European Commission, the Organization for Economic Cooperation and Development (OECD), the national statistical institutes and others.

*Gross public debt*

Government gross debt in the SCN sense is defined, according to the patrimony account of this system, as the total liabilities of the Public Administration as a whole, without consolidation between the constituent institutions.

Gross public debt in the European Union's sense is defined in the Maastricht Treaty (1992) as a consolidated public debt: debts of a public administration to another public administration are deducted from the liabilities of the former and the assets of the latter (the Maastricht Treaty, Protocol No. 12).

According to the BM methodology, gross government debt is composed of all liabilities of the public administration in the form of debt, these items being considered financial instruments that define third party claims on the public sector. According to the BM, they are considered as public debt instruments: Special Drawing Rights (SDRs), which designate the IMF account currency transactions, cash and deposits in public institutions, third-party debt securities to the public sector, loans contracted by public institutions, insurance systems, pensions and standardized guarantees, other payment accounts.

*Net public debt*

Government net debt is determined in Eurostat - the Commission's statistical data portal - by subtracting from gross public debt in the SCN all financial assets of the same general government. The OECD also calculates net public debt by designating this indicator under the heading of "net government financial commitments".

### 1.2. Sustainability of public finances

Public finances are said to be sustainable when responsible public authorities can finance all of their budgetary expenditure, including their liabilities from the contracted or guaranteed public debt and not yet reimbursed, in a long time horizon, in the absence of political changes. Public policies are not exclusively economic and financial, but also institutional, because the State's authority is exercised through its institutions, which implies the coherence and high quality of the functioning of the public services under their responsibility.

In this respect, with regard to public finances, the issues to be taken into account are the budgetary process and the electoral cycle, both closely linked to the public policies implemented by policy makers.

The financing needs of the public sector are multiple, the functional structure of public expenditures being able to reveal the priorities that public authorities grant in the respective budget cycle. The negative balance, meaning the budget deficit resulting from a higher level of spending versus public revenue, can be funded mainly by two methods: tax increases and debt leverage, both of which involve risks that may prove important both at macro level, as well as microeconomic.

At macroeconomic level, an inadequate policy of financing the budget deficit may affect the financial stability of the public sector. This stability is defined according to three main criteria: the liquidity, credibility and solvency of the responsible public authorities:

- the liquidity corresponds to all the short-term means of payment available to the state, which allows it to face immediate financial obligations. Potential liquidity means the ability of the State to pay in the near future, three months to one year;

− credibility is the confidence that public authorities enjoy from economic agents, especially when they are state debtors or in their current activity, as operators carrying out public services as a result of delegated authority management, or as investors who borrow the State - private lending banks, natural or legal persons investing in government securities;

− the solvency shows that the state has a real or implicit inter-temporal repayment capacity, meaning it can actually deal with current and future financial commitments. Solvency refers to both potential liquidity, which can be based on the value of public assets that can be capitalized, and on the state's ability to use the tax to increase public revenues.

The impact of mandatory levies on the stability of public finances is different depending on the reaction of economic agents towards an increase in taxation. In this respect, Arther Laffer's theory, which illustrates the relationship between tax revenues and the rate of pressure that taxation exerts on the economy, is relevant. In a period of economic growth, economic agents will not consider increasing mandatory levies as a hindrance to their development and will honor their fiscal obligations correctly so that public revenues will increase and the budget deficit will decrease. It is said that this is a situation of fiscal neutrality. But as tax pressures increase, activity becomes discouraged, demand falls, followed by supply, the tax base narrows, and if a certain sustainability threshold is exceeded, revenue collected from tax and tax will decrease, even if the fiscal pressure will continue to increase.

The budget deficit deepens; public authorities no longer have enough liquidity to finance their short-term obligations or are unable to meet their medium- or long-term commitments, with the stability of public finances being destabilized. Given the constraints imposed by the behavior of economic agents over tax increases, to cover the public deficit, the State may resort to contracting (a new) public debt without involving taxation, obviously under the conditions of national law in that field.

Classical theory (Bachellerie et Couillault, 2005) states that financing the budget deficit through indebtedness will result in economic agents anticipating a systematic tax increase due to the obligation to repay the contracted debt and to pay the cost of the debt. Instead, policy-makers claim that public debt, as an exogenous source of funding, does not make a direct levy from their income, which will immediately diminish their purchasing power. In this way, demand is not affected, individuals do not decrease their consumption, and businesses do not give up planned investments, consequently the tax base and hence tax revenues will remain unchanged. In conclusion, the impact of public debt on the financial stability of public finances is more favorable than the application of a tax policy that would increase taxes to increase budget revenues.

## 2. THE EVOLUTION OF SOVEREIGN DEBTS

### 2.1. Recent macroeconomic conjuncture

Economic cycles are driven by aggregate supply and demand fluctuations. Large supply variations are generally related to sudden changes in commodity prices, such as energy products, while large variations in demand are the result of changes in monetary or fiscal policies that restrict or, on the contrary, stimulate private spending. Also, cyclical changes depend on the level of stocks that companies hold and which have a considerable impact on industrial production growth, as they are sufficient or, on the contrary, they are too small to meet needs.

With regard to the current economic cycle, growth dynamics in developed countries seems sufficiently robust to keep the current expansion cycle on the same path in the near future. There are, however, a number of factors that disturb the observed cyclical development.

Thus, the dollar's oscillations tend to destabilize the global economy and financial markets. US trade policy exerts considerable pressure on their trading partners, especially China, but also Mexico, Canada and South Korea, as well as the European Union. This type of aggressive, protectionist US policy is a destabilizing factor not only for bilateral relations between the US and these countries, but also because of the major role of these countries in the global economy, including globally.

The impact of the fiscal-budgetary interventionist policy of the United States is set to decrease gradually, but the so-called quantitative easing period, including investment spending with it, will also fall, and the steady rise in jobs and of wages should extend the cycle in developed countries. At the same time, the rhythm of the growth of the Chinese economy shows a steady trend of slowdown, as Chinese leaders opt for economic consolidation rather than a strong expansionist policy.

In order to analyze the impact of important public debt on financial stability, the macroeconomic environment and imbalances of the different categories of economic agents, such as households and / or corporations, should be observed. Thus, the US financial crisis of 2007-2008 started with the liquidity of households on the mortgage market. However, in the US, household accounts are much less unbalanced than in 2007, and the risk of a financial crisis is very low, despite a significant budget deficit. In the European Union, current and budget account deficits are within acceptable limits, and for developing countries, the situation varies with each economy.

*Recent evolution*

One of the main risks to the American continent's economy caused by the US President's actions against Mexico and Canada diminished as a result of the renegotiation agreement for the NAFTA treaty between the three states. At the same time, it is estimated that

the US economy will continue to grow, even if the effects of expansionary fiscal policy will gradually decline and inflation will increase slightly, with the Fed increasing its benchmark rates accordingly. The US budget deficit will continue to be high, and its long-term funding may become an unsustainable risk. The two neighboring US economies, Canada and Mexico, should benefit from the strong growth of the US economy.

It is also estimated that European economies, mainly those in the Eurozone, will continue the slightly upward trend due to domestic demand, employment growth and an accommodating monetary policy. Also, the strong growth of the US economy, China's macroeconomic stabilization and emerging economies are estimated to be potential export support factors. In addition, the European Central Bank will gradually increase interest rates as a result of higher inflation rates and, in correlation, the euro will appreciate very little, thus supporting foreign trade. An important risk to the European Union as a whole is the uncertainties introduced by Brexit, as well as the predictable crises of public debt, which are reflected in Italy as well as in other indebted European states. Developing and emerging countries are expected to benefit from rising raw material prices and energy resources so that national public finances mark a stabilizing trend.

### 2.2. Global public debt in the European Union

#### 2.2.1. Public debt worldwide

The most indebted countries in the world are also the richest, the top three countries with the highest debt being in the United States, China and Japan. Together, they represent more than half of world debt (56%), much higher than their combined share of world production (38% of world GDP in 2017, expressed in purchasing power parity (PPP)). Low-income countries account for only 1% of world debt, significantly lower than their share of world production (Duceux Alice Jetin (2019)).

The US public debt has risen to over 100% of GDP, but it does not include some unpredicted commitments. It should be noted, however, that US debt financing is not a problem at the current level of interest rates, and their growth is unlikely, as the Fed may continue to act as a lender of last resort. But in an economy to the maximum of its capabilities, such as the US economy, a relaxation of monetary policy could allow inflation to increase. On the other hand, a restrictive tax policy - higher taxes and / or lower public spending - could improve the fiscal position but risk and mitigate economic growth.

In terms of second place in the world economic hierarchy, China, its debt is mostly denominated in the local currency, and the debt of strategic sectors is guaranteed by the central government, and the financial crisis risk is thus rather limited. In addition, China is making sustained efforts to reduce its public debt and, at the same time, to reduce loans contracted outside the banking system. Changes in financial policy and concerns about over-indebtedness have been and will continue to be obstacles to the growth of the Chinese economy. Current trade-offs between the United States and China and other possible shocks may affect the economic recovery policy proposed by the Chinese State to counter the slowdown in GDP growth, but a financial crisis seems unlikely.

In conclusion, for most countries and sectors, the risk of financial instability appears to be lower than before the 2008 crisis. Emerging countries are those whose companies are more vulnerable due to the high level of indebtedness in foreign currency. Chinese and American companies are also very indebted, but since this debt is mainly in local currencies, the risk is lower. For the euro area, the financial stability indicators have improved significantly, but political risks are still present and, as far as commercial litigation is concerned, they are mainly political in nature and the authorities are not supposed to take action to destabilize financially.

In recent years, many low-income countries have had access to new sources of funding, including private sources and external creditors at the Paris Club, which brings together rich states and institutions with significant financial resources. Thus, underdeveloped states have been able to implement large-scale development projects, but their public debt has grown significantly. Only in the last four years, in low-income countries, the share of public debt in GDP has increased from 30% to 50%, which means that a large part of their public revenues is intended to pay interest on government debt, and public debt service will exert significant pressure on national public finances.

A factor with a very significant contribution to stimulating activity is a low and stable rate of increase in consumer prices and public authorities wishing to implement a policy of revival the economy in the current context characterized by a relative slowdown in the pace of development, must take into account the mastery of inflation, including the proper management of the main factors that determine this inflation.

Due to overcoming the effects of the financial crisis, many economies currently operate close to full labor utilization, with increased pay being a predictable factor, which may involve increasing the deficit and increasing the public debt to finance it. The pressure of the public debt spill may affect the financial stability of the state, thus imposing the need to resort to restrictive budgetary and monetary regimes.

#### 2.2.2. Public debt in the European Union

The following table shows the vulnerabilities stemming from national public debt - the EU Member States being sorted according to the debt ratio recorded in 2017, the last year in which government debt information is statistical data for the year 2018 referring to the end of the quarter third.

Thus, following the rate of government debt to national GDP, in descending order, four states with a rate exceeding 100% are reported: Greece, Italy, Portugal and Belgium, but France and Spain are very

close, and in what concerns the financial stability criteria of the Maastricht Treaty on public debt - the highest level of public debt accepted being 60% of GDP - 16 Member States do not respect it.

Gross public debt marked a sharp rise after the financial crisis triggered in 2008, but improvement has been seen in recent years due to the economic reforms and debt reduction policies promoted by the most borrowed European countries, especially Greece. However, as the main concern of the euro area financial equilibrium, the public debt of Italy and Portugal remains, but the high level of indebtedness of other developed Eurozone countries such as Belgium, France, Spain, and should be treated with caution, although they do not present the same risks, due to their structure by type of creditor - most of which is an internal public debt, as in the case of the most indebted country, Japan.

An important problem, which is found in many EU Member States, as in many other countries around the world, is the need to develop and implement a pension policy, including the age and retirement age, the calculation of budgetary allocations for the system social insurance public, etc. This approach in public financial policy, together with other economic stimulus measures, while reducing the cost of public actions, should contribute to budgetary balancing and allow public authorities to reduce government debt.

In this regard, the case of Italy is relevant in the European Union because it has so far managed to manage in the short term the pressure generated by the high level of public debt due, first of all, to the low interest rates on the European financial market as a result of very high inflation low, even negative. However, in the medium and long term, the forecasts for interest rates show a slow but sustained growth trend, which will require a public financial policy approach to diminish the budget deficit, even obtaining a primary surplus and consequently a decrease gradual public debt.

Gross government debt (sovereign)

- % din GDP -

| | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 T3 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| UE28 | 60.7 | 73.3 | 78.8 | 81.4 | 83.8 | 85.7 | 86.4 | 84.4 | 83.3 | 81.6 | 80.8 |
| Greece | 109.4 | 126.7 | 146.2 | 172.1 | 159.6 | 177.4 | 178.9 | 175.9 | 178.5 | 176.1 | 182.2 |
| Italy | 102.4 | 112.5 | 115.4 | 116.5 | 123.4 | 129.0 | 131.8 | 131.6 | 131.4 | 131.2 | 133.0 |
| Portugal | 71.7 | 83.6 | 96.2 | 111.4 | 126.2 | 129.0 | 130.6 | 128.8 | 129.2 | 124.8 | 125.0 |
| Belgium | 92.5 | 99.5 | 99.7 | 102.6 | 104.3 | 105.5 | 107.6 | 106.5 | 106.1 | 103.4 | 105.4 |
| France | 68.8 | 83.0 | 85.3 | 87.8 | 90.6 | 93.4 | 94.9 | 95.6 | 98.2 | 98.5 | 99.5 |
| Spain | 39.5 | 52.8 | 60.1 | 69.5 | 85.7 | 95.5 | 100.4 | 99.3 | 99.0 | 98.1 | 98.3 |
| Cyprus | 45.6 | 54.3 | 56.8 | 66.2 | 80.1 | 103.1 | 108.0 | 108.0 | 105.5 | 96.1 | 110.9 |
| United Kingdom | 49.7 | 63.7 | 75.2 | 80.8 | 84.1 | 85.2 | 87.0 | 87.9 | 87.9 | 87.4 | 86.3 |
| Austria | 68.7 | 79.9 | 82.7 | 82.4 | 81.9 | 81.3 | 84.0 | 84.8 | 83.0 | 78.3 | 75.6 |
| Croatia | 39.0 | 48.3 | 57.3 | 63.8 | 69.4 | 80.4 | 84.0 | 83.7 | 80.2 | 77.5 | 74.5 |
| Slovenia | 21.8 | 34.6 | 38.4 | 46.6 | 53.8 | 70.4 | 80.4 | 82.6 | 78.7 | 74.1 | 71.0 |
| Hungary | 71.6 | 77.8 | 80.2 | 80.5 | 78.4 | 77.1 | 76.6 | 76.6 | 75.9 | 73.3 | 72.4 |
| Ireland | 42.4 | 61.5 | 86.0 | 110.9 | 119.9 | 119.7 | 104.1 | 76.8 | 73.4 | 68.4 | 68.8 |
| Germany | 65.2 | 72.6 | 81.0 | 78.6 | 79.9 | 77.4 | 74.5 | 70.8 | 67.9 | 63.9 | 61.0 |
| Finland | 32.7 | 41.7 | 47.1 | 48.5 | 53.9 | 56.5 | 60.2 | 63.6 | 63.0 | 61.3 | 58.8 |
| Netherlands | 54.7 | 56.8 | 59.3 | 61.7 | 66.2 | 67.7 | 67.9 | 64.6 | 61.9 | 57.0 | 52.9 |
| Malta | 62.6 | 67.6 | 67.5 | 70.1 | 67.7 | 68.4 | 63.7 | 58.6 | 56.3 | 50.9 | 45.9 |
| Slovakia | 28.5 | 36.3 | 41.2 | 43.7 | 52.2 | 54.7 | 53.5 | 52.2 | 51.8 | 50.9 | 51.5 |
| Poland | 46.3 | 49.4 | 53.1 | 54.1 | 53.7 | 55.7 | 50.4 | 51.3 | 54.2 | 50.6 | 49.4 |
| Sweden | 37.7 | 41.3 | 38.6 | 37.8 | 38.1 | 40.7 | 45.5 | 44.2 | 42.4 | 40.8 | 38.3 |
| Latvia | 18.2 | 35.8 | 46.8 | 42.7 | 41.2 | 39.0 | 40.9 | 36.8 | 40.3 | 40.0 | 37.1 |
| Lithuania | 14.6 | 28.0 | 36.2 | 37.2 | 39.8 | 38.8 | 40.5 | 42.6 | 39.9 | 39.4 | 35.0 |
| Denmark | 33.3 | 40.2 | 42.6 | 46.1 | 44.9 | 44.0 | 44.3 | 39.9 | 37.9 | 36.1 | 35.2 |
| Romania | 12.4 | 22.1 | 29.7 | 34.0 | 36.9 | 37.6 | 39.2 | 37.8 | 37.3 | 35.1 | 33.9 |
| Czechia | 28.3 | 33.6 | 37.4 | 39.8 | 44.5 | 44.9 | 42.2 | 40.0 | 36.8 | 34.7 | 33.9 |
| Bulgaria | 13.0 | 13.7 | 15.3 | 15.2 | 16.7 | 17.1 | 27.1 | 26.2 | 29.6 | 25.6 | 23.1 |
| Luxembourg | 14.9 | 15.7 | 19.8 | 18.7 | 22.0 | 23.7 | 22.7 | 22.2 | 20.7 | 23.0 | 21.7 |
| Estonia | 4.5 | 7.0 | 6.6 | 6.1 | 9.7 | 10.2 | 10.5 | 9.9 | 9.2 | 8.7 | 8.0 |

http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do

Our country is in the debt-to-GDP ratio among the least indebted countries, but the pace of debt variance compared to the pace of change in macroeconomic development has to be analyzed - at a time when the impact of the economic crisis in the European Union, Romania's public debt has doubled, while national GDP has been downgrading.

Currently, the sustainability of sectors policy funding is being pursued, and in order to diminish the vulnerability of the national economy, the structure of public debt on creditors will change, the share of domestic debt becoming the majority. Thus, the current situation is characterized by an increase in personal income, which makes it possible to stimulate saving, including by attracting investors from the native population to government or local public debt.

## Conclusions

*Impact of public debt*

By the obligations to repay borrowed capital and to pay the cost of public debt, it affects the financial balance of the public administration and implicitly the activity of the public sector. If, however, the public debt pressure on national public finances is high, the impact may be significant, especially if the national economy is not strong and the international economic environment is not favorable.

In this situation, there are many developing countries whose public debt, mainly foreign, has become very important in the context of fragile internal economies, and international financial institutions require repayment of public debt and payment of its cost as a priority obligation to continue to provide financial assistance.

In order to finance public debt service, indebted developing countries have no other choice but to adopt an austerity budget policy, with the lowest possible public spending. This means, however, that the lowest available funds are allocated to key areas for national economic and social life: health, education, public investment in road infrastructure, railways, aeronautics, communications, generating jobs, neglecting research and development, etc.

In order to honor the obligations arising from the external public debt, the public authorities of the developing countries must acquire the contract currency in which the debt is expressed - generally an international currency: USD, Euro, British pound, Swiss franc, yen etc. - which is obtained from exports.

Indebted developing countries can obtain the amounts needed to pay for the public debt service through a high volume of exports, which requires an intensive exploitation of national natural resources - on the basis of which they have also obtained credit from external donors. The intensive exploitation of national resources, whether mineral resources, agricultural products, forest riches, etc., leads to the depletion of the deposits, the destruction of the natural environment, the damage to biodiversity, etc. In addition, as operating costs have to be as low as possible, the living and safety conditions of workers and the population are left second.

*Relations between public debt in the sense of the SNA and the general government deficit in the sense of the Stability and Growth Pact*

Financial coverage of the public deficit can be achieved in a number of ways: public debt, tax increases, asset depreciation / increase of liabilities in the patrimony account of public authorities in the National Accounts System (SCN). Thus, the public deficit can be financed by the repayment of the contracted and drawn public loans, the transfer of some financial assets held by the public administration, the decrease of the liquidities at the disposal of the public institutions, etc., thus not affecting the gross public debt within the SCN but the net public debt will increase.

In the patrimony account of public authorities, acquisitions of non-financial assets are recorded positively and their negative transfer, affecting in the same way the public deficit if the acquisition of financial assets - Primary shares issued by the private or public sector, whether national or foreign - is financed by a public loan to its creditors, the gross public debt will increase without thereby affecting the public deficit. Explanation of the spread between gross government debt in the sense of SNA and the government deficit is based on the net flow of nominal assets (or financial assets) and different accounting methods. Thus, the budget revenues and expenditures underlying the determination of the public deficit are recorded in accrued entitlements rather than cash - actual receipts and payments. if an expense is found to be unpaid, it is recorded in public debt in the sense of the SCN and the public deficit increases, but the gross public debt in the Maastricht sense does not change.

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# ECONOMIC POLICIES INSTRUMENTS USED BY DEVELOPED AND EMERGING STATES IN THE CONJUNCTURE OF OUR DAYS

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**Abstract**

*The objectives of economic policies that public authorities want to implement are economic growth and the improvement of the quality of life of the community members they lead. The success of this approach is ensured by the use of fiscal-budgetary and monetary policy instruments appropriate to both the aims pursued and the correlation with the economic and social conjuncture that characterizes the implementation period. These instruments refer to the tax system - the regulatory, procedural and administrative framework; budget expenditure system, in terms of structure and prioritization; public debt management; the monetary system, referring primarily to the management of inflation, interest rates, lending policy of the national economy sectors, etc.*

*From the multitude of economic policy tools that have been used over time, with better or worse results, public authorities are developing policies that can fit into one of the following categories: expansionist, restrictive, protectionist, opening up to the market free, and so on.*

*Applying these instruments to the real economy of a country will generate the hoped results if the appropriate conjunctural conditions are met both within and outside the country, which requires a thorough analysis of the macroeconomic and social development level of the concerned country as well as its position towards partners and neighbors, both from the point of view of commercial and / or investment relationships or political and strategic influence. Identifying the factors that influence the performance of fiscal and monetary policy implementation in each country is a key element as it can be used as a lever for future policy making.*

*Any activity involves risks, and for each instrument of financial and monetary policy specific risks can be highlighted, which requires their isolation and proposing appropriate measures to address potential risk situations so that they do not negatively affect the overall result.*

**Keywords:** *fiscal-budgetary policy instruments, monetary policy instruments, economic risk, economic growth, development*

## Introduction

The role of the state in the economies of the 21st century is based on two types of macroeconomic theories: liberalism versus interventionism.

- classical theories (such as Adam Smith's theory in the 19th century) and modern liberalism theory, sustain the state's minimal intervention; the state having to fulfill its sovereign functions and to protect the balance between supply and demand on domestic markets. Thus, market mechanisms will enable self-regulated, autonomous and optimal functioning of the economy.
- interventionist theories, like Keynesist and neo-keynesist theories, that suggest the significant state intervention in the economy to stimulate the economic growth and the implementation of a broad social policy.

Now days, no government applies a purely liberal or exclusive interventionist policy, but a mix of thees two policies, in different percents of combination, from country to country and from time to time. At the same time, it should be underlined that, in democratic states, public authorities have no longer fully liberty of their decision-making power, as they are signatories of international conventions wich laying down operating rules in different fields, rules to be respected by all the countries and which are real constraints for them. For example, a Member State of the European Union must comply with Community rules, but also those established by the World Trade Organization (WTO) for external trade or those established by the International Monetary Fund (IMF) for capital transactions. The objectives of economic policy have been formulated in numerous theoretical works, a few of the most relevant being the three theories, formulated by Musgrave (Musgrave, Richard A. and Peggy B., *Public Finance in Theory and Practice*, New York, McGraw-Hill Book Company, 1973): market regulation, social redistribution policy and stabilization of economic fluctuations.

Thus, regarding on the regulations about the markets and the states functionning, public authorities must ensure, in the same time, a real competition on the markets and the suppliance of public services, such as education, health etc., for a proper functioning of the economy.

The income redistribution policy is designed to correct inequalities from the distribution of primary incomes (provided by the labor and the capital) in liberal economies. Because the free market

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mechanisms do not provide regular functioning of the economy, with the possibility of crises, wich triggers unemployment or inflation, the state through its economic policy, aims to achieve four major goals: economic growth, full employment of labor, price stability and a balanced foreign trade.

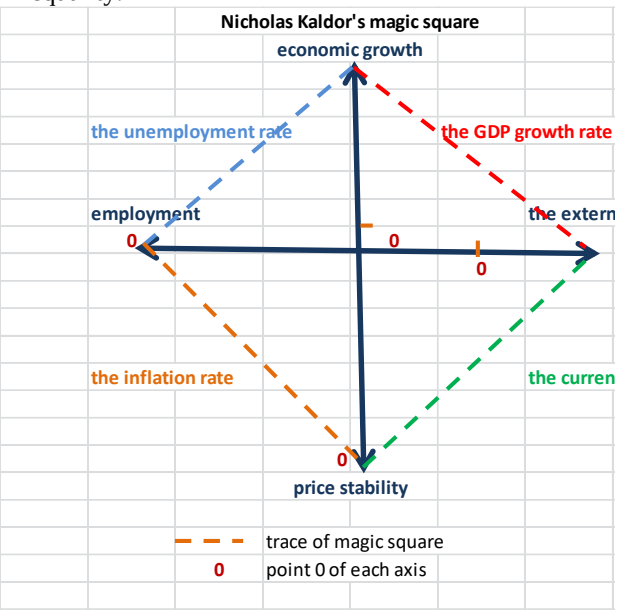
Public authorities' interventions can be classified into two categories:

- those aiming at creating the conditions for a better functioning of the economic system by changing its structures. They are part of the so-called structural policy that includes competition policy, research and innovation policy, sustainable development industrial policy, other policies etc.;
- the policy of regulating economic activity that is subject to short-term fluctuations, called conjunctural policy, which can generate macroeconomic stimulation or stabilization.

As the economic policy is assigned a set of coherent decisions taken by public authorities aimed at achieving the goals that they have proposed a time frame short and medium term, by using economic instruments and / or financial.

The four main objectives of short-term economic policy can be represented in Kaldor's so-called Magic Square, proposed in 1971 by British economist Nicholas Kaldor (1908-1986): full employment, price stability, balance of the external balance, economic growth being difficult to achieve simultaneously.

Long-term economic policy aims to achieve sustainable development, combining economic growth with environmental protection, even minimizing social inequality.




According to this Magic Square, two major macroeconomic relationships are identified: Inflation vs. Unemployment, also known as the Phillips curve and the economic growth relationship vs. unemployment. The Phillips curve shows the dilemma of Keynesian economic policies: rising inflation may reduce unemployment, but fighting inflation leads to rising unemployment.

The relationship between economic growth and unemployment is reversed: the higher the economic growth, the lower the unemployment rate and the wider social security. In economic history, state intervention in social life is a fairly recent event. Thus, in 1883, in Germany (led by Bismarck), compulsory health insurance was created, and in the United Kingdom a model of social security, known as the Lord Beveridge model, was implemented in 1942, operating in accordance with three principles: uniformity, uniqueness and universality.

Conjunctural policy aims at short-term intervention on economic imbalances, using appropriate instruments within a given institutional framework. The main instruments of the conjunctural policy are: fiscal-budgetary policy, monetary policy, currency policy etc.

Structural policy seeks to act in the medium or long term on the fundamentals of the economy (labor market functioning, market competition, market regulation ...) to improve the performance of the economy.

These two aspects of economic policy are complementary. The effectiveness of a conjunctural policy can be enhanced by structural measures, eg reducing the VAT rate on medicines, basic foods, etc., improves living conditions and, implicitly, the functioning of the labor market. At the same time, the term economic policy is now expanding, including social policy. Social policy represents all public interventions aimed at improving the social situation of individuals and can be used for economic purposes, such as supporting education programs.

## Section 1 - Economic Policies. Instruments

Before developing and, subsequently, implementing any economic policy, the responsible authorities must analyze conditions and characteristics of the national economy for choosing appropriate instruments to the objectives pursued. In this sense, it can be identified four contextual states:

- expansion, short-term economic growth, as measured by annual growth of Gross Domestic Product (GDP);
- stagnation, in which situation GDP varies slightly;
- recession, in which situation the decline in GDP has been recorded for at least two consecutive quarters. It is considered recession even if the variation in GDP remained positive, but growth rate dropped significantly.
- depression means an economy where productive activity and GDP have experienced significant decreases over a long period of time.

The level of development of the world states is very different, and economic policies have to take that into account in order to be effective. Therefore, countries are ranked according to the average gross national income per capita.

Ranking of countries by average GNI per capita in 2018

| Category of countries | GNI per capita |
|---|---|
| Low-income countries, the most disadvantaged, low income per capita and unstable growth rates | < 995 |
| Developing countries with intermediate income from the lower tranche | 996 – 3 895 |
| Developing countries with intermediate income from the upper tranche | 3 896 – 12 055 |
| Developed countries, characterized by a high GDP per capita and low growth, high incomes | > 12 055 |

Source: https://datahelpdesk.worldbank.org/knowledgebase/articles/906519

Many developing countries show sustained growth rates, including emerging countries with high growth, integrated in world trade, such as the BRICS (Brazil, Russia, India, China, South Africa) as well as Mexico, Thailand, Turkey etc.

Economic policies are developed using an appropriate model of each country, in terms of level of development, historical traditions and geopolitics. On the other hand, the responsible authorities must take into account the fact that economic growth does not eliminate social inequalities, because in the world there are large inequalities both between countries and within the countries. Thus, 20% of the world's population owns more than 80% of world wealth, and welfare differences do not automatically fall due to economic growth.

*Economic Growth Factors*

Economic growth depends on the mobilization and efficiency with which the factors of production (labor and capital) are combined, and the different levels of economic growth result from their possible combinations:

- Extensive growth - resulting from the use of a larger number of inputs (capital and labor).
- Intensive growth - results from increased productivity of production factors.

Contribution and efficiency of work-factor depend on its quantity and quality. The amount of available work depends on the number of active population and the duration of work. The active population is defined by the International Labor Office (ILO), that all persons who work or declare that they want to engage in business paid its size depends on demographic variables such as birth rates, age structure, life expectancy at birth etc. The quality of work depends on the skills of those who work and labor productivity.

Capital is defined as a good product in the past and used to make other goods in the future. There are two types of capital, which influence the economic performance of different entities that realize the added value:

- Technical or physical capital - refers to all means of production used to produce goods and services. This includes tangible assets (buildings, equipment, vehicles, etc.) and intangible assets (patents, licenses etc.) and working capital (inventories of raw materials, materials, unfinished production and finished goods etc.).
- Financial capital - refers to the value of a company's equity, which makes it possible to finance part of the technical capital.

The growth rate of GDP results from the quantitative and qualitative increase in the capital factor.

The increase in capital comes from investing in material goods (durable goods) and immaterial (research, training) - aimed at increasing production capacities. The financing of these increases is achieved by mobilizing domestic savings and foreign capital, so-called foreign direct investment (FDI).

The quality of capital is measured by its productivity, i.e. the ratio between value added and fixed capital.

The growth rate can be broken down into components:

Growth rate = growth rate of labor + capital growth + technical progress

Technical progress is a residual element, but its lack of activity in a company condemns it to a gradual disappearance.

After the 80s of the 20th century, new growth theories have considered technical progress as a result of the four types of investments:

1. Investment in physical capital - which increases the productivity of other firms through a profesional training effect, including the knowledge of operation and the accumulation of skills to handle the new equipment (Romer, 1986)
2. Investment in research and development to enhance the knowledge and allow cumulative innovation. (Romer, 1987)
3. Investing in human capital, giving priority to education, training, health, which improves the quality of work (Lucas 1988)
4. Infrastructure investments, that improve the efficiency of private investment in physical capital (Barro 1990)

These four types of investment are identified as endogenous growth factors that can be used. In addition, these investments create positive externalities that can not be fully supported by the private sector. Therefore, state intervention in favor of these activities is necessary at different levels:

- Create an investment-friendly economic and institutional environment
- Directly investing in public infrastructure
- The introduction of economic and financial incentives to encourage training, research and innovation.

## 2. Economic Policies currently implemented by developed and emerging countries

Conjunctural economic policy aims to steer short-term activity to ensure sustained growth without imbalances such as unemployment, inflation, excessive budget deficits, etc. and may, depending on the state of the economy, be procyclical or anti-cyclical.

- Conjunctural policy is pro-cyclical when the state acts in the direction of the evolution trend of the conjuncture to amplify it. For example, measures to stimulate demand and thus economic growth, while the pace of development has slowed (typical recession);
- Conjunctural policy is counter-cyclical when the state intervenes to counteract undesirable conjunctural developments. For example, in a period characterized by an inflationary slump, rising interest rates will discourage non-government credit, decreasing pressures on prices.

Conjunctural economic policy implementation requires complementary policies: income policy, employment policy etc. The conjunctural stabilization of the activity is achieved through two main instruments:

- The National Public Budget (NPB), which includes the state budget, the administrative-territorial units' budgets and the state social insurance budget;
- Monetary policy.

Fiscal-budgetary policy and monetary policy can be combined to maintain a sustained rate of economic growth and low inflation.

### 2.1. Objectives and instruments of fiscal-budgetary policy

Fiscal and budgetary policy aims to act in the short term on the economic and social situation, characterized by employment, the pace of macroeconomic development, inflation, external balance (see Kaldor's Magic Sqare) through the NPB, taxes and tax duties, budget expenditures and budget balance.

Fiscal-budgetary policy can be used to achieve two major goals:

- Fiscal stimulation through a budget-development policy that aims at strong economic growth and full employment. The tools that can be used for this purpose are the reduction of the tax burden from some direct taxes or increased allocation of public funds for higher budget expenditures; in this case, fiscal policy means are lower taxes and / or higher public spending;
- • a restrictive budgetary policy, which aims at slowing down the inflationary process by reducing public spending and increasing tax and tax obligations and taxes.

The interventionist theory of economic recovery is also supported by multiplier factors (fiscal and budgetary), including automatic stabilizers. Thus, the concept of the multiplication effect, pronounced in 1936 by British economist J.M. Keynes (1883-1946) justified fiscal stimulus policies and use of the budget deficit as a tool for resuming economic growth. The principle is that in a competition-based economy the change in one of the components of demand (consumption, investment, public spending) will lead to a greater variation in demand, assuming that the economic propensity of consumers remains unchanged.

In conclusion, the main components of the conjunctural policy are:.

- reference interest rates, those that can be managed by the central bank;
- fiscal taxes and compulsory social contributions system;
- public expenditure, in terms of volume, functional and economic structure.

*Guidelines on fiscal policy*

Setting tax rates (direct taxes: tax on personal income, corporate tax, indirect taxes on consumption) is not neutral and can cause a decrease in disposable income and consequently domestic demand (if taxes are increased) or conversely, a revival of economic activity (if the tax pressure drops).

A reduction of the income tax or VAT leads to an increase in disposable income and therefore increase household consumption. Operation of enterprises will grow to meet market demand, which means that will increase their turnover, including value added, leading to an increase in GDP and hence to economic growth.

For example, the US in 2017 - at the end of the Obama administration in 2016, the US economy experienced a modest annual GDP growth of around 1%, driven by weak private sector investment and stagnation in domestic consumption, as a result of the moderate decline in disposable income.

The newly elected Trump Administration has initiated and implemented since the following year a short-term economic recovery policy based on the sharp fall in tax pressure:

- The tax reform of households' disposable revenues modifies the 7 tax brackets and reduces the rates, with notably an upper bracket which passes to 37% against 39.6% currently, and modified thresholds. Simplification measures are also included, with the removal of a number of tax loopholes.
- The corporate tax rate decreases from 35% to 21% as of 2018 permanently
- the deduction of loan interest payments is now capped (up to 30% of earnings before interest taxes, depreciation and amortization - EBITDA - until 2021 and then EBIT).
- Other provisions, with temporary application of three to seven years, including to discourage international tax evasion by multinationals.

Although the proposed reform has been met with much suspicion, the multiplier effect felt since the first year of implementation, 2017, with the US economy rising to around 3% annually, with employment approaching by the maximum level, the disposable income has increased, so that the most dynamic factor

of economic growth has reverted to domestic consumption.

An example of a restrictive economic policy, including its implications for macroeconomic performance, are the measures put in place by the Romanian public authorities in 2010 with the stated purpose of reducing the general consolidated budget deficit. As a result of the economic crisis triggered by the subprime crisis, then the banking crisis triggered in the US in 2007 and expanded across the globe, the Romanian economy marked a strong decline (-6.6% of GDP in 2009, after a record level in 2008 of + 7.3%), a fall in domestic demand of -12% and a budget deficit of -7.2% of GDP. In order to overcome the recession, it was considered that a restrictive economic policy could stabilize negative macroeconomic developments by lowering public spending - reducing budget spending by decreasing the salaries of all the public employees by 25% - and increasing tax revenues - increasing the standard VAT rate from 19 % to 24%.

Positive results were left waiting: in 2010 GDP continued to fall by -1.6%, the budget deficit remained high (- 6.51% of GDP), although VAT receipts increased, as expected, from 6.8% of GDP to 7.7% of GDP, while income tax fell from 3.7% to 3.5%. At the same time, however, domestic demand contracted further (-1.5% from the previous year) due to the decrease in the disposable income - the real monthly average earnings decreased (-3.7% compared to the previous year) - number of employees has diminished in both the budgetary sector (-4%) and in the private sector (-9.5%), as a result of the decrease in activity, and public expenditure on social assistance increased (from 12.7% to 13, 4% of GDP) due to loss of work of a large number of employees, mainly from the private sector.

In the following years the trends in the reform year continued, and the resumption of economic growth took just over a year or even two, which shows, as interventionist theory argues, that the application of a restrictive conjuncture policy in an economy in the recession will accentuate the negative phenomena, the appropriate measures for the exit from the crisis being active measures, supporting investments, production, exports etc. which increase demand as the main factor of macroeconomic development.

*Public spending guidelines*

Expansion budget policy - aims to promote the development of economic activity; an increase in public spending can lead to an increase in consumer demand and business investment, so growth in production will help reduce unemployment, as rising business activity generates the need for additional labor. Also, there are predictable negative effects such as increased inflationary pressures if demand exceeds supply and, in particular, increase the budget deficit (financing its public debt may lead growth).

The restrictive public spending policy makes it possible to reduce the budget deficit, so reducing public debt, but it also has adverse effects, such as a reduction in consumption levels and a level of investment in business.

In conclusion, economic policy represents all the decisions taken by the public authorities to influence the country's economic activity. Depending on the objectives pursued (low inflation, diminishing unemployment, stimulating economic growth, development of foreign trade), the economic policy instruments inherited by the government will be diverse: fiscal-budgetary policy, monetary policy, income policy.

### 2.2. Monetary Policy

The primary objective of monetary policy is to control money in circulation, which means to provide businesses with a sufficient but not excessive source of money to ensure a balanced economic growth that does not contribute to the inflationary process nor to push for recession.

By increasing or decreasing the reference interest rates, monetary authorities or national central bank (or, in the case of the European Union, the European Central Bank) influence the distribution of loans, and thus the access of individuals and businesses to borrowing, stimulating or, discouraging their investments.(Stefan – Duicu Viorica, Stefan – Duicu Adrian, "*The Influence of Lending Activity Over Consumer's Behaviour"*, CKS, Bucharest, 2011)

Monetary policy must serve two major purposes: controlling price fluctuations, and controlling the inflation and economic growth. To achieve these objectives, the central bank may determine the reference interest rates and the refinancing rates.

A decrease in the reference rate of the central bank encouraged commercial banks to reduce interest rates on loans. This reduction in the interest rates applied to credit encourages businesses to borrow for consumption and/or investment, with the risk of escalating inflation due to excess demand.

An increase in the reference rate raises the cost of credit granted by commercial banks, causing businesses to borrow less, their activity stagnates or even declines and there is a risk of economic slowdown.

To control inflation, the central bank may limit creating scriptural currency by banks through loans distributed. For this, the central bank may limit access to refinancing in the money market for these banks by increasing the cost of refinancing (increasing refinancing rates) or by limiting available liquidity (reducing open market operations and increasing reserve requirements). In the absence of central bank cash resources needed to deal with withdrawals, banks are forced to pay less credit and thus create less money.

*Monetary policy instruments*

A national central banks (also the ECB) has two main instruments to conduct monetary policy:

- refinancing interest rate on the interbank market: by fixing the remuneration for money which lends to commercial banks in the money market, it fixes the cost

of refinancing the commercial banks;

− action on money market liquidity by using appropriate mechanisms, such as:

- Open market operations - they are conducted at the central bank's initiative and play a role in steering interest rates, managing liquidity conditions in the money market and signaling the monetary policy stance;
- reserve requirements. The central bank (or the ECB in the Eurosystem) requires commercial banks to set up reserves in open accounts in the national central banks' registers. The purpose of reserve requirements is to create and/or handle a structural liquidity requirement for commercial banks.

## 3. Economic policy coordination in the European Union and worlwide

### 3.1. Economic Policies in the European Union

**Difficult coordination between monetary and fiscal policies**

Monetary policy is the responsibility of central banks, including the ECB, all of which being autonomous public institutions and not subordinated to their governmental authorities. But fiscal-budgetary policies remain the responsibility of national governments. This division of roles in Europe leads to a difficulty in coordinating economic policies, the political mix being the sum of fiscal policies and monetary policy. To solve this problem, the European Union has decided to strengthen the coordination between the economic policies of the states. This better coordination requires mandatory measures for states that renounce a part of their autonomy towards the Union.

The measures adopted are the following:

- "golden rule": the structural deficit of a state budget can not exceed 0.5% of GDP under financial sanctions;
- strengthening the Stability and Growth Pact: in times of crisis, the budget deficit can not exceed 3% of GDP and public debt is 60% of GDP. States that violate this rule will be warned and then penalized with amounts calculated according to an algorithm established by the Treaty;
- Europe 2020 Agenda: this is a set of structural reforms designed to increase the Union's competitiveness;
- Growth Pact: European Union committed $ 120 billion to stimulate economic growth.

*Financing of economic policy by increasing taxation*

To reduce budget deficits, responsible authorities can increase taxes and / or reduce public spending. However, it is likely that this policy will not have the expected results due to lower purchasing power of households, as a fall in demand leads to an economic slowdown. Then, tax revenues will be lower than expected and the social spending will be higher. Therefore, the deficit reduction does not hapened (Greece, Spain and Portugal are facing this situation).

*Funding economic policies through indebtedness and the disadvantages of this method*

The deficit can be financed by borrowing, but there are significant risks in this situation. Since the state is a safe debtor, it can absorb a large part of the available savings at the expense of private enterprises, which present higher risks to investors. In this way, the phenomenon of "eviction", ie the removal from private sector borrowing, in favor of the public sector, appears. This situation affects the development of enterprises and investments of individuals and, in the end, the decline in the growth rate of national GDP appears.

To ensure macroeconomic stability of the EU, founding members of Euro Zone defined a Stability and Growth Pact (SGP), which is a political commitment of all Member States to control their fiscal-budgetary deficits. However, unlike monetary policy, fiscal policy remains the responsibility of national authorities and the SGP requires the Member States to enhance convergence of economic policies.

The PSC contains two types of provision:

− multilateral surveillance as a precautionary measure: Member States submit yearly medium-term budgetary targets in an updated stability program. A rapid alert system allows the Ecofin Council, which brings together EU economic and finance ministers, to make a recommendation to a state in case of budget slippages.

− excessive deficit procedure: this is triggered as soon as a Member State exceeds the cumulative deficit criterion of central, local and social security administrations (3% of GDP), except in exceptional circumstances. The ECOFIN Council shall make recommendations to the state to end this situation. Otherwise, the Council may impose sanctions, which means that the state concerned will have to pay a fine to the ECB.

*The objectives of monetary policy in the Eurozone*

The monetary policy of the Eurozone is entrusted to the European Central Bank (ECB). Two main objectives are attributed to it:

− controlling inflation - consumer prices must be below 2% annually in each Member State of Eurozone, defined as a priority (Article 105 of the ECB Statute);

− economic growth and employment: this is a secondary objective, ie the ECB should not undertake growth-enhancing actions if, in addition, they tend to restrict its objective of controlling inflation growth.

As the eurozone has adopted a floating exchange regime for the euro, the ECB doesn’t aim to maintain a stable exchange rate.

*Structural Policies in Europe*

The objectives and instruments of structural policy in Europe are contained in the Lisbon Strategy (March 2000), which serves as a general framework. This document has set out the broad economic policy guidelines for the Member States to make Europe a competitive and dynamic knowledge-based economic

space. In addition, every three years, on a recommendation from the Commission, the European Council draws up the Integrated Guidelines (IDL), which consist of the Broad Economic Policy Guidelines (BEPGs) and the Employment Guidelines (EDL), which are a series of intermediate objectives derived from the Lisbon Strategy. Based on these guidelines, each country sets a list of priorities in a National Reform Program.

Under the Lisbon Strategy, the European environmental policy aims, by 2020, to "the three 20": 20% reduction in greenhouse gas emissions, 20% renewable energies and 20% improvement in energy efficiency.

*Competition policy aims at encouraging competition in the European space. This allows the development of all intra-zone commercial transactions and the decrease of many prices due to the expansion of national markets. However, there are strict control rules that prohibit agreements, abuses of dominant position and certain protection measures*.

The European competition policy, under the joint responsibility of the European Commission and the EU Member States, aims to promote healthy competition in the European space.

### 3.2. Coordination of economic policies worldwide

The IMF, the WTO and in particular the G20 have established joint decision-making processes to define broad guidelines for the economic policies worldwide.

This coordination seems essential in times of crisis.

*Anticompetitive and restrictive practices on free competition*

The market economy, universally applied today, operates on the principle of free competition. This makes it possible to produce at the lowest cost and to sell at the best price for the high satisfaction of consumers' wishes. This market economy success is often perceived negatively by the public as it encourages companies to relocate their businesses to take advantage of lower wages in emerging economies. Industry competition with new producers in remote areas reduces the control capacity of national authorities and also requires deregulation to benefit from greater flexibility. Deregulation and, consequently, the absence of controls could lead to widespread oligopolies, which would dictate their own laws for the weakest competitors, which would gradually disapear and, also, the market economy.

*Legal Practices*

It is not forbidden to make commercial or financial agreements if the agreement is in the interest of consumers. The law does not prohibit the company to gain a leading position on the market, so a company can benefit - for example, commercial advantages - related to its dominant position. Agreements that do not restrict the market are not declared illegal. For example, an agreement will be legal if it will favor technical progress.

## 4. Recent developments in the world economy and world trade

The increase in international trade and the further increase of competition between territories is a major feature of the globalization of the economy.

Since the end of World War II, economies have become more open and trade has increased considerably. Thus, between 1950 and 1973 world trade grew two times faster than world production. Many factors have contributed to this evolution. These include a considerable decrease in transport and telecommunications costs and the development of free trade, supported by international organizations such as the World Trade Organization (WTO), the World Bank and the International Monetary Fund.

### 4.1. Diversification of trade

The nature of the main traded goods has evolved. After 1945, manufactured goods played a major role in international trade. These goods accounted for 50% of trade in the early 1950s, 75% in 2005 and 65% in 2011. They are now the real engine for the development of world trade.

Increasing the share of manufactured goods in world trade is linked to increased trade between the branches of production, which consists of cross-trade with products belonging to the same branch or the same category of products.

Currently, services represent about 20% of exchanges. Their growth is mainly driven by IT and information services.

Primary goods account for only 14% of trade and have declined significantly since the 1960s. They are made in poorly developed countries which have natural resources but do not process them but export them as such. The economic policies of these countries should aim at creating manufacturing industries that will produce goods with added value so as to increase their national income.

The structure of actors in world trade has changed significantly, last three decades being marked by an increase in the number of emerging countries and the increased role of multinationals.

There are three geographical areas that dominate the global economy: North America (United States and Canada), Western Europe and Asia Pacific (Japan, South Korea and Southeast Asia), all of which having a standard of living higher than the rest of the world.

Before the financial crisis, the developed G7 countries accounted for around 70% of global GDP, 75% of global trade volume and over 90% of global financial operations, but weights have changed with the appearance of emerging markets. Thus, the BRICS group currently accounts for around 20% of world GDP, 40% of the world's population, 15% of the trade volume and 40% of the world's monetary reserves.

### 4.2. Multinational companies

The multinational company is a company formed by a parent company and subsidiaries located abroad. As major players in the globalization process, multinational companies contribute significantly to increasing international trade and financial flows.

In the traditional international labor division, developed countries have produced and exported manufactured goods and services, while developing countries have exported basic commodities and raw materials to developed countries. The new international division of labor presents another structure of world production and a change in the nations' specialties. Thus, developing countries export mainly manufactured products, their share in exports of goods increasing from 25% in 1980 to 60% in early 2000. In turn, the rich countries are focusing their products and services production in high technology, while poor countries remain confined to low-value primary products.

### 4.3. Regulating international trade

Applying the principles of global free trade is not always obvious, and highly divergent practices in world trade have made regulation of trade indispensable.

The gradual liberalization of international trade and its strong growth have made the existence of a regulatory framework indispensable. Initiated by the General Agreement on Tariffs and Trade (GATT) in 1947, this framework was strengthened with the creation of the World Trade Organization (WTO) in 1995. The main objective of WTO is to promote free trade to foster development of world trade, providing for this purpose, a framework of stable rules negotiated and accepted by all member countries.

Various rounds of negotiations between countries in the WTO allowed to establish principles of trade between nations, of which the most important are:

- Most Favored Nation clause, which provides that any commercial advantage for one country to another country shall be granted to all countries in the WTO;
- equal treatment, which requires countries not differentiate imported products from domestic ones;
- the principle of non-discrimination between trading partners: all partners are involved in the negotiations (multilateralism) and should not be treated differently

## Conclusions

1. Economic growth is measured by the GDP growth rate, which is the new created value in a country within one year. Economic growth is therefore a quantitative and monetary indicator, while development is a more complex concept of a qualitative nature.

Development is a process of improving the economic and social situation of a country that improves the well-being of the entire population. Development is based on technical, cultural, social and institutional changes.

Economic growth permits growth as it promotes wealth growth, poverty reduction and income per capita growth, while development is only possible through State involvement, the only one able to build infrastructure (school, bridges, roads ...), to emit stable regulations for trade and to reduce inequalities through redistribution.

2. Trade, one of the most pertinent factors of economic growth, has in recent years marked contradictory developments in geopolitical rather than economic causes. Thus, world trade recovered in 2017 after the economic crisis that followed the subprime crisis. This recovery is mainly due to the increase in demand for imports in East Asia, against the backdrop of domestic demand growth supported by acomodative policies in the region. In a series of large developed economies capital goods imports increased, companies responding favorably to the investment conditions improvement.

Recent reconfigurations of the main trade relations, in particular following the United Kingdom's decision to leave the European Union, the US trade policy to renegotiate the Free Trade Agreement with the other North American countries and revising the terms of its other trade agreements, raises concerns about tougher barriers to trade and exacerbation of commercial litigation. This situation may worsen if other countries, such as China, the world's largest exporter of goods, will implement retaliatory measures.

3. Accelerating economic growth has important implications for the environment. The frequency of climate shocks continues to increase, highlighting the urgent need to strengthen resilience to climate change and to hinder the degradation of the environment.

As we face the risk of exhausting natural resources, primarily energy resources, the issue of renewable energy is becoming more and more acute. China remains the world's largest renewable energy investor, and in 2017, wind energy projects have increased investment in this area in Australia, China, Germany, Mexico, the United Kingdom and the United States. While many countries, especially Africa, continues to experience a severe energy shortage, there are still opportunities to create even now through smart policies and investments, growing conditions ecologically sustainable.

4. Years to date from the 21st century have already marked three different economic periods: at first, the world economy was relatively stable, with an increasing trend manifested in several geographic areas, such as the states of North, South-East, Japan etc.; followed years of financial crisis triggered by the US mortgage market crisis which has spread across Europe, also affecting many other countries in the world; at present, most of the world's economies have experienced performance

that outweighs the economic crisis that followed the financial crisis and is implementing growth policies both economically and socially.

5. The reorientation of economic policy should focus on four concrete areas: increasing economic diversification, reducing inequalities, strengthening the financial architecture and eliminating institutional weaknesses

- First, the acute need for economic diversification, which has been perceived for a long time, in countries that remain largely dependent on a few commodities;
- It is also essential to restrict and to correct the ever-increasing inequalities to ensure a balanced and sustainable growth over time. In this context, contextual policies will be needed to increase the living standards of the population and structural policies in the long term to promote equal opportunities, including by investing in education, expanding access to health and training services, and investment in the road network and electrification.
- The third area in which public intervention is essential is the alignment of the international financial architecture with Agenda 2030 for Sustainable Development and the Addis Ababa Agenda for Action. To this end, it will be necessary to develop a new funding framework for sustainable development and to move progressively from the current concerns based on profit (short term), the concerns focused on added value (long-term) in a responsible manner. Macro-prudential policies, if well coordinated with monetary, fiscal and exchange rate policies, can help achieve these goals by promoting financial stability and limiting the build-up of financial risks.
- Governance weakness and political instability remain fundamental obstacles to achieving the 2030 Sustainable Development Agenda. In this context, strengthening global economic growth is not enough. In addition, the priorities of public action must be, among other things, to step up activities to support conflict prevention and resolution and to correct the institutional shortcomings that underlie the many difficulties encountered.

6. In times of economic and financial crisis, public authorities are almost forced to intervene in the economy, but this intervention can be done in different ways.

If the state is social and interventionist, it will intervene in the context of implementing a cyclical fiscal incentive, implementing a budgetary conjuncture policy to stimulate demand - a Keynesian fiscal stimulus policy - and pursuing a social approach to unemployment. But in times of economic crisis, even if the liberal state does not want to intervene, it must develop so-called structural employment policies, called active policies.

In the risky context of financial globalization, States are often dependent on international financial markets that indirectly dictate their fiscal policy with regard to the sustainability of public finances. In this context, the margins of maneuver of states are weak and do not allow them to cover their high sovereign debt.

The public authorities are wondering whether the current economic policy of deficit reduction is necessary and sufficient to stimulate growth. The current economic climate precipitates the economic and political actions of states towards reducing their deficits in order to invest more in the medium or long term in order to revive economic growth.

The policy of reducing deficits by limiting budget spending will force the state no longer to intervene significantly in the economy. Structural economic policies related to infrastructure, innovation and training can be compromised and yet effective for resuming economic growth.

Reducing deficits may involve increasing state revenues by increasing taxes, but this action is likely to aggravate domestic consumption by reducing households' disposable income.

Ultimately, a policy to reduce deficits by increasing taxes may reduce the competitiveness of companies. Indeed, the additional taxation generated by government spending will create a financial burden for companies, which they will transfer to their prices, which will, in the first place, reduce national consumption and international competitiveness in terms of exports.

In conclusion, reducing deficits can be an obstacle to economic growth, although large deficit deficits destabilize public finances and prevent the use of opportunistic policies appropriate to the resumption of economic growth.

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# ENTREPRENEURSHIP MODELS AND RURAL DEVELOPMENT IN ROMANIA BASED ON THE CULTURAL HERITAGE

**Mihaela Andreea STROE***

**Abstract**

*Entrepreneurship lays at the basis of the development of society and based on the concept of innovation. The entrepreneurial models developed over time start from the classic concept which states that the owner of resources can play the role of the entrepreneur, the ownership right being very important, this models continue with the diversification of the market, of the industries of the market segments where the state contribution plays a very significant role for example, continuing with modern entrepreneurial theories where innovation plays the leading role by identifying business opportunities. Innovation can be revolutionary or incremental, can be based upon product and process development, systematic and sporadic innovations, entrepreneurial and social innovations. Cultural heritage entrepreneurship plays an important role as the pivot for the heritage tourism development in which concerns rural areas of Romania which represents the main focus of this study. It is important to outline that having into consideration the need of change in the consumption process of the tourist consumer and this implies the development of a new entrepreneurship models based on multiculturalism and innovation.*

**Keywords:** *Entrepreneurship, model, cultural heritage, rural, tourism*

## Introduction

The concept of entrepreneurship is very largely used these days, but a few focus on the basis of rural entrepreneurship. To start, the Global Entrepreneurship Monitor uses one of the more straightforward definitions: "Any attempt to create a new business enterprise or to expand an existing business by an individual, a team of individuals, or an established business" (Zacharis et al.) Entrepreneurship is recognized as a primary engine of economic growth. Without it other factors of development will be wasted or frittered away. Entrepreneurship stimulates economic growth through the knowledge spill over and increased competition of the entrepreneurs (Carree, Thurik , 2005).

The concept of rural development is a subject of constant debate, especially regarding the relative importance of its sectorial and territorial dimension. Rural development is seen as a primary territorial activity, in which the development of agriculture has an important role by the recognition of "the strong support that land provides in terms livelihood". The importance of this topic is based on the fact that it includes not only the economic, social and environmental development of those territories, but also the development of good governance in these areas. The program for rural development can contain, depending on the conditions and needs, the development of: infrastructure, agriculture, tourism, small and medium-sized enterprises and the creation of jobs, but also ideas regarding environmental protection, education, community development. Rural entrepreneurship is one of the newest areas of research in the entrepreneurship field. In opinion of Wortman rural entrepreneurship generally can be defined as creation of a new organization that introduces a new product, serves or creates a new market, or utilizes a new technology in a rural environment.

A specific part of the rural entrepreneurship can be considered the valorification of the cultural heritage which is defined by two main domains: **tangible patrimony ((**building, books, monuments, works of art, artefacts, landscape) and **untangible patrimony** (language and knowledge, folklore, oral history, traditions customs, aesthetic and spiritual beliefs etc). There is also another category **cultural natural heritage** (countryside, natural environment, flora and fauna, landscapes that are proned for cultural tourisme). (Zaman, Ghe., 2015)

Culture is a recognized territorial development factor at the international level, both politically and through dedicated investments. Politically, culture has been recognized as a pillar of sustainable development at local and regional level through the Agenda 21 for Culture (2004), a United Cities and Local Governments (UCLG) Committee approach. "Cultural diversity is necessary for humanity, such as biodiversity in the natural environment; the diversity of cultural expressions generates wealth and is essential for the development of a broad cultural ecosystem with a diversity of backgrounds, actors and content; dialogue, coexistence and interculturality are basic principles for the dynamics of the relationship with and between citizens; public spaces must be seen as cultural spaces. "The preservation of the cultural heritage takes place at various levels, from the concrete actions of study, documentation and inventory of assets, registration and surveying of conservation status, conservation and

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restoration interventions, heritage management and museum tourism and access to the general public.

The tourism offer in which concerns the cultural heritage is very heterogeneous in which concerns the typology of goods, historical and cultural importance, patrimonial classification and resources, geographical location. On the other hand, a vast unclassified heritage, can be found isolated, protected by local and independent bodies, and sometimes without a well-defined dissemination strategy and with a much smaller historic-artistic and local expression. A different investment is represented by the dissemination of heritage and its valuation as a tourist resource, mainly in Romania the cultural heritage is owned by the state. If the cultural heritage is managed through several national or regional management bodies, with a public management, the tourism agents that use this resource are relatively unrelated to the decision-making process in which concerns investment, promotion and development strategy.

We have to take into account that the intangible heritage has an emotional component as well an emotional trigger, the emotional burden being the blend between history and legend, between facts and imagination. Creating emotional impact and regulating behaviour to embrace values of heritage including protection and conservation objectives, intercultural and interfaith dialogue and political awareness is the quintessence of a quality cultural heritage service. (Papathanasius-Zuhrt, Di Russo, Valentina Vasile, 2016)

The applications to UNESCO intangible heritage of various artistic and cultural manifestations converted items like the Romanian blouse or some folcklor activities like de dance of calusari, represent objects of intangible cultural property. This valorisation of popular culture, which is the identity mark of some regions or places, has as its objective the preservation of techniques and materials through the maintenance of these activities as a way of disseminating the territories, culture and endogenous resources. This factors can lay to the basis of a new entrepreneurship model based on multiculturalism like the Transylvania area, as we will see further.

**Methodology**

Screening upon literature review and thematic synthesis of actual entrepreneurial models. This is to say that the study aims to make a comparison between the existing entrepreneurial models regarding rural environment through grouping as a method of analysing the characteristics of rural entrepreneurship. Grouping consists in separating the surveyed community into homogeneous categories units after the variation of one or more characteristics, in our case the endogenous or exogenous factors and *comparison* as a qualitative method of comparing the entrepreneurial characteristics based on criterion such as time or space ( as it can be seen below the three types of entrepreneurship: innovation entrepreneurship, opportunity and enlargement entrepreneurship are analysed based upon a geographical distribution, thus creating several countries' profile.

## 2. Models of entrepreneurship- stage of knowledge

The presented models should highlight the innovation potential of local entrepreneurs as a condition of success in developing the local tourism and the level of well-being. The approach is justified by the identification of the profile of geographical areas, to start with and going towards the local entrepreneur profile and the role of social and cultural factors upon developing new models of rural entrepreneurship. In other word, we can start from the "big frame", collapsing into the individualisation of cultural heritage as entrepreneurship goal.

Table 1. General entrepreneurial model based on geographical distribution

| | | |
|---|---|---|
| East European profile ( Croatia, Romania, Bulgaria, Hungary)<br>Low EA, very low NE, very low EE, low number of women in business compared to men, relatively low percentage of adults identify business opportunities, they know an entrepreneur and think they know how to start a business, the differences between incomes are small, the sector agricultural sector has a significant share and there is a low level of venture capital investment and informal investment | Aggressive Asian profile (China, Japonia, Singapore)<br>low opportunistic entrepreneurship (OE), very low entrepreneurship of necessity (NE) , very low entrepreneurship of enlargement (EE), few business women compared to men and a low percentage of adults identify business opportunities, they know an entrepreneur and think they can start a business, the differences between Income is low | The profile of the enlarged European Union<br>EO moderate, very low NE, moderate EE, percentage of business women is rising and a high percentage of adults identify business opportunities, I think they have entrepreneurial abilities and have a high fear of failure Differences between incomes are low and social costs are and there is a moderate level of venture capital investment and informal investment |

| | | |
|---|---|---|
| The profile of the former British colonies (Australia, Noua Zeelanda, Africa de Sud, SUA ) characterized by high OE, very low NE, low EE are few business women compared to men and a high percentage of adults identify business opportunities, I think they have entrepreneurial abilities and have a low fear of failure. Income differentials are moderate, high social costs and a moderate level of venture capital investment and informal investment | Latin America profile (Argentina, Brasil, Chile, Mexic ) EO profile increased, NE increased, EE increased. Women begin to get men involved in business and a high percentage of adults identify business opportunities, they think they have entrepreneurial abilities or know a business man. The agricultural sector is substantial, there is a high percentage of unemployed aged less than 25 years. Here we see the biggest differences between incomes, the biggest barriers to initiating and registering business. Social costs are high, the level of venture capital investment and informal investment is moderate. | Asian development profile ( India, China) characterized by increased EO Increased EE increased women start to grow in business engagement rates and a high percentage of adults identify business opportunities, they think they have entrepreneurial abilities and know an entrepreneur. The agricultural sector is substantial, there is a high percentage of unemployed younger than 25 years old. There are large income gaps, which coexist with the most ambitious business initiation and registration barriers, and the level of risk capital investment and informal investment is moderate |

Source: own centralization

Predictive model design- innovation models in entrepreneurship has a large spectrum of interventions from good practice models presented to entrepreneurs to diverse programmes which have been tested and can anticipate problems, having the tendency of generalization.

The model above shows the connections between the entrepreneur characteristics and the entrepreneurial environment that has external features and internal features as input factors of the model, a very important data being the location of the entrepreneurial activity which will impose some particularities if we are speaking about a rural space.

The innovation which boosts the level of entrepreneurship has at its basis the motivation, as we can see also in the figure 1. The process of innovation implies the next stages: *process of innovation generation, novelty degree of the innovation strategy, level of entrepreneurial innovation, types of innovation.* As main motivation that lay at the basis of the process, there can be outlined: area development, development strategy, stakeholders, financing programs, the level of education, etc.


Fig.1 Predictive model of entrepreneurial innovation in rural environment, Source: Harpa Elena, Monica Sorina, Dana Rus, A predictive model of innovation in rural entrepreneurship, procedia Technology 2014

The strategies to encourage rural entrepreneurship initiative must respond to three major challenges (Steriu, Otiman et al., 2013):

- aspects of economic structure
- low employment opportunities in the primary sectors as a result of structural changes in the economy
- increased by legislative changes far too fast to could be assimilated by the rural population.

The characteristics of rural business environment play a major role having into consideration the difficulty of maintaining a critical mass of facilities in rural areas (infrastructure, market, tax incentives, etc.) and, also, the need to support economic development. (Andreea Feher,

Vasile Gosa,2014) accelerated aging of the population associated with extra-rural exodus of young people and (re)turning to rural areas, especially of persons at retirement age are social aspects that can effect in a negative way the chances of potential rural entrepreneurship.

So, as a way of stimulating the entrepreneurial spirit, the Small Business Act for Europe (EC, 2011), proposed a new model based on three pillars of action (Figure 2).

- development of entrepreneurship education and training to support economic growth and driving the emergence of new business;
- creating a favourable business environment for entrepreneurs (providing the access to financing, providing support with the development stages of business, reducing administrative restrictions;
- dynamization of entrepreneurial culture through the use of good practice patterns and stimulation of entrepreneurial initiative of target groups with the potential to become entrepreneurs. (Andreea Feher, Vasile Gosa,2014)

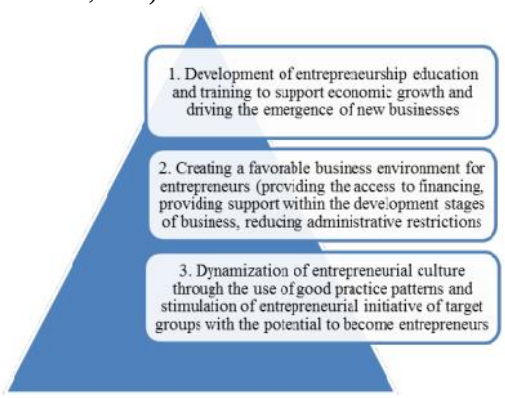



Fig.2 Pillars of Action of rural entrepreneurship development, Source: The development of rural entrepreneurship in Romania, Andrea Feher, Vasile Goşa,Tabita Hurmuyache, Miroslav Raicov, 2014

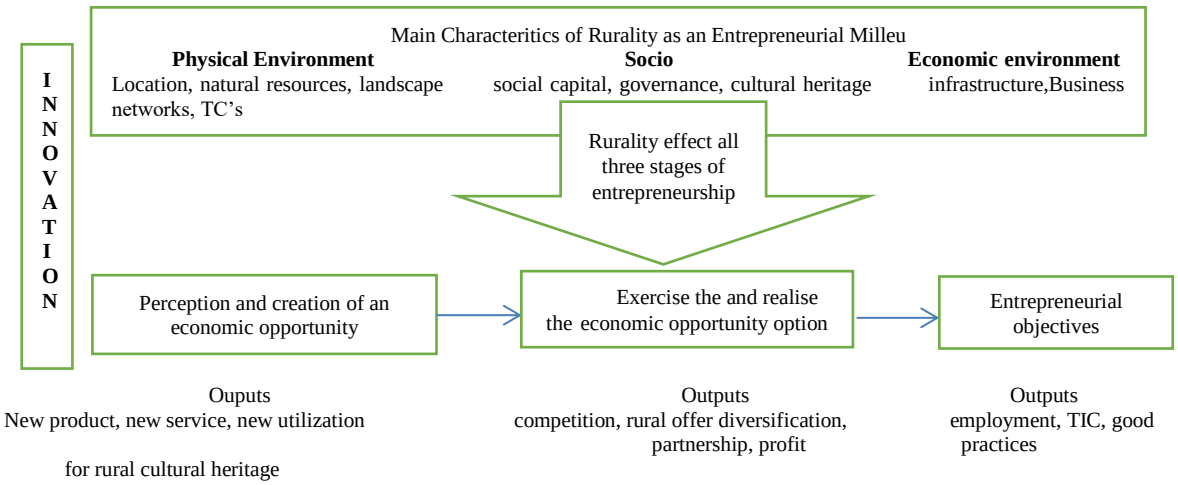
The first pillar of action covers measures such as (Steriu, Otiman et al., 2013): including among the programs of primary, secondary, professional, and higher education, as well among the adult education, of needed disciplines for skills training necessary for an entrepreneurial spirit development and using structural funds for the revival of entrepreneurship education for youth; The second pillar refers to creating a favourable business environment for entrepreneurs, comprising the following steps: providing support for entrepreneurs in the developmental stages of the business through: rural tax systems more favourable for businesses in the early stages; financing programs and making them known among entrepreneurs or implementing a new payment scheme of VAT at collecting for small businesses. This financial measurement, of course, need to be sustained by educational ones like special programs of training, reducing the number of immigrants each year and creating new employment opportunities for the young people from the rural areas. So, according to social exchange theory, an individual contributes to the institutionalization of entrepreneurship in her social environment by engaging in the activities of opportunity search and resource assembly. In this way, the norms expected from her role attains legitimacy as an entrepreneur.

**III. Innovation model in rural entrepreneurship**

This innovation entrepreneurship model is based upon the idea of perceiving the information of the market, the need for cultural consumption, for example, and the ability to concretize it using modern technology.

The adapted model of a three-stage entrepreneurial process in the rural development focuses on the idea that the local community is in search for a new business model for their community as a whole, rather than searching for new firms, jobs, growth opportunities and entrepreneurs. (for examples the vacation village hotel or a campus where different households play different role in a holistic manner)

Figure 3 Innovation model of entrepreneurship




Source: own centralization adapted upon Stathopoulou, Psaltopoulos, and Skuras (2004)

It can be said that on the first stage Innovation is important to perceive the opportunity, the means to put the "vision" into practice using innovative methods. In creating an economic opportunity as a next stage, the entrepreneurs develop a new product, a new activity as an advantage of his own or as a peculiarity of the area. In realising the economic opportunity option (second stage) the main outputs refer to utilising and allocating outputs, contact with institution or creating different partnership. Finally, we can focus on the entrepreneurial objectives and its outputs like external gains (social gains, profit, employment) or internal gains (motivation, satisfaction).

Entrepreneurship is seen more than a way to develop business ideas, but it becomes part of the local structure. In order to sustain the process there is an interplay between *communication and history* – the where some local successful entrepreneurs share in exterior their vision and innovating idea for the near community, internalising also other stakeholders vision upon the local development their historical deeds and sins, their contemporary community visions and moreover their trustworthiness to outline the future strategic direction. Successful entrepreneurs are constantly engaged in social exchanges with a wide variety of networks to creating social capital through trust, mutual obligation, expectations and norm setting activities.

## 3. Rural entrepreneurship and cultural heritage in Romania (Transylvania study case)

Rural tourism could be both a chance for the rural areas' revival and a possible solution to the problems affecting them. Moreover, for a sustainable development of rural tourism, beneficial for the local communities, it is also necessary that the businesses be local and capitalize also the favourable nature-based resources and the cultural heritage (i.e. traditions, history and local specifi cities). Consistent with other researches, we found that the supply of funding for rural businesses is somewhat weaker and less competitive compared to the urban-based businesses. In which concerns rural areas, the major form of entrepreneurship are SME's, family firms, individual firms or authorized person. Rural tourism can be a large area to discuss in order to emphaze all the typology that can be deducted out of the multiple forms that are found spread in Romania. The subject of this study does not focus on the economic side of entrepreneurship and the organizational part, such as SME's or financial strategy to enlarge the entrepreneurship area in the country side, the aim of the study being more a qualitative analysis of the rural environment with it's potential of innovation and multiculturality. In this study case, I have taken into consideration a pilot study that addresses to the Transylvania area as an example for the rural entrepreneurship and innovation models that can be developed based on the cultural heritage that can be tangible (touristic objectives) or intangible (customs, tradition ).

In the last half century, in many countries, rural tourism is considered a future strategy that can help reduce population mobility, create jobs, and finally promote socio-economic development of disadvantaged areas. Several elements explain this option:

- rural tourism allows meeting the need for space, opening by practicing recreational, sports and cultural entertainment activities;
- responds to the increasing interest in the natural heritage and rural culture on the part of the urban population, who feels that is lacking the knowledge and pleasure of these values.
- the local government is aware of the opportunity offered by rural tourism (agro-tourism) through its multiplicative effect, which means producing complementary incomes, maintenance a demand for infrastructure and services that interests both the local community and visitors. Studies in France and Norway have shown that the amounts spent for shopping made by tourists in the area, very important in weight, are essential for maintaining and developing commerce and local crafts;

The models shown in the literature review above refer mainly to the *mono-culturalism* entrepreneurship which operates with the idea of consuming culture in different places but mainly with the same traditions and same culture topic. At the extremes, we can find a mono-culturalism model of visiting the cultural heritage, that implies knowing tradition in one place and making the accommodation in a nearby city, for example you visit the surroundings of Sibiu but you choose to make the accommodation in a hotel in Sibiu, so you will "migrate" in order to make the heritage consumption in the near villages knowing the intangible patrimony as customs, tradition, food in a different place, so you will have a *radial consumption* model of rural tourism based on rural heritage.

At the other extreme, it can be found a more *centered model* of mono-culturalism rural entrepreneurship that has into consideration the village-hotel concept that emphases the collaboration between all inhabitant entrepreneurs of the location that provides separately accommodation, food, culture consumption.

In Romania, if we are talking about Transylvania area, certain villages can be considered representative. This area is characterized by multi-culturalsim being a meeting point of some mixed population and tradition such as german, hungarian, romanian, oriental influences, this co-existance leading in time to mixed tradition, mixed culture and mixed activities that particularized the area very much. So, from a rural tourism point of view, we can speak about *ethnographic and folklore tourist villages, tourist villages of artistic and craftsmanship, landscape tourist villages.*

In the category of *ethnographic and folklore tourist villages* can be included the localities where the port traditionally, the architecture, furniture and interior decoration of the tourist village, folk music and folk choreography prevails and is required as the essential attributes of the village. (Talaga, Rural Turism, Course notes,2010)

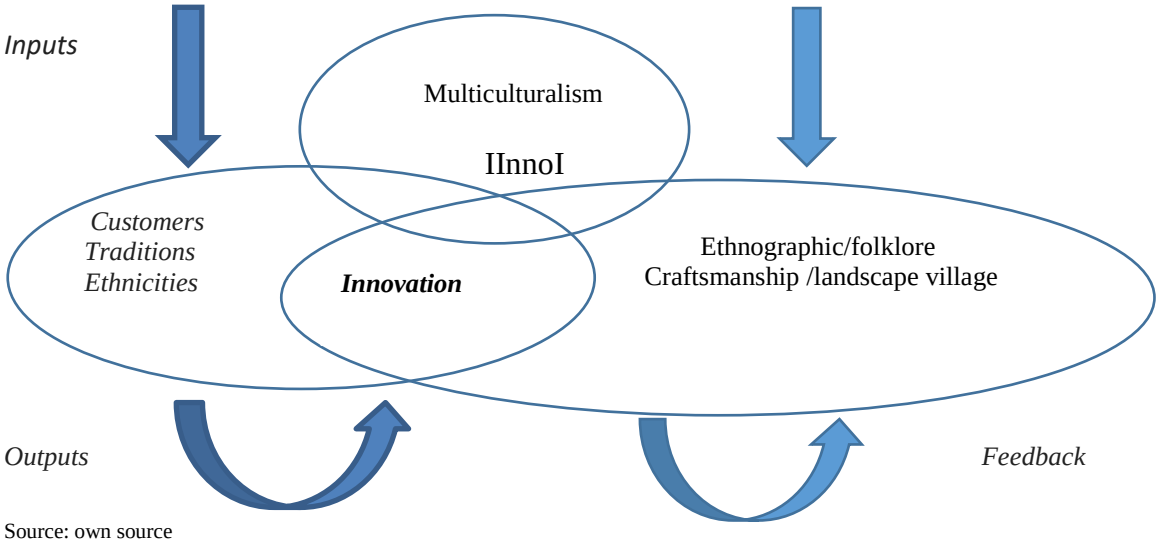
The villages of this type can offer accommodation and dining services to tourists under authentic conditions (furniture, decor, equipment bed linen in traditional style, traditional dishes served in dishes and special cutlery - dishes and dishes pottery, wood spoons etc. Artisanal exhibitions can be organized, and for tourists who do not stay in the locality but only visit it, there can be arranged one or more households with an ethnographic outdoor museum. Also, in these villages popular vocal or instrumental bards can be identified, we can refer also to Sunday horns, and celebrations, other customs and local traditions. (exemplifying those from the localities: Bogdan Vodă, Vaideeni, Lereşti, Sibiel,).

*Tourist villages of artistic and craftsmanship*. The interests of many tourists are known for artistic artistic creation, and their desire to purchase such creations directly from source, by the manufacturer himself. Until now, only local tourism is practiced in these localities circulation. Such villages offer the possibility of practicing a holiday tourism, in which, in specially designed workshops and with the guidance of famous artists and craftsmen, tourists would be able to initiate popular archeological techniques: glass icon, naive painting, wood sculpture and stone, folk weaving, folk clothing and stitches, ceramics, folk music and dances, etc.

We are considering identifying the possibilities of practicing some of these activities, even within of host households. There are many villages where the basic concerns of households are woven peacock woven fabrics, popular stitching or embroidery, activities where tourists can be initiated as amateurs. Therefore, the essential feature of these villages, their brand image, would be artistic and craftsmanship (examples of localities such as Dealu Frumos, Marga, Bucerdea Vinoasa etc.).

The predominant characteristics of *landscape tourist villages*. of these villages (for the quiet, solitary walks in a scenic natural setting) are the natural setting and geographic location isolated from crowded centers and large arteries of circulation. The hill and mountain villages, with homes spread over the valleys and hills at some distance with respect to each other, with meadows or orchards, satisfy the fundamental motivation of the numerous tourists of "returning to nature". Examples are localities such as Valea Viilor, Mărginimea Sibiului.

Figure 4 Multicultural model




Source: own source

Multiculturalism is an undeniable reality and value in both cultural spaces formed in countries with a large contribution of immigrants, as we can see in some cases in Western space and in cultural spaces with a long historical tradition and a structure that requires coexistence between a majority culture and several historical minorities, such as the Romanian case and in particular the Transylvanian area. Transylvania is a special place with historical, ethnic, cultural and ethnographic values distinguishes itself from the other provinces of Romania. A multiethnic history and multicultural traditions have marked forever this region. Romanians, Hungarians, Saxons and Szeklers - very different ethnic groups - have managed to create a unique world, in which the archaic cultural character was preserved.

The Transylvanian villages with Saxon fortified churches offer a lively picture of the landscape cultural heritage in southern Transylvania. Sibiu, the cradle of the Saxon civilization in our lands, bordering on the west with a grouping of Romanian villages that form an ethnographic unit called Sibiu Surroundings . These

villages stand a testimony of the Romanians' cultural identity on these lands.

In the model of developing innovation in the rural entrepreneurship has into consideration the *inputs* and *outputs* of the rural system. In the category of inputs there are external factors and internal factors that can lead to innovation. External factors that can influence can be: location, natural resources, landscape. On the other hand, with external influence can be stakeholders (city hall, investments, public organizations or non-profit organization, social capital) that develop program for rural tourism and sustainability of patrimonial heritage. Features such as ethnicity, customs, traditions, consultancy, financing programs and field of activity ( for example the type of activity that is characteristic for a certain area (evening sittings, sewing, weaving, pottery, embroidery, art of wine making, different local preparations and how to prepare such as "gulas" in Transylvania, etc.). To all of this, to the physical environment and social one, it can be added as a feature of rurality as an entrepreneurial middle, the economic environment (infrastructure, business networks, ICT's)

Or if we are referring to tangible patrimony- the touristic objectives of the area, the cultural patrimony such as mansions (example Ambient mansion situated in Cristian village where the history and tradition of the Saxon crafts are still remarked or such as Apafi mansion, Malancrav build by prince Mihaly Apafi in 1920 and thanks to a Romanian-British NGO who has forced to help traditional rural communities in the Transylvanian region, Apafi Mansion is part of the Mihai Eminescu Trust Foundation's projects.

The internal factors regarding the outputs are the internal features of each ethnicity such as their values, way of thinking, religions that leads to a diversity in the inhabited space that becomes an eclectic rural community which offers a diversified tourism offer.

The motivation in innovating, the level of education are certain factors that influence the multi-culturalism level and that can create important outputs for the community. Regarding the level of education as input for the model, two forms of socializing of the individual can be seen in Romania: the first is based on traditional values, values which are transmitted in a structured way of understanding the world and interacting with it, and the second belongs to the formal education system that is different not only in rural area compared to urban area but also in Eastern Europe.

The two social systems complement each other to a point where the individual will build on those social forms that are closest to their own personality structure. The educational gap is favouring the traditionalist orientation of people living in the rural area at the expense of entrepreneurship of Western origin. This generates risk aversion and reluctance to bank financial instruments that can develop rural area and local economy, based on the principle of the minimum allowed.

The process of innovation can lead to various *outputs*. The innovation is a process that implies a complete circle and it depends of the degree of the innovation strategy (gadget, IT equipment, virtual presentation of the area) and level of entrepreneurial innovation that lead to types of innovation. So, the outputs are important for the development of the area, for their purpose of putting into like different traditions, different kind of particularities regarding a nation or a niche sector. One of the most important output is the effect on the social economy, the social cost, the improvement on the way of living. And if we are talking about a qualitative output, the emphasize is upon the perpetuating traditions, protecting and preserving the rural cultural heritage, improving the living environment of communities, framing the areas in the European coordinates regarding the promotion of cultural heritage and innovation technology.

Rudolf Rezsohazy (2008 ), makes a typology of values regarding rural develpment advancing a classification dividing them into: core values, structural values, peripheral values, final values, instrumental values overall, sectored values, explicit values, default values, hidden values. The persistence of these values related to the specific culture of a nation's culture and social model in culture. (Gabriel Pricina, 2012)

Entrepreneurship models, well applied create impact upon the social economy, reducing the cost of living and contribute to the economic development of the area. This can be seen as the social impact of rural touristic entrepreneurship model. The social economy is an important "employer" with a share of 3.3% of the total number of employees from Romania. (insse.ro)

Besides lower the total social cost, there are positive implication in which regards road construction, sewage and drinking water network. Thus, at the end of 2013, from 31639 km communal roads, only 7% were mostly upgraded being cobbled roads (48%) and earth roads (29%) (insse.ro)

Successful ventures have shown that counter-urbanization and well-managed rural tourism sites can have a positive effect on the area's economic stability and growth. In rural areas, a social enterprise participates in the development of the community as a whole in Sustainable way: Creates jobs for the community or people in difficulty, addresses the problems of each community (education, poverty, promotion crafts, support for local tourism).

Tourists are becoming increasingly interested in rural tourism opportunities, it is necessary to focus on diversifying the tourism offer through the ingenious combination of passive rest with an active involvement in learning crafts and traditions, as well as farm practices in the household, highlighting the educational component of tourism.

For example, in the rural tourism of Romania it can be seen an increase in the number of establishments, increase that lead to a development of agro-touristic tourism and increase in the cultural heritage of the connected areas because big cities like

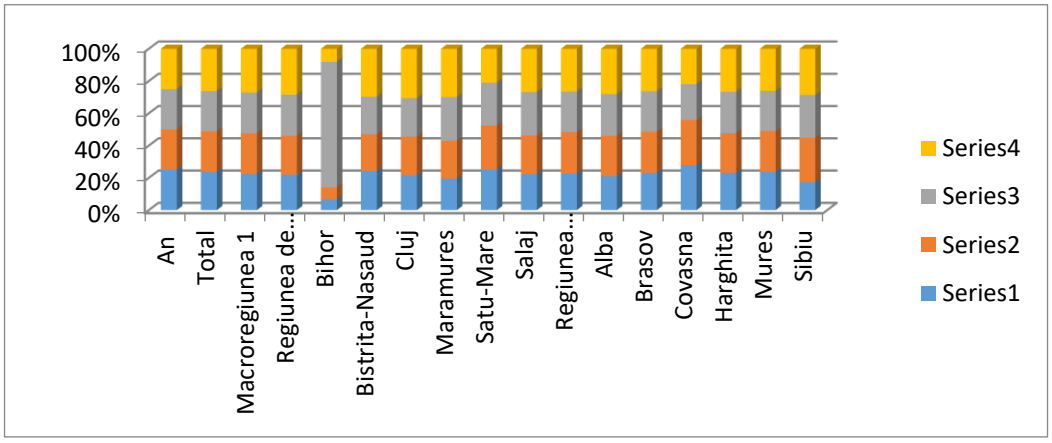
Alba-Iulia, Sibiu, Brasov, etc. act like pole magnets for different type of tourists.

| | 2015 | 2016 | 2017 |
|---|---|---|---|
| Number of establishments | | | |
| Total | 6821 | 6946 | 7905 |
| Hotels | 1545 | 1551 | 1597 |
| Motels | 221 | 218 | 222 |
| Tourist inns | 3 | 3 | 3 |
| Hostels | 248 | 266 | 300 |
| Tourist villas | 643 | 636 | 659 |
| Bungalows | 280 | 288 | 434 |
| Tourist chalets | 196 | 288 | 434 |
| Holiday villages | 7 | 7 | 9 |
| Camping sites | 66 | 61 | 57 |
| Schools and pre-school camps | 63 | 58 | 57 |
| Tourist halting places | 33 | 38 | 40 |
| Tourist boarding houses | 1527 | 1530 | 1666 |
| Agro-tourist boarding houses | 1918 | 2028 | 2556 |
| Houselet-types units | 61 | 59 | 70 |
| Ship accommodation places | 10 | 10 | 10 |

Table 2. Number of rural establishments www.ins.ro, Statistical Brevity, 2018

This data can be related with the development of tourism divided by geographical area that lead, also, to the conclusion that social benefits to the area when rural tourism is managed well. For example, rural tourism in Europe in 2014 provides around 6 million bed spaces in 500,000 establishments, representing around 15% of the total accommodation capacity of Europe. Together with related services, the sector generates more than €100 billion in direct spending. From the corroborated pictures, the one related to rural accommodation such as inn, camping, vacation villages and the one related to total.

Figure 5 Existent tourist accommodation capacity, www.insse.ro, years 2014-2017




existing capacity, we can conclude that the touristic capacity has risen during 2014-2017, the Central region regarding Transylvania has had a capacity 60597 in 2014 and of 71038 in 2017, the most important areas being Sibiu (10902 in 2017), Brasov (29881) and Mures (11491). The big cities act like pole magnets, "selling" also the rural cultural heritage of surrounding villages with social implication of diminishing costs and creating local business, raising the life quality.

In order to support the role of rural tourism with its social benefits, the social networks and stakeholders must be adapted to the rural profile. Social exchange behaviours can involve active positioning within a network. For example, creating strong ties provide support, validation, and market intelligence from stakeholders while fostering weak ties provide information about the macro-environment outside the tourism industry. Therefore, the querie could be to identify and respond to opportunities by facilitating access to technology and social network links between potential entrepreneurs and demand markets.

## Conclusions

In this research, the purpose was to realize a literature review that can summarize the main rural entrepreneurial models starting with predictive models based on innovation, external features of entrepreneurial milieu and internal factors such as motivation, level of education, training and continuing with models regarding pillars of action of rural entrepreneurship development, outlining the importance of developing a proper entrepreneurship education, supporting the economic growth and creating a favourable business environment for entrepreneurs.

The main focus is upon the innovation models and, in this direction, I have proposed two models: one adapted after the main characteristics of rurality (Stathopoulos, Psaltopoulos,2014 ) as an entrepreneurial milieu where the innovation is seen as a pre-stage phases and an own innovation model based on multiculturalism and cultural heritage that has the innovation as a central idea based upon the intersection of various customs, traditions, culture, ethnicities, intangible patrimony, touristic objectives that are to generate social, economic and educational outputs for the rural community with positive feedback for the future generation and, nonetheless, for the growth and sustainability of the present community. It is very important to outline the the cultural and educational positive impact that goes along with the economic and social impact (such as low migration rates, low unemployment ratio, school abandonment, etc) and, also, with the impact of lowering the social costs by creating a favourable rural entrepreneurship environment. The innovation lays at the basis of progress, the process of innovation can lead to various *outputs*, this implies a complete circle and it depends of the degree of the innovation strategy (gadget, IT equipment, virtual presentation of the area) and level of entrepreneurial innovation that lead to types of innovation. The main direction that where outlined regarding the cultural heritage were ethnographic and folklore tourist villages, tourist villages of artistic and craftsmanship, landscape tourist villages, that focus on the idea that multiculturalism is an undeniable reality and value in both cultural spaces formed in countries with a large contribution of immigrants that can lead to multiple inputs and outputs regarding innovation and the methods in which the touristic potential of a rural area can be valorized.

In spite of the fact that the traditional world was unbalanced by eliminating or reducing a component, however, other components of the traditional values have remained present and accounted for substitute work outside the home. The perpetuation of traditional exists in the form of creating rural SMe's, individual firm or family firms or authorized person that can lead an activity in a entrepreneurial framework but the innovation is the key element in boosting tradition and cultural objectives.. It can be observed that after 1990, the trend of returning to areas from regaining ownership, has led to a symbiosis between the two formulas and helped to a new form of minimum entrepreneurship to ensure. The new owners or the potential owners (the future rights of inheritance) compared the alternatives and chose the most convenient formulas by reporting the requirements to ensure their effort. In this context the traditional philosophy was kept, and the rural residents adapted to a modern economic context, so the survival was ensured the minimum by the outsourcing of the economic activities in order to ensure convenient report work-incomes.

Cultural tourism and innovation can be seen as a future model of *cultural consumption based on* the change in the consumption need of tourist consumer that focuses not only in the culture consumption of the visited place but, also, on the attractiveness of the place regarding the innovation techniques and communication equipment that has raised the problem of an adapted entrepreneurship model based on the need of innovation. When a certain area is visited, the consumer of culture or tourism is no longer satisfied only by cultural aspects or dynamics but, also, by the creativeness of the place. The role of creativity in the development of regions and the innovation of new products in order to create attractiveness is becoming important.

Having into consideration the migration problem and the effects of the economic crisis until de present, in the case of Romania, the rural population is the holder of a traditional cultural heritage and, this, in the economy is only one dimension of a complex system.

If the social identity of entrepreneurs is not institutionalized in rural regions, the pre-startup phase may be more properly viewed as a social exchange phenomenon. So, when the community development is set as an objective, there are required cognitive effort and notification in order to meet the need for change and innovation. So, in this context there are important three directions: will of change, perception of innovation, the human and financial resources.

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# PRACTICAL METHODS OF SELECTION AND CALCULATION OF SAMPLE SIZE FOR AUDIT SAMPLING

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**Abstract**

*Audit sampling is very important part of audit works. No mater it is financial audit, internal audit and others kind of audit, audit sampling still need to be used by auditors. Sampling is a process of selecting a subset of a population of items for the purpose of making inferences to the whole population. Accounting populations usually consist of a large number of items (debts values, credit values), often totalling millions of monetary units, and a detailed examination of all accounts is not possible. Statistical sampling allows the auditor to draw conclusions supported by statistical inference. The results obtained for the sample extend, in probabilistic terms to the whole population, obtaining the confidence interval for the errors mean. It is critical that the selected sample to be representative for population.*

*The purpose of this study is to estimate the accounting misstatements related to debts values of 5121 account of an audited company. The study objectives regards determining the sample size to be verified, estimating accounting misstatements of the debts values for the entire population studied. using different statistical sampling methods.*

**Keywords:** *financial auditing, statistical sampling, sample size, materiality, accounting misstatement, confidence interval*

## Introduction

The financial audit represents the evaluation activity made by a qualified person prone to accurately record the fiscal and accounting financial data, to be honest and to undertake only credible economic transactions.

The basic feature of audit is independent of the entity or the auditing activity as well as the global appreciation of the reports issued by this following a critical analysis of its procedures and structures.

The main purpose of an audit mission is to increase the confidence of financial information users, the auditor having to express their opinion on financial reporting in accordance with General Financial Reporting Framework applicable (IFAC, 2013, pp.75).

The methodological approach of a financial audit mission to issue an opinion can be structured in four fundamental phases (Arens et al., 2012, pp. 162). In the first phase, the planning of the audit mission takes place, when the auditor has to set a threshold of significance, in the second phase shall be tested internal control system and performs a series of tests substantial of transactions, in the third phase apply analytical procedures and tests of details of account balances, and in the last phase occurs final review by the responsible mission and issue audit report (Arens et al., 2012, pp. 414-423).

For each of these stage, the auditor should obtain sufficient appropriate audit sampling regarding the existence and functionality of the internal control system, and the main assertions managers on transactions, account balances and other information reported (IFAC, 2013, pp. 405).

The theme chosen aims at studying the audit sampling and other selective testing methods and procedures as this is an extremely important issue especially for the professionals practice in financial audit. The practical procedures of sampling are at the basis of the audit proofs credibility or the financial auditors as well as the auditing entity management are equally interested in it. Moreover, all the users of the information published in the financial situations are interested in its credibility in order not to negatively influence their decisions. The importance of audit sampling is given by the fact that an integral examination of the accounting financial transactions and operations could take as much time as their realization.

## 1. Literature Review

In order to highlight the importance of knowing and using sampling in audit, we take into account the statistical sampling methods met in the specialized literature as well as the methods recommended by the ISA 530 [11], and the audit professional in Romania, issued by the Chamber of Financial Auditors of Romania (CFAR).

At the stage of knowing the units planning and organizing the audit work, the auditor needs to obtain enough data on the applied accounting system and on

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the internal control in order to adapt an effective work plan. Before proceeding on testing, the auditor needs to establish the sample size and the elements selected from the population being tested for each audit procedure.

When the auditor decides to test less than 100%, out of population aiming inferences on the total population it is used the term audit survey or survey auditing. Evaluating the audit survey results represents an essential part and often difficult for the audit process. In this way a series of questions rises as follows:

When is a sample size bigger enough to allow for evaluating the characteristics of a population? Does a sample correctly represent the accounting information?

*A representative sample* is that in which the auditing characteristics are approximately identical to those of the population. That means that the elements included in the sample are similar to those which remain out of it.

The auditor does not quantify a sampling risk in the non-statistical survey. In turn, he chooses to analyze the sample's elements which will provide, in the auditor's opinion and under the given circumstances, the most useful information. The conclusions on the whole population could be drawn in terms of a subjective judgment. For this reason, the non-probabilistic sampling is often called *"rationalized sampling"*. The statistical survey distinguishes from the neon-statistical survey as it allows for quantifying (measuring) the sampling risk within the survey planning and result evaluation by using a series of math patterns. During the courses of statistics, a statistical result is computed at the confidence level of 95%. The confidence level of 95% generates a sampling risk of 5%.

The auditor has the option to choose between a statistical and a non-statistical sampling technique. The three steps to follow, irrespective of whether a statistical or non-statistical technique will be employed, are sample size determination, selection of the sample, and the evaluation of the sample results (Guy et al., 2002:2; IFAC, 2012d ISA 530 par. 6-8).

Hitzig (2004, pp 31) points out that the implementation of a statistical or a non-statistical sampling technique is determined by the sample selection method, and should not simply be an arbitrary decision to apply/not apply statistical techniques, made by the auditor. In addition, the ISA on Audit Sampling 530 (IFAC, 2012d ISA 530 par. A9) indicates that the sample size cannot be used as a criterion to determine whether to use statistical or non-statistical techniques. The choice of non-statistical sampling techniques does not imply the use of smaller sample sizes in order to provide sufficient audit evidence (Crous et al., 2012, pp 257-258).

Gul (2008, pp259-260), mention some principal advantages of statistical:(1) statistical sampling will help the auditor to calculate a precise and reliable confidence level , (2) statistical sampling demands an auditor to properly plan an audit procedure in a systematic and scientific manner, (3) statistical sampling will permit the auditor to interpret sampling results in an objective manner base on the value of statistical precisions and reliability, (4) statistical sampling will permit an auditor to rely on a smaller sample than would have been the case if nonstatistical sampling was to be used.

A sample selection method that an auditor will prefer to use in the process of selecting a sample will largely depend on whether the auditor is using statistical or a nonstatistical sampling approach. However, there are some sample selection methods that can be used for both statistical and nonstatistical audit sampling approaches such as random sample selection method, systematic sample selection method or stratified sample selection method. On the other hand, haphazard, block, or directed sample selection methods are usable in situations where the auditor has chosen to use a nonstatistical sampling approach (Tate & Grein, 2009, pp.171).

Jaba et al (2014) determined the sample size of the customers to be verified, extracting the sample using SPSS 20.0 statistical program.

## 2. Paper Content

In the proposed study, we refer to the theoretical and practical methods used in the selection of the elements for the testing within an audit process. Here are some methods for selecting the sample, determining its volume and the confidence interval for the population average.

In this study, we analyze the financial statement of an audited firm.

**Defining the population**

The characteristics of the population are summarised below: 5121 account status (current bank account) of the audited company is as follows: N = 459 items representing the whole population, total credits = 72,566,389.00, total debts = 72,299,809.00. The sampling base is the debit balance. The difference between the accounting data and data from primary documents will be the "error" or "accounting misstatement".

**The main objective**

The main objective of audit sampling is to detect any kind of error or fraud that could happen in the company as well as financial statements. This involves testing the correctness of calculation by estimating the number of errors mean. The objective of the auditor, when using audit sampling, is to provide a reasonable basis for the auditor to draw conclusions about the population from which the sample is selected.

**The variability of population**

In devising their samples, auditors must ensure that the sample selected is representative of the population. If the sample is not representative of the population, the auditor will be unable to form a conclusion on the entire population. Before selecting

the sample, the auditor should evaluate the homogeneity of the population. It is determined by calculating the coefficient of variation $v = \frac{\sigma}{\bar{X}} \cdot 100$. If $v \leq 35\%$, population is considered homogeneous. If $v > 35\%$, population is heterogeneous, the variation is very high, the average is not representative and the group must be restored. Thus, the auditor will use to stratify the population to reduce the high variability of the elements, by dividing it into subpopulations. Reducing variation within each population allows the auditor to draw a smaller sample, keeping the same level of confidence and precision.

**Establishing acceptable sampling risk of 5%.**

Thus, the confidence level is set a priori to 95%, while in reality, for certain types of operations, such as unacceptable levels. An audit risk of 5% could also be very high in some cases. The auditor can determine the elements for each task or type of population, depending of their specific, and it is advisable to do so. Only in this way, the audit evidence obtained by analyzing the results of a representative sample may be relevant and credible.

**The sample size**

The sample size calculation was performed using several versions presented below.

**Extraction of the sample and performing audit procedures**

The sample extraction can be done using several selection methods. In the following we present three such methods.

**Inferential statistics**

The results obtained for this sample extend, in probabilistic terms to the whole population, obtaining the confidence interval for the number of errors mean.

### 3.1. Selection methods

#### 3.1.1. First selection method (systematic selection of the sample)

This method involves selecting items using a constant interval between selections, the first interval having a random start. We assume that the auditor proposes to choose 10% of items to create the sample. Then, $n = 10\% \cdot N$=45 items for the sample. In this case, the sampling interval is $\frac{N}{n} = 10$. Thus, every 10th sampling unit is selected (from 10 to 10 starting from a first randomly selected item).

The auditor chooses, according to the audited company, a maximum materiality level. This level differs from one company to another, and is measured in units of currency.

When applying a statistical method, the audit authority will estimate most likely misstatement in the population and compare this to materiality in order to evaluate the results. It is expected that the actual known errors found will be corrected. If the obtained difference (accounting misstatement or error) between the accounting data and the primary documents data is below the materiality level, then it is said that the error is insignificant. If the accounting misstatement is greater or equal than materiality level, the error is significant. In case an significant error occurs, it must be either corrected, or displayed accordingly. Consequently, the auditor will consider it when providing the audit report (in this case the auditor's opinion may be full responsability or limited responsability).

For example, the auditor choose a sample of 45 items, 10%, randomly. Suppose for $n_0 = 40$ items, there was insignificant misstatements and for $n_1 = 5$ items, the errors were significant. Let, B, be a binary random variable:

$$B = \begin{pmatrix} 0 & 1 \\ \hat{p} & \hat{q} \end{pmatrix} = \begin{pmatrix} 0 & 1 \\ \frac{40}{45} & \frac{5}{45} \end{pmatrix},$$

where $\hat{p} = \bar{X} = \frac{n_1}{n_0+n_1} = \frac{5}{45}$ is the error sample proportion and $\hat{q} = \frac{n_0}{n_0+n_1} = \frac{40}{45}$ is the correct sample proportion. The sample variance is $S^2 = \hat{p}(1-\hat{p}) = \hat{p} \cdot \hat{q} = \frac{5}{45} \cdot \frac{40}{45} = \frac{200}{45^2}$ and sample standard deviation will be $S = \frac{\sqrt{200}}{45} = 0{,}314$.

Assuming that the auditor selects without replacements sampling, then the confidence interval for whole population errors mean is

$$\bar{X} - Z_{1-\frac{\alpha}{2}} \cdot \frac{\sqrt{S}}{n} \cdot \sqrt{1-\frac{n}{N}} < \mu < \bar{X} + Z_{1-\frac{\alpha}{2}} \cdot \frac{\sqrt{S}}{n} \cdot \sqrt{1-\frac{n}{N}} \quad (1)$$

where

$\bar{X}$ = sample mean,

$N$ = the whole population size,

$n$ =the number of units being sampled,

$Z_{1-\frac{\alpha}{2}}$= a $Z$- normal value corresponding to confidence level $1-\alpha$, or to the $\alpha$ audit risk,

$\mu =$ the number of errors mean in the whole population (the expected error frequency or the expected number of misstatements, not their values).

In performing audit sampling procedures, the auditor is interested to estimate the confidence interval of the errors mean value that could occur in the debts of 5121 account.

Thus, the confidence interval is defined by the limits of:

$$\left[L_{inf\_accounting\_misstatement}; L_{sup\_accounting\_misstatement}\right]$$
$$= \left[\bar{X} - Z_{1-\frac{\alpha}{2}} \cdot \frac{\sqrt{S}}{n} \cdot \sqrt{1-\frac{n}{N}}\ ;\ \bar{X} + Z_{1-\frac{\alpha}{2}} \cdot \frac{\sqrt{S}}{n} \cdot \sqrt{1-\frac{n}{N}}\right] =$$
$$= \left[\frac{5}{45} - 1.96 \cdot \frac{0{,}314}{45} \cdot \sqrt{1-\frac{45}{459}};\ \frac{5}{45} + 1.96 \cdot \frac{0{,}314}{45} \cdot \sqrt{1-\frac{45}{459}}\right] =$$
$$= [2{,}4\%;\ 19{,}8\%]$$

The maximum number of misstatements the auditor can expect in the population, based on the sample, at a 95% confidence level, is 19,8%.

#### 3.1.2. Second Method (block selection followed by a statistical or a non-statistical selection)

In situations when the auditor uses block selection as a sampling technique, many blocks should be selected to help minimise sampling risk. An example

of block selection is where the auditor may only examine the documents values that are higher than 500,000. For the rest of items, the auditors use the first method of selection or even use a non-statistical method, the mechanical one. Depending on the number of errors found, the sample can be increased.

**3.1.3. Third Method selection (without replacement simple randomly selection)**

Sampling without replacements provide the sample size to be extracted, calculated using the formula:

$$n = \frac{\frac{Z^2_{1-\frac{\alpha}{2}} \cdot S^2}{2}}{\frac{Z^2_{1-\frac{\alpha}{2}} \cdot S^2}{\Delta^2_{\bar{X}} + \frac{N}{N}}} \quad (2)$$

where $\Delta_{\bar{X}} = Z_{1-\frac{\alpha}{2}} \cdot \frac{S}{\sqrt{n}}$ is tolerable error,

$\frac{S}{\sqrt{n}}$ is standard error,

$S^2 = \frac{\sum_{i=1}^{n}(x_i - \bar{X})^2}{n-1}$ is the sample variance estimator.

As neither $\Delta_{\bar{X}}$ nor $S^2$ are known, invariably depending on the sample size, the above formula can not be determined. In fact, empirically, however, it can be determined. Below are three alternatives for computing of the sample size.

**3.2. Alternatives for computing of the sample size**

**3.2.1.Version 1 for computing of sample size (S is assumed to be known )**

However, given the fact that the firm activity, procedures, the company employees, accountants have not changed in time, the auditor considers that historical data may be used to estimate the standard deviation in the population. In practice, the auditor will have to rely either on historical knowledge (standard deviation of the population in the past period) or on a preliminary sample (the standard deviation of which being the best estimate for the unknown value).

Based on a randomly selected sample of operations, the size of which has been computed according to the formula (2) and for a tolerable error $\Delta_{\bar{X}}$, defined by the auditor (at the level of the operations, e.g. 1% or 2% from total debts), the observed misstatement mean in the sample can be projected to the whole population, yielding the expected population misstatement. The sampling error can then be added to the expected population misstatement to derive an upper limit to the population misstatement at the desired confidence level (e.g. 95%).

**3.2.2. Version 2 for computing of sample size (S determined from a pilot sample)**

**Version 2.1.** The first step, for the auditor, is to filter the sampling base to eliminate the values exceeds the materiality. These items must be tested individually. Eliminating from the 459 items, those with debts values are greater than materiality, a new sampling basis is obtained.

The second step is to determine the standard deviation for the rest of items, named the pilot sample. The next step is to compute the tolerable misstatement, which is 1% of the total book value. From this information, the sample size can be determined as

$$n = \frac{1{,}96^2 \cdot 49{,}3^2}{7{,}81^2 + \frac{1{,}96^2 \cdot 49{,}3^2}{459}} = 29{,}881 \approx 30 \; units$$

If the sample size, *n*, exceeds 5% of the whole population size, then the Cochran correction form for the sample size can be used

Thus,

$$n_{Cohran} = \frac{n}{1+\frac{n}{N}} = \frac{30}{1+\frac{30}{459}} = 28 \; units$$

The 28 units will be included in the sample and will be tested. For an assumed risk of 5%, the auditor can expect accounting misstatement mean will be covered by the confidence interval shown in (1).

**Version 2.2.** Alternatively, the auditor could select a $n'$ value of the sample (according to Method I of selection). The evaluation is sumarized in the table below:

| No. | Data from primary documents | Accounting data | Difference (error, accounting misstatement) |
|---|---|---|---|
| 1 | | | |
| 2 | | | |
| ⋮ | | | |
| $n'$ | | | |

For these debts values, data from primary documents will be compared with the accounting data and the difference will be note, if it occurs. For this pilot sample, created randomly, the standard deviation, *S'*, corresponding to the errors found, will be calculated. A new value *n* will be calculated with (2) formula

$$n = \frac{Z^2_{1-\frac{\alpha}{2}} \cdot S'^2}{\Delta^2_{\bar{X}} + \frac{Z^2_{1-\frac{\alpha}{2}} \cdot S'^2}{N}}$$

where tolerable misstatement, $\Delta_{\bar{X}}$ is 1% of the total book value.

The auditor will compare this new *n* value, with the *n'* value used in establishing the tested sample. If $n \leq n'$, then it is no longer necessary to increase the basis for selection. If, however, $n > n'$, then the auditor will have to increase the sample with *n'* - *n* units.

## 3. Conclusions

When auditing a company, auditors use a combination of professional judgment and statistical sampling methods to estimate account balances. The concept of "sampling method" actually encompasses two elements: the selection method (statistical or non-statistical) and the actual sampling method, which provide the framework for computing sample size and allowing for projection of the results. There are various sampling methods available to auditors and ISA 530 [11] recognises, the standard itself covers the principal methods. In reality there are a number of ways in which sampling can be applied. If the audit authority is of the opinion that the sampling method initially selected is

not the most appropriate one, it could decide to change the method.

In the case study three selection methods were featured: a systematic selection of the sample, a block selection followed by a statistical or a non-statistical selection, respectively without replacement simple randomly selection. Also, there are three alternatives for computing of the sample size. We presented how the standard error and confidence interval are calculated, and the interpretation of the confidence interval. The latter is especially important for explaining findings to others who may not have much understanding of statistics. Future works includes stratification in a particular case of heterogeneous population.

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# BOUNDED RATIONALITY IN DECISION-MAKING

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**Abstract**

*The purpose of this paper is to study the relationship between rationality and decision making. As a specific objective it will be explained the benefit of learning in the decision making process derived from its results. The research question is: How does bounded rationality impact the decision making of organizations? The initial hypothesis is that the organization, as a social system, seeks to maintain the balance between the behavior that determines the positions of people and the structure of values and beliefs shared among them, but that is bounded to the rationality of the decision maker. The research method used is descriptive, being a qualitative analysis, that follows from the understanding of the behavioral theory of the firm also the behavioral decision theory, in terms of behavioral decision-making processes and the analysis through learning. The main conclusion is that bounded rationality occurs when companies lack context information of the results of their actions, being forced to make less than optimal decisions because they have to adjust to the conditions in which they operate. Decisions involve a commitment of large amounts of resources of the organization for the fulfillment of the objectives and purposes of the organization through the appropriate means. These means can be translated into models that help reduce the limits of rationality in organizations.*

**Keywords:** *Decision making, bounded rationality, learning process.*

**JEL:** *D91, G91*

## 1. Introduction

This document is a reflection of the decision-making process in organizations, and the growth of companies through the behavioral theory of the firm. Decision making is analyzed from the point of view of bounded rationality, this with the aim of clarifying how decisions are made considering the human aspect of who decides. From a general point of view, the decision is an act that leads to the action of choosing between different alternatives. The adequate selection of these depends, to a large extent, on their success or failure, since they must cover the risk, certainty and uncertainty inherent in the decision and the action (Egan, 2007).

In organizations there is evidently a complex network of decisions and actions, the latter consisting of events that can be attributed to a system (Luhmann, 1997), while the decision finds its identity in the choice between alternatives, understanding that the decisions are much more sensitive to context than actions and, therefore, not equal to stable. Simon (1947) describes how organizations influence the decisions of their members, trying to make them compatible with the global objectives of the organization.

The theory of decision making, under different schemes, indicates the steps for a decision to be rational (Eduards, *The theory of decision making*, 1954). The people in charge try to do it this way, but in the real world it is not always possible. It is argued that an adequate study of human behavior in organizations should take into account the motivational, attitude and rational aspects of human behavior. In this way, both the works of economists on planning processes and the work of psychologists on organizational communication and problem solving capacities (March and Simon 1958), cited in (Vargas-Hernández, Guerra-García, Bojórquez-Gutiérrez, & Bojórquez-Gutiérrez, 2014).

In this regard, Cyert & March (1963) in their book "*A Behavioral Theory of the Firm*" offered four main research topics; a) A small number of key economic decisions, b) Development of a general theory, generalizing the results of studies of specific companies, c) Linking empirical data to models, d) Orientation towards the process instead of the results. They argue that, the behavior approach takes the company as the basic unit of analysis, trying to predict the behavior with respect to the decisions of price allocation, production and resources; the decision-making process is emphasized.

On the other hand, economists and some psychologists have produced a large number of theories and experiments that have to do with decision-making with a particular focus on rational behavior.

Alfred Marshall proclaimed in his principles of economics that economics was a science of psychology, stating:

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Economy is a study of humanity in the ordinary business of life; examines that part of individual and social action that is most closely related to achievement and to the use of material welfare requirements. Therefore, it is on the one hand a study of wealth; and on the other hand, and more importantly, a part of the study of man. Because the character of man has been shaped by his daily work and the material resources that he therefore seeks, rather than by any other influence, unless it is that of his religious ideals. Marshall, 1890, (quoted by Simon, 1979, p.493)

Subscribing to the previous contribution, Simon (1979) mentions that economic science has focused on a single aspect of human character, which is the use of reason, and particularly the application of it to problems of decision making. The organization, as a social system, seeks to maintain the balance between the behavior that determines the positions of people and the structure of values and beliefs shared among them, that import a certain order between individuals and the dynamics of organizations.

The behavioral theory of the firm takes from the theory of games, and research of operations, between several branches of social sciences in which there is interdependence and complementarity; models to express a way of anticipating problems, and simulate a solution of them in a given context. This document will not address these models in detail.

Why bounded rationality? Answering this question is not possible only in one way, that is why Conslick (1996) provides four reasons; the first, there is abundant empirical evidence that is important. Second, models of bounded rationality prove themselves. Third, justifications that assume that rationality is not bounded are not convincing in general. Fourth, the deliberation of an economic decision is a costly activity and a good economic decision requires that all costs be covered.

## 2. Background of the study of bounded rationality in decision making

In recent years there has been growing interest in the description of decision making that refers and analyzes the way people perform these actions in real contexts, which mostly prevents them from taking them rationally and in what conditions they will actually be relatively rational. This problem was analyzed by Barnard (1938), in which he defined formal organization as a consciously coordinated system of activities or forces of two or more people; He also emphasized the role of the informal organization, in which the individual personality is maintained against certain effects of the formal organization that tends to disintegrate the personality. In fact, Barnard (1938) concludes that: "the expansion of cooperation and development of the individual are mutually dependent realities, and that due to a proportion or balance between them is a necessary condition for human welfare" (p. 16).

This of course is related to the incentives of formal organizations, which are related to the social capacity in which people feel in the work environment, the condition of communion or camaraderie. On the other hand, authority is also mentioned as the character of a communication or order in a formal organization by virtue of which the dependents accept that order. The latter has greater impact on the issue of decision making, since the holder of the authority must have the rationality to take an action from among the alternatives within his reach and communicate this to his dependents through the authority that he enjoys.

From this point one of the fundamental problems of the organizations with respect to the communication begins, since the signature is considered like a processor of information more efficient than the individual, having failures in the communication or understanding, deriving from her a complex system cognitive called bounded rationality, of which the behavioral theory of the firm centers its study (Simon H., 1955).

After Barnard, one of the authors of the *Behavioral theory of the firm*, Herbert Simon, describes the importance of organizations in the decision-making of its members, considering these organizations remove such individuals as part of their autonomy and replace it with an organizational process of decision making (Vargas-Hernández et al., 2014). In this theory is provided a self-conscious attempt to develop linguistic and conceptual tools appropriate to reality, and meaningfully applied to organizations. The main thesis of Simon (1947) is that decision making forms the heart of the organization, and that the vocabulary of organizational theory must be derived from the logic and psychology of human choice.

From the perspective of the vision of rational systems, the behavior of organizations is considered as actions carried out by determined and coordinated agents. In this sense, Simon (1947) is consistent with the logic of economics and uses the flow of information, efficiency, implementation and design. Insists on reaching good terms with cognitive limitations, implying that the rationality of the behavior of organizations with clearly specific limitations. Regarding bounded rationality, Simon (1947) observes that a person does not live for years in a particular position in an organization, exposed to some currents of communication, protected from others, without profound effects on what the person knows, believes, wait, emphasize, fear and propose.

So, the organization provides positions of responsibility to exercise authority and influence over others, executives who make decisions and take actions, they must do so with an eye on the situation and another eye on the effects of this decision and future effects on the organization. This means that decisions are also influenced by the authority relationship. The major contribution of Simon (1947) to the economics of the organization is the argument

that it is precisely in the realm where human behavior is intentionally rational, but only in a bounded way.

Organizational behavior is the theory of intentional and bounded rationality: it is about the behavior of humans that satisfy because they do not have the capacity to maximize (Simon, 1947). While the "economic man" maximizes and selects the best alternative among all available, the "man of the organization" satisfies, seeks a course of action that is satisfactory or "good enough." The economic man deals with the real world "in all its complexity. The world organization that man perceives is a drastically simplified model of the real world (Eduards, *The theory of decision making*, 1954).

The limits of rationality are the central theme that is addressed in this document. Rationality requires a choice between all possible alternative behaviors, in reality only a few of those alternatives come to mind. Complete rationality is "bounded" by the lack of knowledge. At the simplest level, performance may be bounded by manual dexterity or reaction time, and decision-making processes may be bounded by the speed of mental processes (Simon., 1979). Individuals are also bounded by their values and the conceptions of purpose that influence them in making their decisions, and these tend to be shaped by their organizational experience.

For example, if the loyalty of the executives of the organization is high, their decisions can show sincere acceptance of the set of objectives given within the firm. As mentioned above, people are bounded by their knowledge of the relevant factors for their work. This limitation applies both to the basic knowledge required in decision-making (bridge designers must know the fundamentals of mechanics) and to the information required to make appropriate decisions in a given situation.

On the other hand, Cyert & March, (1963) proposed that companies in reality, aim to "satisfy", instead of maximizing their results. That is, some groups can settle for "good enough" achievements instead of fighting for the best possible outcome. Again, this comes from bounded rationality. In the authors' model, the objectives are not established to maximize the relevant magnitudes, such as profits, sales and market share. Instead, the objectives are commitments negotiated by the groups of the organization. In the decision-making process the information is required to take the most appropriate, however, the collection of information by itself has a cost and requires resources.

The information is not transmitted immediately or automatically from its point of origin to the rest of the organization. Vargas-Hernández et al., (2014) affirm that there is often a lack of information transmission upwards, simply because subordinates cannot visualize the information with precision that their superiors need. These authors suggest that the problem also exists in an inverse situation, since the superior can retain information from subordinates; It can be accidental or fraudulent. This is a weight variable that affects rationality, again limiting the feasibility with which decisions are made.

This current work focus on investigating the close relationship of the decision-making process and the rationality in them. Then the following research question will be pursued: What is the impact of bounded rationality in the decision making of organizations?

In the study, only the relationship between the decision factor is analyzed, which in this case will depend on the bounded rationality of the person who performs the decision actions and what to do with the behavioral theory of the firm.

## 3. Conceptual theoretical review

### 3.1. Bounded rationality

It is known that behavior can be rational or irrational, then, it could be inferred that preferences, beliefs, expectations and the decision-making process are also. Cyert and March (1963) mention that the company is an institutional, functionally rational response to uncertainty and bounded rationality. How much of this can be observed in reality is to be doubted. Rationality in the real world is a complex concept, due to which there are numerous research works that argue that rationality is bounded by the lack of knowledge.

Human beings struggle for rationality, but it is restricted within the limits of their knowledge. The rational choice is feasible as the bounded set of factors on which the decision is based corresponds to a closed system of variables, Vargas-Hernández et al. (2014). This indicates that decisions can be made without taking into account the possible results derived from knowledge biases. A branch of the social sciences that tries to mitigate these biases, along with the economy, is operations research, however, the behavioral part is incorporated into these areas to try to explain and solve the limitations of the decision making in the firms.

A decision can be called objectively rational, if, in fact, it is the correct behavior to maximize the values given in a specific situation. A decision is subjectively rational if it maximizes achievement relative to the subject's actual knowledge (Mahoney Joseph, 2012). From this it can be inferred that an action is consciously rational insofar as the adjustment of the means to the ends is a conscious process. This resembles what economic man (*homo economicus)* represents, since it has characteristics such as being fully informed, sensitive and rational.

An economic man according to the theory of the decision, has complete information, assuming that he knows not only all the courses of action, but also his results. It is sensitive to the available alternatives. The crucial fact about the economic man is that he is rational. This means that their preferences are complete, transitive and that there are perfect substitutes; and on the other hand he makes his

decisions to maximize his utility (Eduards 1954). The same author refers to the behavior in the decisions, mentioning that humans are neither perfectly consistent nor perfectly sensitive.

The above makes sense to the extent that it is understood that in the tensions that exist between society and the individual, there is a great demand to compete within the individual conscience. Where rational economic approach is to think individually, as well as the economic man who seeks to maximize its utility derived from instrumental rationality (rational choice). And since the capacity of the human mind to formulate and solve complex problems is very small compared to the size of the problems, whose solution is necessary for objectively rational behavior in the real world, instrumental rationality becomes, so to speak, bounded rationality.

The Theory of the instrumental rationality or rational choice, assumes that, in a situation of decision, the means, the information, the beliefs and personal analyzes, are optimal; the estimates of probabilities are easily realizable; the individual has at his disposal information about all possible alternatives and has a complete and consistent system of preferences that allows him to make a perfect analysis of all of them. It does not present difficulties or limits in the mathematical calculations that it must carry out to determine which is the best, therefore, it guarantees that the chosen alternative is a global optimum (Aumann, 1997).

The theory of bounded rationality, sees the decision process from a very different point of view. In the decision-making process, even in relatively simple problems, a maximum cannot be obtained since it is impossible to verify all possible alternatives. People differ in both available opportunities and desires (influenced by environmental factors). When an individual must decide, they influence him, both the desires that he possesses and the opportunities that he thinks he has. It is not certain that these beliefs are correct: it is possible that the individual is not aware of some opportunities that are actually viable to him or, he may believe that certain opportunities are favorable to him, which in reality are not, therefore it cannot be guaranteed that choose the best alternative (Elster, 1990).

As mentioned in Vargas-Hernández et al. (2014), about bounded rationality, referring to the fact that human behavior is rational first intention, but bounded by information asymmetry. And as mentioned earlier, the ability of the human mind to formulate and solve problems is small and is bounded by neuropsychological issues on the one hand and language limits on the other. Physical limits are the individual abilities to receive, retrieve and process information; those of language refer to the inability of individuals to articulate their knowledge or feeling by the use of a word, so that they can be understood by others (Williamson, 1979).

Table 1. Comparative Rational Choice and Bounded Rationality

| Bounded rationality | Rational choice |
|---|---|
| Necessity of assistance of the bounded mental capacity of the subject that decides. | Unbounded cognitive ability of the subject who decides. |
| Knowledge of an acceptable set of actions | Knowledge of all available actions. |
| Approximate and heterogeneous knowledge of the consequences. | Numerical knowledge of all the consequences of actions. |
| Evolutionary and unsettled preferences. | Stable and ordered preferences. |
| Temporary and cost limitation that affects the quality of the decision. | Unbounded or non-influential resources in the decision-making process. |
| Search for a satisfactory result | Search for the best possible result |
| Help the one who decides to understand what will happen if he does something. | Inform the one who decides about what to do. |

Source: Own elaboration with data from Simon (1957) and (2000).

### 3.2. Decision Making

The theory of the decision under the behavior Paul & Fischhoff (1977), mentions that the decisions taken under a system of perceptions have, in a certain degree, to do with the uncertainty about the states of the environment in which the decision maker is. For example, who takes an umbrella depends on something that is not known with certainty that is the weather; or if you are a smoker, the decision will depend on the point of view of the loss of health due to smoking.

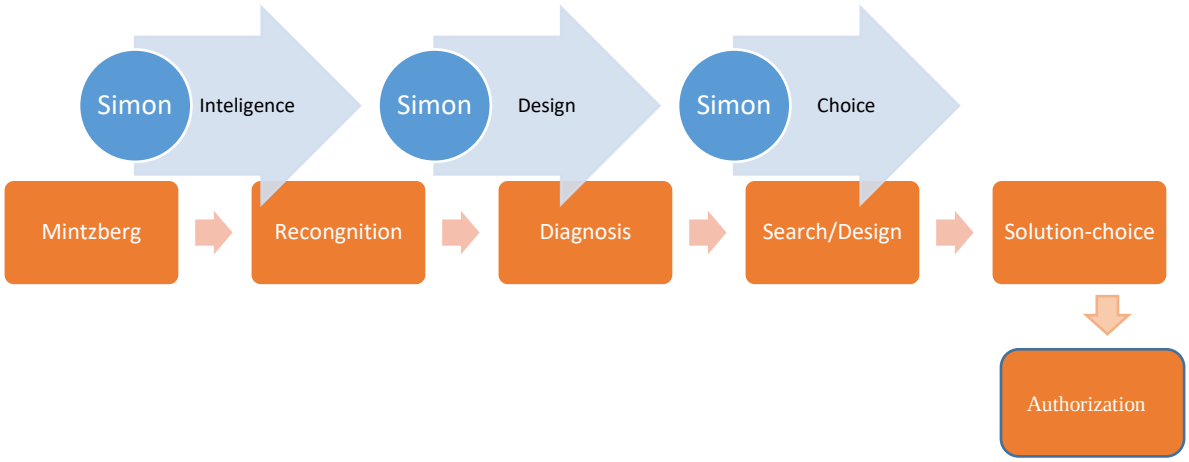
With this respect the theory of the decision making of Eduards (1954), three main ideas are assumed, first of all, there are options to choose from, so if a doctor wants to measure the reflexes when hitting the knee with a Neurological hammer, produces an automatic reaction, therefore there is no decision made (by the patient). However, from the doctor's point of view when he chooses between the two knees of the patient to hit, he makes a decision, because he has options (the legs). So, the theory of decision is about deciding with different options.

Second, this theory assumes that decisions are made in a non-random way. So it does not make sense to investigate the mechanisms of decision making, if these decisions are random. And finally, as a third point it is assumed that the decisions are oriented in specific

goals. In general, decision theory is concerned with goal-directed behavior, in the presence of options.

Paul & Fischhoff (1977) mention that there are two types of decision theories; normative and descriptive. The first, explains how decisions should be made, the second describes how decisions are actually made. The behavioral decision theory in a descriptive way tries to explain the real behavior. In this context it makes sense to separate the decisions in different stages, then, different philosophers and psychologists, and scientists, separated the decision-making process in different stages, but more or less, all of them suggest, that first, we identify the problem, then, we collect information related to the problem; solutions are produced, alternatives are evaluated and finally selected among them. Figure 1 explains the above.

Figure 1. Comparison of the states of the decision process.




Source: Own elaboration with data from Simon (1982) and Mintzberg et. to the. (2001).

### 3.3. Behavioral theory of the firm

The behavioral theory of the firm has had an enormous influence on the theory of organization, strategic management, and socio-scientific research fields. Its central concepts have given motivation and foundation of theoretical and empirical works focused on the organizational phenomenon. In the present investigation the behavioral theory of the firm is used to explain the relationship in decision making and bounded rationality. The authors are mentioned, Barnad (1938) studied the functions of executives; where he emphasized the role of the individual personality in the informal organization, which subsists against the current of the formal organization. In the studies of administrative behavior, Simon (1947) and organizations March & Simon (1958), a behavioral theory of the firm Cyert & March (1963), were three contributions of the Carneige School that founded the scientific studies of the administration and behavior of the signature. Again Simon (1982) publishes a paper entitled *"Models of Bounded Rationality"*. In the following paragraphs their contributions that form the behavioral theory of the firm will be analyzed.

**3.3.1. The functions of the executive of Barnard (1938).**

Barnard (1938) notes that successful cooperation is an abnormal condition rather than normal. In his work it is mentioned that, within innumerable failures of cooperation, it can see successes that survive these. Both the failures of cooperation and those of the organization are characteristic of human history. Its purpose is to provide a comprehensive theory of cooperative behavior in formal organizations. The main characteristics of the contribution of Barnard are: The willingness to cooperate, the ability to communicate and the existence and acceptance of a purpose. In this work it is argued that there is a zone of indifference in each individual, in which the orders are accepted without consciously questioning them about their authority.

It is pointed out that the art of executive decision making consists in not deciding questions that are not pertinent, in not deciding prematurely, in not making a decision that cannot be made effective, and in not making decisions that others must make. Such good judgment of the executive preserves morality, develops competence and preserves authority.

It is concluded that the expansion of cooperation and development of the individual are mutually dependent realities, and a due proportion or balance between them is a necessary condition for human well-being, Barnad (1938) cited in Mahoney (2012).

**3.3.2. Administrative behavior of Simon (1947).**

Simon's main thesis is that decision-making is the heart of the organization and must be derived from the logic and psychology of social choice. Three roles of the organization are highlighted: Organizations influence people's habits, organizations provide means to exert authority and influence over others; and organizations influence the flow of communications. Simon (1947) argues that it is precisely in the realm where the behavior is intentionally rational, but only in a bounded way, that there is room for a true theory of organization.

Organizational behavior is the theory of intentional and bounded rationality. In this sense, the term bounded rationality is used to designate a rational choice that takes into account the cognitive limitations of the person responsible for decision making, limitations of both knowledge and computational capacity. Bounded rationality is a central issue in the behavioral approach to economics, which is deeply rooted in the ways in which the actual decision-making process influences the actions that are taken.

Considering the brain as a scarce resource, Simon (1947) states that the information processing systems of modern civilization swim in an extremely rich soup of information. In a world of this kind, the scarce resource is not information; it is the processing capacity to attend to the information. Attention is the main bottleneck in the organization's activity, and the bottleneck becomes increasingly narrow as we move towards the top of the organizations.

**3.3.3. Organizations de March & Simon (1958)**

This model imposes a responsibility on the managers, which is to continuously seek to complement the information of their assignment of tasks. An organizational model that neglects economic incentives will be, for most humans, a poor predictive model; and the behavior of the organization can often be predicted by knowing previous behaviors and routines (March & Simon, 1958).

The characteristics of its organizational structure model was the optimization was replaced by the "satisfy", the alternatives of the action and its consequences are discovered sequentially through the search process, and each specific action deals with a bounded range of situations and a bounded range of consequences. It can be interpreted as the search is partially random, but in the effective search for problems is not blind, given that the design of a search process by itself is often an object of a rational decision (Mahoney Joseph, 2012)

**3.3.4. A behavioral theory of the firm of Cyert and March (1963)**

His work contains four research commitments: 1) Focus on a small number of key economic decisions made by the company; 2) Develop models oriented to company processes; 3) Link the company's models as close as possible to the empirical observations; and 4) Develop the theory with generality beyond the specific studies of the companies.

According to Cyert & March (1963) the organizations consist of a series of coalitions and that the function of the administration is to achieve a quasi-resolution of conflicts and avoid uncertainty. The problematic search that is stimulated by a problem with (or lack of) an existing routine is assumed to be motivated, simplified and biased, reflecting unresolved conflicts within the organization.

**3.3.5. Models of bounded rationality by Simon (1982)**

To cover the conflict of objectives and uncertainty, Simon (1982) mentions that we need to know something about perceptual and cognitive processes to predict short-term behavior. Also, the filtering of information is not a passive process, but an active process of attention, which is influenced by hopes and desires. (Simon., 1979).

The abundance of information means the scarcity of something else: the scarcity of information consumed, the information consumes the attention of its recipients. Information systems need to listen and think more than they speak. Establishing the problem of organization in this way leads to a very different system design that deals with information overload, (Simon H. A., 1997).

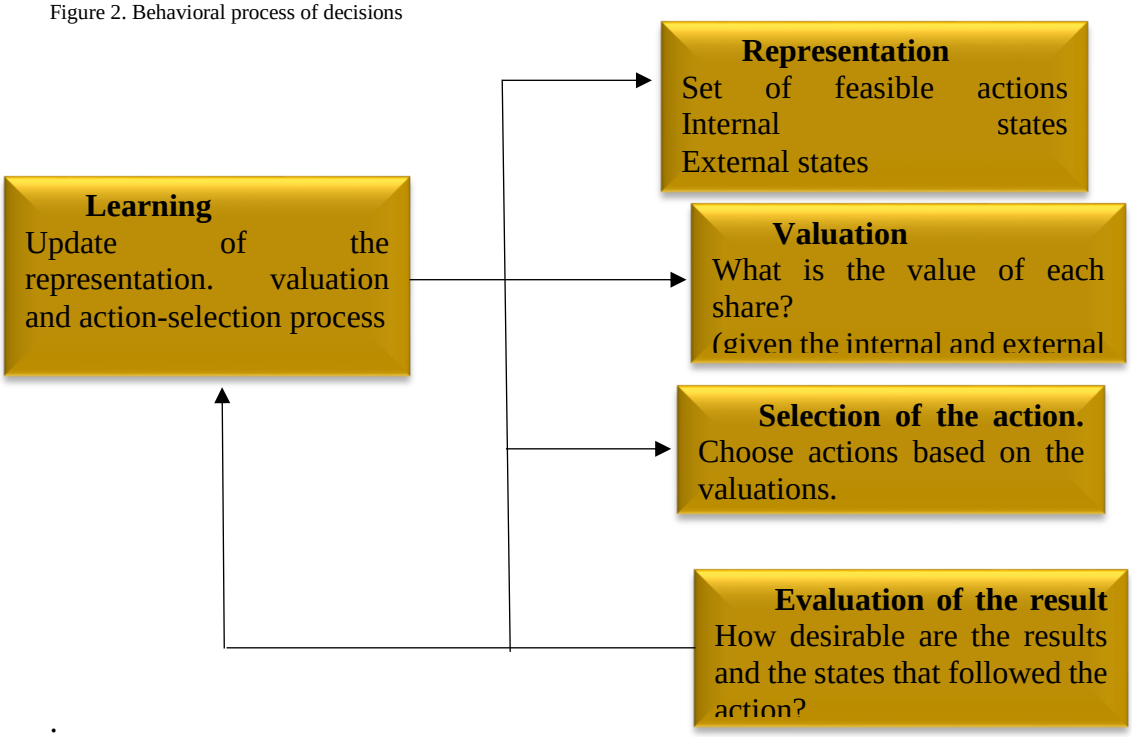
In this work we also talk about two concepts, one called Substantive Rationality, which deals with an appropriate behavior for the achievement of the given goals within the limits imposed by the given restrictions. In this vision of the economy, given the objectives, the rational behavior is determined in its entirety by the characteristics of the environment in which said behavior develops. And the other concept is Procedural Rationality, which is a search for better heuristics (heart of intelligence). Organizational economics is a description and explanation of human institutions. Decision processes, like all other aspects of economic institutions, exist within human reasoning. This is subject to changes in what humans know, and with each change in their means of calculation, (Simon H. A., 1997). A commercial company equipped with the operations research tools does not make the same decisions, for example, in regards to inventory management, as it did before it possessed such tools (Simon., 1979).

In this work it is concluded that complexity is profound in the nature of things, and the discovery of approachable procedures and tolerable heuristics that allow to select large spaces selectively is the core of intelligence, whether human or artificial (Mahoney Joseph, 2012).

## 4. Research methods

The present investigation is of descriptive character, being a qualitative analysis that follows from the understanding of the behavioral theory of the firm of Simon (1947, 2000; Cyert and March, 1963), the theory of the behavior of the decisions, (Paul & Fischhoff 1977; Busemeyer & Bruza, 2012; Gonzalez & Pegah, 2017), in terms of behavioral decision-making processes and their analysis through learning, which significantly influence the process of making decisions that help mitigate rationality bounded to a certain degree due to this key factor, which is learning.

Figure 2. Behavioral process of decisions




Sources: Own elaboration with information from Natural Reviews, Neurocience. Volume 9. July 2008.

As can be seen in figure 2, the main difference with respect to figure 1, is shown in the learning that adds value to the decision process is learning. From this valuable concept, the results of each action will be evaluated. The learning process can modify all the states of decision making. It is likely that flexibility, which characterizes learning by greater openness of ideas, greater discussions, allowing for the possibility of being creative contributing to rational decisions (Hart & Banbury 1994), and in this way, mitigating its limitations, less in an aspect that is the adequate use of information, obtained through learning.

It is considered by what he mentions (Raport, 1975) that learning is of great importance because decisions are not always static. Static decisions are characterized by a single option and are often conceptualized as linear processes: one observes explicit alternatives and makes a decision, but one cannot learn from the consequences of those decisions (Gonzalez, 2012). Alternatives in typical static decisions are often described by probabilities and probabilities. A choice between an alternative that gives $ 3 with security and one that gives $ 4 with a probability of 0.8 and $ 0 otherwise is an example of a static decision (Gonzalez & Pegah, 2017).

There are other types of decisions that are dynamic decisions. These, in contrast to static ones, involve a sequence of choices made in an environment that can change exogenously or based on previous choices and where decisions are sequentially linked to each other through their effects so that an action at a specific time influences directly or indirectly future actions. Consider the previous example about finding the best couple. If we continue to see a person affects or not our chances of knowing a better or worse candidate. This can occur because dynamic environments vary in their inclusion of delayed feedback, interrelated actions and their effects over time, and dependence on time, where the value of actions is determined when an action is taken (Gonzalez & Pegah, 2017).

Simple tasks can have a dynamic complexity, arising from the relationship between the choices and their effects over time, from the sequential nature of these interdependencies, and the different lags between the actions and their effect on the environment and looking for the best partner is influenced by who we know and with whom we spend time, before making a marriage decision (Gonzalez & Pegah, 2017).

According to figure 2 and the theoretical analysis of Raport (1975) another very common approach for the modeling of learning in the tasks of the decision-making process is reinforcement learning (Reinforcemente Learning from now on RL). In a typical RL problem, an agent tries to find an association between an observed result and the previous actions using either its memory or environmental cues. An agent performs an action in each state (for example, by selecting an option in a binary choice task) and the environment delivers a reward or punishment based on the action state pair and changes the agent's current state. It is important to note that an RL agent tries to estimate the dynamics of the environment when experiencing it.

## 5. Analysis of results

As discussed above, an agent learns how good or bad each action is, based on the reward received. These characteristics can be probabilistic or deterministic and can be modified dynamically over time (Busemeyer & Bruza, 2012). This vision of the learning process originates in the work of Simon (1955), Edwards (1962), and the research paradigms that followed from the Behavioral Theory of the Firm. Under this tradition, the effects of real-world characteristics of decisions were investigated, such as time constraints, delays in feedback and cognitive workload, and how people handle such environmental constraints and learning everything. This process.

The thought cannot be thought stable and according to general objectives, the individuals that make up the group responsible for decision making are the matrix of ramification of the objectives, which are rationally subjective and then give coherence to what has to be decided, with personal interests, as a result of the rational limitations offered by the generalization to which it subscribes. Due to this, the learning of the predictive becomes a meta-theoretical challenge about the rationality of the organization; Only from this challenge can the organizational objective be generalized: "Learning, in the sense of reacting to perceived consequences, is the main way in which rationality manifests itself" (Simon, 1978, p.162) cited in (Hart & Banbury (1994).

In the solution of problems, human thinking is governed by programs that organize a multitude of simple information processes, in ordered and complex sequences that respond and adapt to the environment of the task and to the data extracted from that environment as develop the sequences. The secret of problem solving is that there are no secrets: it is done through complex structures of simple and familiar elements of learning in a decision process (Simon., 1979).

## 6. Conclusions

From a rational point of view, Simon (1979) states that choice is the process by which an alternative behavior for each moment is selected. For this, the possible alternatives must be selected, determine the consequences of each alternative and compare them. Being able to determine the consequences of the decisions taken is complex, since we must know the actions of other individuals or firms. However, from a logic of the limits of rationality in individual behavior it is not possible to reach a high degree of rationality (Simon 1947).

Choices made by an individual usually take place in an environment where premises are given, which are accepted as the basis of choice; and the behavior only fits within the limits set by these given environments. One of the functions of the organization is to establish its members in such a psychological environment that it helps to adapt their choices to the objectives of the firm, providing the necessary information to make their decisions.

Bounded rationality occurs when companies lack perfect information, that is, they do not have context information about the results of their actions, for example; they have bounded resources, and are restricted to the ability to process information. Under these conditions, firms are forced to make decisions, based on the data available for this, their resources and capacities to process information (Simon., 1979). This implies that firms can make decisions that are not completely optimal because they have to adjust to the conditions in which they operate.

Decisions involve a commitment of large amounts of resources of the organization for the fulfillment of the objectives and purposes of the organization through the appropriate means. These means can be translated into models that help reduce the limits of rationality in companies (Grosvold., Stephan, & Hoejmose, 2013).

## 7. Recommendations

Addressing the bounded rationality and complexity of the problems that organizations have to deal with, implies that the personnel of the organizations adopt a number of reductionist strategies, that is, that allows them to simplify their representation of the situation that presents a problem, trying to include the outstanding information, before trying to model the objective reality. For example, to contribute to a better understanding of the decision-making processes, recent research has reduced the control tasks to its fundamental elements: a stock, an inflow and an outflow, and called for judgments about the relationships between these elements over time (Gonzalez & Pegah, 2017).

Recent efforts present cognitive explanations of failure in decision making, suggesting the importance of human capacity to observe the similarities between experienced patterns of behavior.

Although research on complex and dynamic tasks will continue to inform the limits of human behavior. By studying simple tasks, we can focus on the study of human decisions that depend on the relationships between choices and their effects over time, and thus in the decision process, when repeated decisions are made, it can be observed and obtained feedback on the results.

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# IMMIGRANTS' ECONOMIC AND SOCIAL INTEGRATION IN HOST COUNTRY- FROM PRECONCEIVED IDEAS TO REAL LIFE. CASE STUDY ON THE ROMANIANS'

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**Abstract**

*Reticence towards Romanian migrants is a matter of interest in the analysis of migratory flows in the EU by country of origin. Since Romania's pre-accession to the European Union, among developed countries such as Great Britain, France, Germany, etc., there have been opinions on the fact that Romania's accession also implies increased pressure on the labor market entry in this developed countries . Moreover, even after the 7-year transition period in which some states have set up barriers for Romanian citizens, fears have been maintained that after 2014 new waves of migrants will enter the developed countries of the European Union. Although this estimate was far too exaggerated, and reality has proven through many good practices that Romanian migrants are useful for destination areas - they cover local employment deficits and their work is appreciated - there are still negative, even discriminatory opinions.*

*The fear of the large number of Romanian migrants who have entered the European Union is materialized also by the fact that they are regarded as "social risk" people with "integration problems". Thus, in recent years public opinion has succeeded to provoc a political backlash (i.e. in France or UK) regarding Romanian migrants. The aim of our research is to analyze the situation of Romanian migrants in the destination countries and to highlight the factors of economic and social discrimination.*

**Keywords:** *immigrant, labour market, discrimination, social vulnerability, Romania.*

## 1. Introduction

One of the most debated topics in recent years is about the economic and social impact of immigrants on destination countries. The greatest increase in the migratory flow in recent years has taken place from East to West. The same direction of migration was registered in the case of the Romanians, who chose Western Europe, USA and Canada as destination states. With Romania's accession to the European Union, there has been a growing debate about the impact of Romanian migrants on destination countries. Cultural erosions, threats to national identity, and the notions of "us towards them" are often identified directly or indirectly in the speech of immigrant opponents. Although the economy has acknowledged the beneficial effect of immigrants on the labor market of developed countries with accelerated demographic aging, (IMF 2019; IMF 2018; Kahanec et al. 2017) the socially discriminatory discourse is often fueled by the fear of altering/alienating the traditional socio- cultural pattern. The expansion of these non-economic concerns largely depends, on the one hand, on the natives 'perception of immigrants' expectations and, on the other hand, on the ability of immigrants to socialy integrate. The speech of assimilation versus multiculturalism (The Independent, 2015) gains different accents depending on the country of destination of migrant workers and affects their position on the labor market - in fact favors economic discrimination (Arai et al. 2004) - the quality of jobs, access to some professions, salary levels, career advancement, etc., which often do not strictly relate to their economic performance (productivity and quality of work), but on the contrary. Moreover, they are perceived as a threat to the employability of natives, although often a false problem (natives do not want native jobs or do not meet the selection criteria). For immigrants, social integration also means developing a sense of belonging to the host society. This often implies acceptance and action in accordance with the values and norms of society and, if necessary, the constitution of the social capital deemed necessary by the host country's institutions, because migrant integration is about the stimulation of economic growth (Abdou 2019). The role of indigenous peoples is equally important: social integration is only possible once immigrants are accepted as members of society and treated equally without any discrimination and repercussions.

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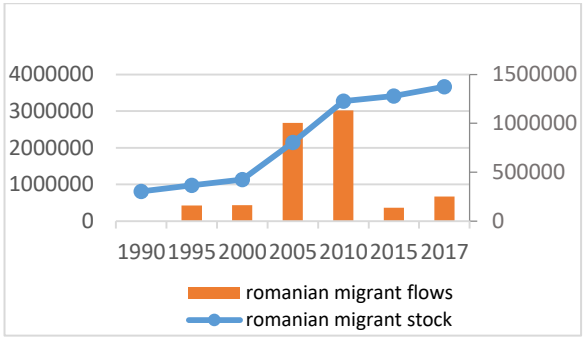
## 2. Evolution of Romanian migrants on the labor market of destination countries

Romanians labour migration has been and remains the main option for emigration, but accession to the EU has allowed the development of the temporary migration option, being more and more preferred the multi-year mobility option. Thus, by 2017 the stock of Romanian migrant workers has exceeded 3.6 million people, by 1.5 million more than in 2005 (Chart 1).

Chart 1. Evolution of Romanian migrants between 1990 and 2017, persons




Source: Author's calculation based on World Bank data.

Regarding the destination countries, we notice that during the period 2010-2017 the preferences of the Romanians did not register any significant changes (Table 1).

Table 1. Stock of Romanian migrants on the labor market of the countries of destination

| Main mobility destinations for work | 2017 – stock persons | $\Delta_{17/10}$ stock persons | $\Delta_{17/15}$ stock persons | 2017 - % of the total stock of Romanian migrant workers | $\Delta_{17/10}$ % of the total stock of Romanian migrant workers | Distance between Romania and destination countries, km |
|---|---|---|---|---|---|---|
| Total, of which: | 3662849 | 388620 | 250794 | 100 | - | - |
| Italy | 1024132 | 211095 | 15963 | 27,95 | -1.41 | 1141 |
| Spain | 639676 | -170795 | -160724 | 17,46 | -11.8 | 2479 |
| Germany | 533660 | 398749 | 95660 | 14,56 | 9,69 | 1297 |
| Hungary | 340000 | 286919 | 236579 | 9,28 | 7,37 | 2096 |
| USA | 208362 | 19307 | -24431 | 5,68 | -1,14 | 643 |
| Israel | 161629 | -9624 | -27010 | 4,41 | -1,77 | 7997 |
| UK | 98727 | 41795 | 24827 | 2,69 | 0,64 | 858 |
| Canada | 96031 | -178 | 532 | 2,62 | -0,85 | 7433 |
| Austria | 91158 | 36853 | 33469 | 2,48 | 0,52 | 1875 |
| France | 77770 | -104329 | -27718 | 2,12 | -4,45 | 1566 |
| Belgium | 72751 | 51117 | 20051 | 1,98 | 1,2 | 1774 |
| Greece | 45355 | 66 | 6758 | 1,23 | -0,4 | 744 |
| Other destination | 273298 | 132521 | 56838 | 7,46 | 2,37 | - |

Source: Author's calculation based on World Bank and Google Maps data.
Available:https://www.timeanddate.com/worldclock/distanceresult.html?p1=49&p2=26
http://www.worldbank.org/en/topic/migrationremittancesdiasporaissues/brief/migration-remittances-data

So, Romanian's preferred destinations for work were both in 2010 and in 2017 Italy and Spain. If the stock of Romanian workers in Italy is around 28% of the total Romanian migrants, with an increase in the absolute value of more than 200 thousand in the period 2010-2017, the number of Romanians left in Spain, in the same period it was reduced by more than 150 thousand people and their weight by over 11 percentage points, respectively from 29.26% to only 17.46%. The reduction of the Romanian stock in Italy and Spain can be explained by circulatory migration, the Romanians are moving to countries with more attractive economic opportunities, and by the increasing number of naturalization of Romanians in these states (ANSA 2017).

At the same time, we notice that the largest flow of Romanian migrants is recorded in Germany, about 400 000 from 2010-2017, and their share in total Romanian migrants rises from 4.8% to 14.56%, thus exceeding the traditional destination - Italy.

Another significant increase in the number of Romanian migrants is recorded in the United Kingdom, so that from 2010 to 2017, the number of migrants has increased almost 7 times to 340,000 and represents over 9% of all Romanian migrants.

The increase of the Romanian migrant flows in Great Britain and Germany is due to the fact that these

countries have some of the highest wage differentials at the level of the European Union states compared to Romania, although they have supported a selective entry by field of activity, also requesting a certain level and profile of education and specialization.

Thus, the Romanians who chose to migrate to Germany in 2017 were motivated by the possibility of earning a salary 5 times higher than in Romania (Table 2) and the low probability of becoming unemployed, in Germany being one of the lowest rates of unemployment among migrants in the analyzed states. The United Kingdom is also an attractive destination for Romanian migrants as a result of a 6.13-fold wage differential compared to Romania at the level of 2017 and an unemployment rate among migrants of only 6.4%.

An analysis of the pressure of the Romanians on the destination countries' labor market gives us a different point of view (Table 2). Mobility incentives in destinations with a significant share of Romanians are strongly differentiated by language criteria (Hungary, Germany), medium and low qualification level (Italy and Spain) and high level of qualification , Austria, Belgium, etc.).

Although the average salary in Hungary has similar values to Romanian one, the historical and ethnic considerations favor migration to this country. The reasons for the high number of Romanian migrants who choose Hungary as a destination state can be found in language similarities, because in Romania there are many bilingual schools with teaching in Hungarian, access to the Hungarian labor market is much easier. Thus, we observe that over 200 thousand Romanian migrants in Hungary represent almost half of all migrants in this country, but the share in the total employed population is only 4.4%, which indicates the lack of pressure on the labor market.

Italy is the second state after the share of Romanian migrants in total migrants, so the 1 million Romanians account for 17.65% of the total number of foreigners in 2017, with an insignificant decrease of 0.57 percentage points compared to 2010. Thus, Romanian workers exercise the higher labor market pressure in 2017 - 4% - after Hungary. Although there is a large number of Romanian workers in Spain (more than 650 thousand), their share does not exceed 10% of the total of foreigners in 2017 and the labor market pressure is much lower, around 2.7%. Similar pressure is also found in Israel, the country with tradition in accepting Romanian workers - in various indistrial activities and in construction. Although, the number of Romanian migrants in Israel does not exceed 103 thousand people, being over 6 times smaller than in Spain.

In contrast, there are states such as the United States, the United Kingdom or France, where the share of Romanian migrant workers does not exceed 1.25% of total active migrants on the labor market and 0.3% of the total employed population, although the number of Romanian migrants increased in 2017 compared to 2010 in the United Kingdom and France.

There are some factors that influence this mobility:

- the occupation profile is complementary, migrants accepting jobs, denied by natives; however, the reputation of the Romanians in the labor market is good, being appreciated, even preferable to other categories of migrants (in construction are preferred in Israel and Germany; in the medical field (OECD 2015) in Italy and Belgium, where almost 50% and 18% of foreign nurses are Romanian, in France over 16% of foreign doctors are Romanian, and in the United Kingdom there are 2140 Romanian doctors, etc.)
- starting with the pre-accession period and later in the post-accession period when it was liberalized (gradually and / or selectively or even totally in some Member States) the labor market for Romanian workers, there was an increase in the share of those with a high level of education, but not necessarily the quality of employment in the country of destination, which is why the proportion of over-qualified persons has increased. (OECD 2018).
- there is greater availability for employment in marginal jobs on the labor market of destination countries, from "dedicated" jobs to migrants, to common jobs, but for which migrants are preferred to natives, being less paid (construction, transport, etc.).

Table 2. The impact of Romanian migrants on the destination country's labor market

| | Share of RO migrants in total migrants country X,% | | Share of RO emigrants in total destination county's labour force X,% | | Wage differential[1] | | Migrant unemployment rate, % | |
|---|---|---|---|---|---|---|---|---|
| | 2017 | 2010 | 2017 | 15,7 | 2017 | 2010 | 2017 | 2010 |
| Italy | 17,65 | 18,22 | 4,031 | 29,8 | 3,861 | 4,97 | 15,7 | 11,5 |
| Spain | 10,48 | 11,75 | 2,854 | 7,7 | 3,698 | 4 | 29,8 | 19,9 |
| Germany | 5,09 | 1,25 | 1,380 | 6,8 | 5,020 | 7,7 | 7,7 | 10,8 |
| Hungary | 46,86 | 51,36 | 4,432 | 5 | 1,275 | 1,77 | 6,8 | 7,5 |
| USA | 0,38 | 0,4 | 0,104 | 4,3 | 7,188 | 7,16 | 5 | 9,6 |
| Israel | 5,32 | 6,19 | 2,674 | 6,4 | 3,533 | 3,62 | 4,3 | 7,2 |
| UK | 1,18 | 0,76 | 0,268 | 7,5 | 6,138 | 5,37 | 6,4 | 8 |

[1] Diferențialul de salarii dintre țara X și România a fost calculat ca raport dintre salariul mediu anual al țării X și salariul mediu anual din România.

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Canada | 1,30 | 1,34 | 0,461 | 10,7 | 5,840 | 7,27 | 7,5 | 8,1 |
| Austria | 5,51 | 4,35 | 1,577 | 17,3 | 5,460 | 5,54 | 10,7 | 8,2 |
| France | 1,25 | 0,81 | 0,297 | 17 | 4,852 | 5,58 | 17,3 | 14,5 |
| Belgium | 5,43 | 1,48 | 1,142 | 32 | 5,729 | 6,59 | 17 | 17,1 |
| Greece | 3,64 | 4 | 0,941 | 6,8 | 2,291 | 2,32 | 32 | 16,2 |

Source: Author's calculation based on World Bank data Available : http://www.worldbank.org/en/topic/migrationremittancesdiasporaissues/brief/migration-remittances-data. http://www.ilo.org/travail/areasofwork/wages-and-income/WCMS_142568/lang--en/index.htm.

Mobility for work currently depends more on the opportunities and comparative advantages of employment than on distance (Bunduchi et al. 2019). Digitization has allowed real-time communication and practically eliminated constraints on distance, as well as the development of means of transport and the promotion of flexible forms of employment.

## 3. Access of the Romanians to the labor market of the member states

With the start of Romania's accession to the European Union, according to the experience of other states that joined in 2004, fears appeared in the developed countries of the Union (EU15) on migratory flows from Romania that would cause tensions on the labor market, both in number and by accepting lower salaries, with effects on the natives - the risk of vacancy and the reduction of the average salary level.

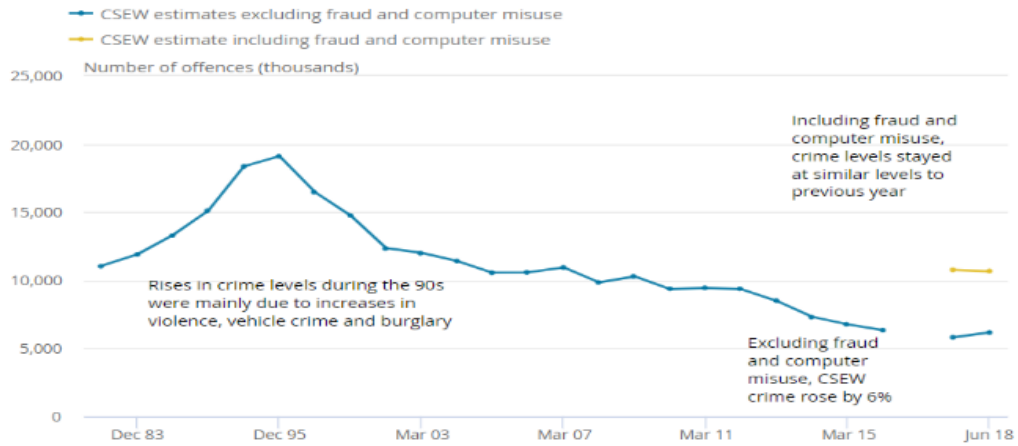
This was the reason why a number of EU Member States have introduced the controlled (monitored and limited) traffic regime within a maximum of 7 years, as required by EU law. Some countries have applied restrictions for shorter periods of time (Denmark, Greece, Portugal, Spain and Hungary have applied a restrictive circulation regime abolished in 2009, but in 2012 Spain has reintroduced restrictions by invoking the increase in unemployment) and others for longer periods (Ireland, Italy and Luxembourg have lifted the restrictions only from the beginning of 2012).

And Germany, the United Kingdom, Austria and France have decided to restrict access to the internal labor market for Romanian migrants for the entire period of up to 7 years, with few exceptions for highly qualified staff.

During this period, the media in the destination countries promoted repeated campaigns against migrants in several countries, such as France, the United Kingdom, etc., in which was promoted a distorted picture of the negative effects of immigrants on the labor market and society in general.

They even mentioned that migrants only aim at accessing social care systems without the intention to work. At the end of this period (January 1, 2014), there were again fears about the "invasion" of the Romanians, but they did not materialize.(Vasile et al. 2013).

Chart 2 Crime rate evolution in UK, 1983-2018




Source: Office for National Statistics, 2019

The same thing happened in the United Kingdom, where the British press and government initiated an entire anti-Romanian immigrant campaign. Knowing the influence it has on citizens, the British press speculated that with the arrival of a wave of both Romanian and Bulgarian immigrants, the crime rate will increase, linking this theory to the year 2004, when 10 eastern states joined the European Union, and with that the number of immigrants in the UK has increased. So in the period 2004-2009 in the British press, there were 691 articles related to the theme of Romanian immigrants (Fox et al. 2012).

Firstly, the media presented in false data and figures, such as the article "Prepare for the Romanians' Invasion" (Daily Express 2006) which announced in 2006 that 450,000 Romanian immigrants are expected

to "invade" the Kingdom Unit, although the official statistics show clearly that in 2010 there were 53081 Romanians, and in 2015 they reached 89402 persons (World Bank 2018). At the same time, in addition to the fake number of newspapers, the titles of newspapers on Romanian immigrants contained terms such as invasion, horde or flood, leading to obvious discrimination and encouraging racism.

These journalistic assessments must be analyzed with caution because, in fact, the opening of the labor market to migrant workers in the new Member States, including Romania, has been gradually achieved, being closely monitored. Thus, we have two periods in the analysis of migration in the context of Romania's accession to the European Union:

- the 2004-2006 pre-accession period, in which access to member countries was restricted by bilateral agreements, even in the first years of Romania's transition to a market economy (eg Germany, the United Kingdom, France, Spain, etc.), the period in which migrant movement was monitored through visas and work permits, labor contracts concluded before arriving in the country of destination, well-defined periods of stay, etc.

This selection of Romanian workers for the labor market of the destination countries was in fact associated with the employment policy of the destination countries, the number and professional profile of the migrants accepted being associated with the needs of the local labor market. The presence of the employment shortage not covered by native workers has generated the availability of employment, demanded by the business needs of the country of destination and not based on the wishes and expectations of migrants.

- 2007-2014, the monitoring period for the opening of the labor market and the gradual liberalization of the movement for the Romanian migrants. Bilateral agreements have been promoted with each of the member countries establishing the labor market monitoring process, from free movement in 2007 to limitations for the entire period allowed by EU legislation, ie 7 years. In fact, free movement was still limited in some countries, so we can not talk about uncontrolled migration or invasion. The number of Romanian migrants was managed by the limits established annually by the receiving states.

In the United Kingdom, the increase from 53 000 to 89 000 was achieved at a time when traffic restrictions were well established and the profile of migrants was strictly defined according to the needs of the labor market of the destination country, on the one hand, job completions, unoccupied by natives, on the other hand, jobs with a deficit in employment by natives (illustrative example is the medical field). In Germany, the number of Romanian migrants increased by more than 300,000 in the period 2010-2015, especially as a result of the bilateral agreement on seasonal workers, the number of contracts depended on the needs of the labor market of the two countries. In France, the increase in the number of Romanians in the same period was determined by the needs of the French labor market, the authorities reducing the restrictions on jobs with recruitment difficulties.

In addition to discrimination on the labor market - by limiting labor migration, lower salaries compared to native workers, limitations of career development, quasi-generalized over-qualification, etc., Romanian migrant workers have been subjected to exaggerated social pressures, based on isolated cases promoted exaggeratedly by the media than on the official statistics of the destination countries. Such proof of discrimination was the association of Romanian immigrants with the term "crime". A British press study, which comprised over 4,000 articles published by the 19 most important national newspapers in 2012-2013, conducted by the Migration Observatory (2014) showed that references to Romanians had a strong association with crime, gangs of criminals and the poverty of the country of origin. The language used by tabloid newspapers to describe and discuss Romanians has often been centered on crime and antisocial behavior (gang, criminal, beggar, thief), while the statistical data show no direct link between the increase in the number of immigrants Romans and increasing crime.

Romanians and Bulgarians were considered criminals before the accession, as many of them arrived in the UK through illegal methods. Although a person is illegally in a country, he can not be considered a criminal, just because he used illegal methods to reach that country. Illegal access is generally associated with the existence of an alternative to employment in the informal economy, a way of occupying existing in all countries of the world, albeit in very different proportions and shapes. Thus, the press did not emphasize the concrete illegal facts made by the Romanian immigrants, but only presented them as criminals (Carnegie Europe 2014). However, according to official data(Office for National Statistics 2019) of the British authorities, since 2002 and so far, crime rates in the UK have a declining trend, and no significant increases have been recorded either as a result of the accession of the 2004 member states or after the accession of Romania and Bulgaria (Chart 2).

In a Daily Mail (2013) article it is mentioned that for every 1,000 Romanians in London, 183 are arrested. Due to the fact that the number of arrested Romanians does not exceed 700 persons (Table 3), it is assumed that the total number of Romanian migrants does not exceed 3800 persons, while there are actually 103 421 persons. It is useless to mention that "arrested" is different from "convicted" or "defendant" and in many cases the same person has been arrested several times. It went so far that a simple ID check could become an "arrest" if the person is invited to the police station and registered in the database (MAE 2013). Thus, we notice that the number of those sentenced to imprisonment is lower than that of persons arrested. The share of Romanians convicted in total convictions is below 1%

which proves once again that the data presented by the press only had the role of denigrating and discriminating against the Romanian migrants, without any statistical arguments regarding the higher criminality of the Romanians compared to other migrants.

Although official statistics show real data, the British press showed exorbitant figures that Romanians are responsible for 92% of the 2012 ATM frauds (The Daily Express, 2013)

Table 3. Situation of arrests among Romanian migrants in the period 2012-2018, persons

| | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 |
|---|---|---|---|---|---|---|---|
| Arrested romanians | 427 | 649 | 769 | 1035 | 1551 | 1837 | 1426 |
| Romanian prisoners | 512 | 588 | 629 | 798 | 619 | 652 | 727 |
| Total number of people in prison | 83769 | 85265 | 84093 | 84235 | 85513 | 83263 | 82236 |
| Share of Romanians imprisoned in total prisoners,% | 0,61 | 0,68 | 0,75 | 0,94 | 0,72 | 0,75 | 0,88 |

Source: Author's calculation based on Ministry of Justice și Home Office data Available: https://www.gov.uk/government/collections/offender-management-statistics-quarterly; https://www.gov.uk/government/publications/immigration-statistics-year-ending-december-2018/list-of-tables.

Even if organized crime is a global business and the British press indicates that gangs in Romania are involved in such frauds, official police data shows us a totally distinct situation, namely that of the total of 6,511 ATM frauds, only 5.8% were carried out by Romanian immigrants, and not 92%, as the representatives of the media presented.

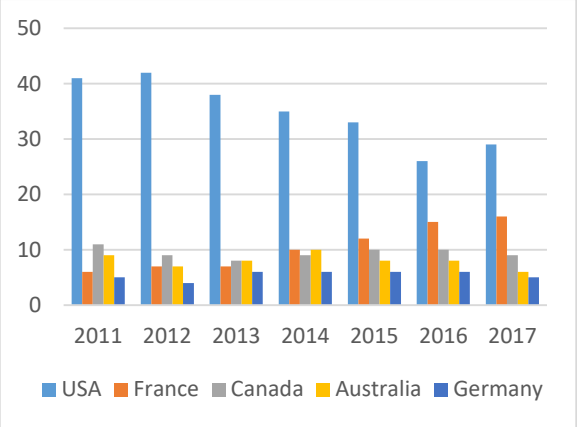
Table 4. Situation of ATM fraud arrests in 2012

| Total people arrested | Total Romanians arrested | Percentage,% |
|---|---|---|
| 6 511 | 377 | 5,8 |

Source: Author's calculation based on Metropolitan Police data. Available: http://www.met.police.uk/foi/pdfs/disclosure_2013/feb_2013/2013010001669.pdf

And the latest annual data show that in 2017 the top five countries for the fraudulent activity of British cards were the USA, France, Luxembourg, Italy and Ireland (Financial Fraud Action 2018), and Romanians were not on the list.

Chart 3. Top five countries for fraud cards occurring in the UK 2011-2017, £ millions




Source: Author's calculation based on Financial Fraud Action data 2015 and 2018

The fear of the British, fed by the press, that the increase in the number of Romanian migrants will lead to an increase in the crime rate was a false one. The Romanian anti-immigrant campaign was a denigrating, discriminatory and false-based campaign that does not correspond to the official data of the authorities. Such discriminatory actions against Romanian migrants are not singular in the United Kingdom, in other member states have also appeared, but statistical evidence has not proved the validity of the scale and impact. Such actions are often associated with political discourse during electoral campaigns (BalkanInsight 2018; ENAR 2016; Open Democracy 2013).

Statistical data officially registered in the EU states shows another image, but the discrimination promoted by different sources brings major damage not only to those targeted - migrants - but also to natives in those countries. The fact is that the labor force moves according to the demand of the labor market, and the competition for employment is a natural phenomenon of the competitive economy. Discrimination promoted on the labor market and in the social environment generally only adjusts the efficiency of human resource allocation, with direct effects on business profitability, reduced demand on the consumer goods and services market, and finally adjusts the welfare of all.

## Conclusions

Mobility for work is a phenomenon of the current society and the trend is to increase labor force circulation as a form of ensuring the efficient allocation of production factors. In addition, developed countries experiencing an aging population aging require external resources - migrants - to cover the labor market shortage and as a source of functioning of insurance and social security systems. Paying pensions on the PAYG system requires state budget sources from labor-related taxation. In addition, special services are developed for third-age people, as do many other digitization professions.

Ensuring the labor market with the necessary workforce to create an appropriate offer for demand is a perennial need which, under the current conditions, is particularly regulated by the opening of the labor market for migrants because the demographic increase of the native population does not cover the employment deficits. In addition, migrant workers are generally young people whose children are born, raised, live and then work on the destination labor market, helping to improve the demographic deficit.

Although with profound unfavorable effects for less developed countries of origin, labour migration towards more developed countries is a phenomenon with historical roots and deep social motivation.

Since 1990, the number of Romanian migrants has been on the rise, with market globalization and promoting the free movement of labor across the EU. Mobility for work from less developed countries to the most developed is and will be primarily complementarity and not just marginal to substitution. The business environment, through employers, is the one that supports mobility through demand for work, according to the principle of optimal allocation of factors of production. In the first years after accession, the main European destination countries were Italy and Spain, adding Germany and the UK. The increase in the number of Romanians in Germany and the United Kingdom after 2007-2014 can be explained by the restrictions imposed by the authorities of the two states, which were in force until 2014, to manage the inflows of persons with a well-defined migrant profile depending on the needs of the labor market, from the perspective of the profession and the level of qualification.

If we are to take into account the tendency of relocation of productive activities in developed countries in recent years (see US policy and others), it is expected that migrant workers' flows will increase, both in the form of spatial mobility and teleworking activities. Therefore, the labor market of the developed countries will be increasingly dependent on the migrant labor force, as an economic factor supporting profitability and, indirectly, fueling fiscal revenues from taxes.

Regulating the labor market and industrial relations is the responsibility of the states, but according to universally accepted moral rules this can not be achieved under conditions of economic and social discrimination. The business environment is continuously developing and outperforming the episodic and / or periodic interests of political discourse, predominantly in its electoral stages. Examples such as that in the United Kingdom or France over Romanian migrant workers are not singular but must be treated with social responsibility because adverse effects are much more difficult to manage. The workforce, respectively human capital, requires significant public and private costs associated with education and training, requires time and the business environment is the main designer of its spatial and professional distribution through the demand of the labor market.

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# THE RECYCLING BEHAVIOR OF ROMANIAN CONSUMERS

**Mirela-Cristina VOICU***

**Abstract**

*For any of us, protecting the environment should no longer be an optional activity, taking into account the negative effects of the environmental degradation that is becoming increasingly acute these days. Yet a positive attitude toward protecting the environment is still lacking for many of us, not to mention the lack of positive behavior in this direction. As the field of environmental protection requires a multidisciplinary approach, the marketing also contributes to the achievement of sustainable economic development in our country, especially through the researches carried out on consumers ecological behavior. Both the business environment and public organizations require reliable information about the determinants of consumers' environmental behavior. One aspect of this ecological behavior is the recycling behavior. Given that the need to meet the European recycling standards is becoming increasingly stringent, it is also necessary to know all the factors that can determine an appropriate environmental behavior. In this context, the following paper reveals some important aspects regarding the current situation of the recycling activity in Romania together with the characteristics of the recycling behavior of Romanians that require a specific marketing activity conducted in this field.*

**Keywords:** *green marketing, consumer environmental behavior, recycling, circular economy, sustainable marketing*

## 1. Introduction

It's been quite a while since the environmental issues have been put on the table, and yet they are far from being resolved. Moreover, experts in the field warn us every year about the continuous degradation of the environment. The volume of solid waste has increased, while the number of areas where we can store it is getting smaller, toxic waste has contaminated the soil and water, gas emissions are increasingly diminishing the ozone layer, plastic finds itself already in the most protected areas of the Earth[1] and in our intestines for some time[2]. It is quite clear that, despite the increasing number of those who support the environmental protection movement, more and more consumers must be persuaded to think about the consequences of their consumption decisions.

Recycling is one of the solutions that contribute to improving the quality of the environment or at least slowing down the degradation process. The recycling industry is basically about taking over used materials, such as plastic or glass containers, and converting them into new materials, thus saving them from the landfill. The idea behind recycling is to reduce energy costs, reduce air and water pollution, and encourage the use of "clean" raw materials.

What is actually happening in this area shows that the solution to the recycling problem requires an interdisciplinary scientific approach. Under these circumstances, marketing plays an important role given that the key element that determines the success of recycling programs is the consumers participation. On the other hand, given the situation in which Romania is currently in, placing at the bottom of the ranking regarding the recycling activity, it is necessary, among other things, to know the determinants of the Romanian recycling behavior as well as the characteristics of the marketing activity leading to changing behavior in the desired direction.

## 2. Recycling in Romania

Before analyzing the recycling phenomenon in Romania, it is advisable to understand the importance of this activity. Thus, recycling can be defined as the process through which products or other materials are recovered or diverted from the waste stream for use as raw materials in the manufacture of new products[3]. Recovering materials reduces the need to re-produce those materials, which leads to the conservation of vital resources. For example, collecting approximately 1kg of used garments means saving roughly 3.6 kg of carbon emissions and 5,678 liters of water[4], or

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[1] Sample, I., 2018, *"Sad surprise": Amazon fish contaminated by plastic particles*, The Guardian, 16 November, https://www.theguardian.com/environment/2018/nov/16/sad-surprise-amazon-fish-contaminated-by-plastic-particles

[2] O'Sullivan M., 2018, *Plastic particles found in human digestive systems*, The Times, 23 October, https://www.thetimes.co.uk/article/plastic-particles-found-in-human-digestive-systems-7wbgt0kpj

[3] Sarmaniotis, C., Tilikidou, I., 2000, *Consumer attitudes towards recycling: construction of a reliable and valid multi-item measure*, Mediterranean Journal of Economics, Agriculture and Enviroment, Vol. 11, No 2, pp 48-51, http://newmedit.iamb.it/share/img_new_medit_articoli/633_48-sarmaniotis.pdf

[4] Balch, O., 2012, *Is recycling revamping retail rules?*, The Guardian, https://www.theguardian.com/sustainable-business/recycling-circular-economy-consumer-behaviour

collecting one liter of waste oil saves one million liters of water[5].

The recycling industry takes on materials such as glass, paper, metal, plastic, textiles and electronics. Food and garden waste can be transformed into compost, and then used as fertilizer, thus giving them back to the soil and helping to protect the environment. By recycling, the quality of the environment improves and becomes stable.

Unfortunately, Romania is still at an early stage when it comes to consumer behavior oriented towards recycling or the consumption of recycled materials. According to the European Commission report, in 2016 Romania had very low recycling and composting levels, i.e. 16%, compared to the European average of 44%, as well as high rates of waste storage. By comparison, Germany recovers 65% of recycled material annually, the rest of the waste being incinerated for energy production. Even Croatia, which joined the European Union in 2013, does five times better than Romania in this respect, according to the European Environment Agency[6].

Practically, Romania is everyday wasting a significant amount of reusable materials, taking into account that, according to Elena Gaşpar-Ion, the representative of the Environ Association (an organization that created the EcoRampa in Bucharest, the first selective waste collection center with 10 different streams), household waste contains about 16% -20% paper/cardboard, 5% aluminum/metal, 5% glass, 10% -15% plastics, 15% other materials, and only 39% biodegradable debris[7].

On the other hand, according to European directives, Romania has to achieve a number of recycling targets by 2020: a minimum of 50% rate of reuse and recycling of the total mass of waste (paper, metal, plastic and glass) at least 70% level of preparation for re-use, recycling and other material recovery operations of at least 70% of the mass of non-hazardous waste resulting from construction and demolition activities, 60% recycling of packaging waste from the total packaging placed on the national market. Also, our country will have to reach an annual amount of 4 kg per inhabitant of collected electronic waste and to collect bio-waste separately for composting and fermenting[8]. Yet Romania was in 2018 the only European Union country that had not yet adopted waste prevention programs, since the new European laws adopted on 22 May 2018 included the obligation to monitor waste prevention measures and to report how the waste was reused[9].

Even worse, the Environment Ministry warned that Romania is liable to pay a fine of 124,000 euros per day since 2018 due to the failure of the authorities to close non-compliant municipal landfills. Also, Romania is liable for infringement for failure to comply with the requirement to collect and recover at least 50% of waste, with a minimum fine of 200,000 euro day[10], given that in 2018 this figure was 5%[11].

One of the biggest obstacles to achieving these goals, along with the disinterest of state bodies, is the lack of public interest in environmental protection.

## 3. Consumer recycling behavior

Recycling involves a behavior that is different from most consumer behaviors. In this case, consumers do not show an immediate interest for recycling and the benefits of this activity are not immediate, but accumulate over time in society, while the costs of time and effort are immediate.

In terms of recycling behavior, individuals can fall into the following categories[12]:

- *Non-recyclers* who do not believe in recycling and its benefits and act in accordance with this belief;
- *Not-assumed recyclers* are people who recycle but do not strongly believe in this activity;
- *Recyclers* who believe in recycling and its benefits and act according to this belief;
- *Involuntary non-recyclers* represent a segment of consumers who believe in the principles of recycling but do not recycle, often due to the absence of recycling facilities or misperceptions about the lack of facilities.

Whilst the motive for most recyclers is based on the belief that recycling is environmentally beneficial, the quantification of the positive impact of recycling is not enough to convince a number of consumers that

[5] Zaharia, C., 2014, *One liter of waste oil pollutes one million liters of water but is still not perceived as waste in Romania,* Green Report, https://www.green-report.ro/uleiul-alimentar-uzat-nu-este-perceput-ca-un-deseu-in-romania-inca/

[6] Stanca, A., 2017, *On paper, Romania is at the forefront of EU countries in terms of municipal waste. Recycling pulls us down*, Vocea.biz online magazine, https://vocea.biz/social/2017/feb/03/pe-hartie-romania-este-in-fruntea-tarilor-ue-la-capitolul-deseuri-municipale-reciclarea-ne-trage-in-jos/

[7] Rachita, P., Chiruta, R., 2015, *Why are we the last in Europe to recycle*, Romania Libera, October, http://romanialibera.ro/special/documentare/de-ce-suntem-pe-ultimul-loc-din-europa-la-reciclare-395255

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[12] Johansson, K., 2016, *Understanding recycling behavior: a study of motivational factors behind waste recycling*, Proceedings of the 8 International th Conference on Waste Management and The Environment, published in Transactions on Ecology and The Environment, Vol 202, available at https://www.witpress.com/Secure/elibrary/papers/WM16/WM16036FU1.pdf

recycling does have an impact and that it is a behavior to be adopted. Aside from the fact that consumers usually associate sustainable behaviors (such as recycling) with a series of costs (money, time, effort and inconvenience), for many consumers there is a fragmentation between individual recycling behavior and its positive impact on the environment that cannot be measured in the short term, which leads to poor consumer feedback. Given that consumer actions have no consequences that can be noticed, they will not be motivated to continue to conduct themselves in that manner. For example, one of the beneficial effects of recycling that consumers cannot see is the reduction in greenhouse gases which they perceive as harmful. Thus, the lack of feedback on the impact of recycling perpetuates consumer inactivity[13]. Although consumers have a theoretical understanding of the benefits of recycling, these benefits do not have a tangible impact on everyday life, so good intentions do not translate into good recycling behavior.

Studies in this field have shown that recycling is a decision on which consumers do not spend too much time thinking, and habit and inertia block the change[14]. Also, consumers' attitude towards recycling is the determining factor of consumer recycling behavior, the attitude being influenced, first of all by the opportunities, facilities and knowledge regarding recycling, secondly by the obstacles involved in the actual process of recycling (time, space and inconvenience)[15]. Under these circumstances, efforts to stimulate recycling should focus primarily on making it a convenient process, visible for others and having personal rewards.

## 4. Objectives of the marketing activity regarding recycling

The marketing specific to recycling can be considered to be analogue to consumer goods marketing, just that the purpose involves the formulation of a rather delicate proposal consisting in encouraging voluntary behavior encumbered by tangible costs and less tangible future benefits.

Marketing activity in the field of recycling collection programs targets mainly the following specific objectives:

- *Increasing the recycling rate*. The recycling rate is the share of collected recycled materials in relation to the total generated waste;
- *Increasing the quantity of recyclable materials;*
- *Increasing the number of consumers who recycle or the participation rate* (the percentage of people recycling in the total potential recyclers).

In addition, it is well-known that as the various recyclable materials are more mixed, the recycling process gets more complicated, more costly and the risk of contamination increases. The recycling becomes costly and inefficient. The problem underlying the inefficient recycling is the way to recycle, the way individuals take into account the specifications listed on collection bins available on the street, in schools and office buildings. Most times, people don't know what can and cannot be introduced into these containers either because of the lack of education in this area or because of the faulty way in which the collection containers are labeled (for example, the "plastic" label may lead us to mistakenly consider polystyrene as recyclable material). Under these circumstances, one of the marketing objectives in this field is *to obtain a less contaminated collection* from the consumer by increasing the level of their involvement, raising awareness and standardizing the labeling of collection containers. In other words, one of the marketing objectives regarding recycling is *to persuade the population to hold different types of waste in the household, to collect them in a certain period of time, and to dispose of them separated into categories.*

## 5. To do's in marketing regarding consumer recycling behavior

Any attempt to implement or improve recycling systems and / or recycling behavior should take into account the following three issues[16]:

- a well-designed recycling infrastructure;
- specific recycling knowledge;
- a general understanding of environmental issues.

A high recycling rate should be achievable given that consumer motivation is high enough and the conditions for achieving this task are simple.

Taking into account the characteristics of the recycling behavior presented in the previous section, the paths to be followed and the strategies to be implemented to achieve the recycling marketing objectives are outlined on the following coordinates:

- ***Identifying the target of the recycling promotional activity.*** Only by clearly identifying the consumer segment we want to persuade to recycle we can develop a good marketing strategy in this area. Thus, the segment may be represented by producers,

[13] Shrum, L.J., Lowrey, T.M., McCarty, J.A., 1995, *Applying Social and Traditional Marketing Principles to the Reduction of Household Waste*, American Behavioral Scientist, Vol. 38, No 4, February, pp. 646-657

[14] Smallbone, T., 2005, *How cand domestic households become part of the solution to England's recycling problem?,* Business Strategy and the Environment, No 14, pp 110-122, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.519.4222&rep=rep1&type=pdf

[15] Tonglet, M., Phillips, P.S., Read, A.D., 2004, *Using the Theory of Planned Behavior to investigate the determinants of recycling behavior: a case study from Brixworth, UK*, Resources, Conservation and Recycling, No 41, pp. 191-214, https://www.sciencedirect.com/science/article/pii/S0921344903001629

[16] Johansson, K., 2016, *Understanding recycling behavior: a study of motivational factors behind waste recycling,* Proceedings of the 8 International th Conference on Waste Management and The Environment, published in Transactions on Ecology and The Environment, Vol 202, disponibil la https://www.witpress.com/Secure/elibrary/papers/WM16/WM16036FU1.pdf

traders or individuals, each segment determining the selection of a different strategy.

Social marketing strategies in this area may target a particular territorial area, a neighborhood or multiple neighborhoods of a city being integrated into a recycling program, a single apartment block or a whole apartment complex, a school or more, a collection point or more, a specific collection activity (for example, the collection of home appliances or household oil), a single shopping complex or a whole chain of stores.

Depending on the target segment, the communication and motivation of consumers will also be adapted. In this context, a distinction will be made between those segments with a more individualistic orientation than those with a collectivist orientation[17].

In addition, in organizing and carrying out marketing activities in this area, it is imperative that in the target audience investigation process, to properly understand which barriers/obstacles the consumers perceive in adopting the recycling behavior[18].

- ***Educating the public***. Unfortunately we can't state about the Romanian consumers that they are an educated public when it comes to recycling. We have not yet reached a culture of recycling. Thus, most of the efforts of those interested in this field must be directed towards education, bearing in mind that before attempting to change consumers' behavior regarding recycling, it is important to provide people with a strong reason that explains the programs focused in this direction. A rational justification for the recycling incentive program will increase the likelihood of developing an intrinsic justification for the desired behavior and the continuation of that behavior even in the absence of extrinsic reasons (such as rewards and punishments). The public should be informed about the benefits of implementing a recycling program at home, at work and in public spaces: reuse of materials that would otherwise reach the landfill, protect the environment from pollution by non-breakdown materials, etc. In addition to programs to build a positive attitude towards recycling, public education should also be done through individual programs focused on certain categories of waste (batteries, electronics, waste oil, clothing, etc.).

On the other hand, with regard to the organization and implementation of educational programs, research has shown that education aimed at changing consumer behavior is much more effective on small groups than large groups and should include interactive demonstrations and discussions rather than lectures or watching films by a passive audience, following the principle: "Tell them and they will forget - Demonstrate and they will remember - Involve them and they will understand"[19]. In this context, we shouldn't overlook the fact that public education programs on recycling should focus not only on the education component, but also on motivation. We must not lose sight of the fact that relying solely on information to change behavior is not enough. Changes in consumer behavior are difficult to achieve, including when the new behavior has considerable advantages over the old one. In order to determine changes in the behavior of Romanian consumers in terms of recycling, it is necessary to focus the education activity towards direct experimentation of what recycling means, an approach that will have a much stronger influence on behavior than indirect experiences (learning only theoretically!). For a lasting change in consumers' recycling behavior, the creation of attitudes through direct experience must be determined.

It is advisable to organize and carry out education campaigns especially during the launch of a recycling program or in the event of changes to certain existing programs.

- ***Using the Internet.*** It goes without saying that today, those that don't turn to the online for promotion, don't exist. Thus, for an interested organization, it is important to promote the idea of recycling on its website, including the hours and days of waste collection or the location of the containers it provides for collection, as well as information on the types of materials the organization is interested in collecting and the tariff offered for each material (taking the example of „Uleiosul", „Sigurec" etc.).
- ***Creating news***. Press releases, providing advice and information on the importance of recycling, information on innovative technology in the industry, and how waste is transformed into other products complement consumer education campaigns. In addition, given that the lack of feedback on the impact of recycling perpetuates consumer inactivity, providing data on what has been achieved through macro-level (national, regional) recycling can significantly contribute to remove feelings of individual helplessness and inefficiency which accompany the recycling behavior.[20]
- ***Carrying out social campaigns aimed at raising awareness and sensitize*** the population. It has been proved that the use of emotional messages in social campaigns has most often influenced the consumer's

[17] McCarty, J.A., Shrum, L.J., 2001, *The Influence of Individualism, Collectivism, and Locus of Control on Environmental Beliefs and Behavior*, Journal of Public Policy & Marketing, Vol. 20 (1), pp. 93-104, http://130.18.86.27/faculty/warkentin/SecurityPapers/Merrill/McCartyShrum2001_JPPM20_1_IndividCollect.pdf

[18] McKenzie-Mohr, D., 2000, *Promoting Sustainable Behavior: An Introduction to Community-Based Social Marketing*, Journal of Social Issues, Vol. 56, No. 3, pp 543-554

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[20] Shrum, L.J., Lowrey, T.M., McCarty, J.A., 1995, *Applying Social and Traditional Marketing Principles to the Reduction of Household Waste*, American Behavioral Scientist, Vol. 38, No 4, February, pp. 646-657

intention to recycle[21].

Usually, traditional social marketing campaigns emphasize the low level of participation of the target segment in the recycling process. This type of campaign sometimes induces feelings of aversion against the promoted request as well as feelings of guilt and resentment, considering that not everyone is delighted to be told what to do. Traditional campaigns tell the public that it has a similar behavior to everyone else (in the sense that the best environmental decisions are not adopted), which has been shown to reinforce unwanted behavior. In this context, in social marketing campaigns, the emphasis should be placed on the environmental behavior that consumers have already adopted, a situation that can lead to an improvement in their attitude towards recycling[22], and can raise public awareness regarding the campaign's request to adopt an additional pro-ecological behavior, such as recycling. Placing the emphasis on the ecological behavior adopted by individuals in the past will cause the target consumers to repeat that behavior in the future. Studies in this field have shown that individuals who perceive themselves as ecological consumers are motivated to act in the direction of this perception.

Another aspect to be considered in organizing campaigns in this area is the need to provide multiple and explicit examples of positive environmental changes as a cumulative result of recycling behavior to alleviate the perceived uselessness that accompanies recycling[23].

In this context the use of creative visualizations in waste collection locations (on the street, inside institutions, restaurants, etc.) should not be ignored, as they have the power to trigger an immediate emotional response from consumers. These visualizations can evoke positive emotions of joy and delight, causing consumer's greater responsiveness to recycling and increased willingness to adopt this behavior.

In addition, from the research on ecological marketing, we can conclude that associating recycling behavior with a positively assessed social identity in campaigns to stimulate recycling is much more effective. In other words, the recycling activity would be particularly stimulated if it were to associate this behavior with a prestigious image at the same time as associating an "outdated" identity to the anti-ecological behavior[24]. An additional boost may come from using social norms in pro-recycling campaigns, those unwritten rules about how to behave, given that we all want to integrate into the society we live in.

- ***Creating a well structured and convenient collection system*** where consumers can participate as easily as possible. People will recycle when the necessary infrastructure is provided. As long as the services in this area remain at the same low level of development, a pro-recycling behavior cannot develop. In Romania, things have begun to catch a minimal momentum in this area, a statement based on some examples. First example is the infrastructure developed by Sigurec, coupled with convenient location near the major commercial areas with a positive impact on waste reduction and increased recycling. For now, hypermarkets are one of the most convenient solutions for recycling. The most important hypermarkets in Romania (Cora, Carrefour or Auchan) have installed in most of their locations, systems that collect PETs, aluminum and glass recipients as well as other types of waste, such as electronics and home appliances.

It is particularly important to create and place recycling facilities as close as possible to those who are expected to recycle. In order to create a convenient recycling system for consumers, the following aspects should be considered:

- the distance consumers are willing to travel to the collection point;
- number of collection points;
- placing collection points in convenient locations for consumers (such as commercial premises);
- visibility of collection points;
- the variety of waste collected. The more diverse the types of waste collected, the more convenient the recycling system is for the consumer.

- ***Introducing the „pay as you throw" system*** a situation where consumers pay in proportion to the amount of waste dumped. People would be encouraged to reduce the amount of waste generated and pay a lower bill for waste collection.
- ***Using incentives***, whether of financial nature, such as those currently used, in the form of coupons offered for recycling PETs, paying with PETs for services (such as in Indonesia with transport services), the „Rabla" program for used cars, discounts for old appliances, old clothing and shoes, etc. when buying new ones, promotional contests (such as the competition organized by Kaufland Romania in partnership with the ViitorPlus Association for the "Recicleta" program to increase the paper recycling rate for a number of 300 apartment buildings in sector

[21] *Big Brands, Big Impact – A Marketer's Guide to Behavior Change,* 2015, site-ul oficial al Business for Social Responsibility, pp. 21, https://www.bsr.org/reports/BSR_SLFG_Marketers_Guide_to_Behavior_Change.pdf

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2 of Bucharest[25]), or incentives of a moral nature. However, we must be aware that the use of financial incentives (or, on the contrary, the use of punishments) only motivates the consumer to obtain the reward (respectively to avoid punishment) rather than promoting a pro-environment behavior, so that with the elimination of the incentive system, the pro-recycling behavior is also stopped. In this context, we reiterate the idea that consumers need a positive feedback to reward their altruistic impulses such as communications on the benefits to the community and the environment as a result of their recycling activity in order to change the behavior on the long term.

## 5. Conclusions

For recycling to become an efficient and effective waste treatment method, it is necessary to achieve a high, usual and regular level of participation in the separation, storage and collection of household waste and this can only be achieved by changing the attitudes of Romanian consumers, a goal much more difficult to achieve given that attitudes change much harder and through a long-term process. Success in achieving this depends significantly on the extent to which this behavior will be considered normal.

Changing the behavior of Romanian consumers with regard to recycling is a challenge of great importance for the development of a circular economy. Manufacturers and retailers have the power to make this change, and many of them have already proceeded in reaching this goal. Governmental and non-profit organizations as well as local authorities should incorporate creative campaigns aimed at creating environmental attitudes, social responsibility, and consumer perception of the power they have over policymakers and policy into recycling strategies.

Approaches to achieving a change in the Romanians' recycling behavior can take the form of intervention through education to change attitudes and to increase consumer knowledge, either a religious and moral approach that employs a sum of values aimed at changing general beliefs and opinions, either in the form of effort focused on behavior that is sensitive to material incentives and, last but not least, an approach through community management, involving the establishment of common rules and expectations. By far, the most effective programs for changing consumer behavior regarding recycling involve combining the four types of intervention[26].

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# FOREIGN UNIVERSITIES IN QATAR: A CRITICAL REVIEW OF POLICY AND SUSTAINABILITY ISSUES

**Fethi B Jomaa AHMED***

**Abstract**

*Qatar is transitioning toward knowledge society and aims at becoming a hub for international education. The Permanent Constitution and the Nation Vision 2030 of Qatar explicitly refer to the role of government in promoting sound education as making it the prime driver of human, social and economic development. The government has invested 3.5% of its GDP in education. Since 1998, Qatar has succeeded in contracting 11 International foreign universities to open branches in Qatar. These International Branch Campuses (IBCs) include Texas A&M University, Weill Cornell Medical College, Georgetown University, University College London and University of Calgary. The IBCs offer a range of specializations and degree programs such as medicine, engineering, foreign affairs, journalism, and tourism. Qatar spends more than US$400 million annually on the six US branch campuses only excluding construction expenses. Hence, this study attempts to examine Qatar's policy on the IBCs and investigate its sustainability. The author focuses on discussing critical policy issues including English as language of instruction, mixed-gender education, and the 'glocalization' of the IBCs. Moreover, he addresses sustainability issues related to the IBCs such as the political will, diversification of the economy, and the contribution of the IBCs to Qatar's society. Ultimately, the author is enthusiastic that this library-based, theoretical and critical study would provoke more scholarly debates on Qatar's unique model of hosting foreign universities campuses.*

**Keywords:** *Qatar, International Education, IBCs, Policy, Sustainability, Model*

## Introduction

Despite its small geographical and population size, Qatar has emerged as a country renowned for its remarkable achievements in education, human development, business, media and politics. A few decades ago, the social, political and economic institutions of the State of Qatar were traditional and conservative. The country's economy was solely dependent on hydrocarbon resources and the government almost funds all projects from oil and gas revenues. However, a huge transition has taken place since the ratification of the Permanent Constitution in 2004 and the approval of the Vision 2030 in 2008. These two documents explicitly refer to the role of government in promoting sound education and making it the prime driver of human, social and economic development. Qatar is now transitioning toward knowledge society and aims at becoming a hub for international education, media, culture and business. Hence, the government has invested significant resources in education and is now earmarking 3.5% of its GDP to it. Since 1998, Qatar has worked on inviting prominent global higher education institutions from USA, Canada, UK, France and the Netherlands to open branches in Qatar. There are 11 International Branch Campuses currently operating in Qatar including Texas A&M University, Weill Cornell Medicine, Georgetown University, University College London and the University of Calgary. These IBCs offer a range of specializations and degree programs such as medicine, engineering, foreign affairs, journalism, and tourism. Qatar spends more than $400 million annually on these IBCs excluding construction expenses. A cursory review of the literature would suggest that there is lack of material on studying the status-quo and future of these IBCs in Qatar. Therefore, it is important to examine Qatar's pressing policy and sustainability issues regarding the IBCs. The discussion focuses on three major policy issues and three sustainability issues. The critical policy issues include English as language of instruction, mixed-gender education, and the 'glocalization' of the IBCs. The three core sustainability topics include the political will, the diversification of the economy, and the contribution of the IBCs to the socio-economic wellbeing of Qatar' present and future generations.

Reflecting on these issues, the author explains how the political will is in favor of the IBCs existence and future, analyze Qatar's endeavors to diversify the economy in order to secure the endurance of adequate funds for the IBCs to continue operating in Qatar. The author elucidates the contributions of the IBCs to the current and future job market in terms of feeding it with highly skilled workforce and leaders, and to the general advancement of the Qatari economy and society. This relates essentially to the raison-d'etre of the IBCs in Qatar and their sustainability.

This library-based study is both descriptive and analytical, theoretical and critical study. It also applies some normative perspectives because the author uses the participant observation method to incorporate some insights from his work experience as he worked for more than five years with Hamad Bin Khalifa University, which is a member of Qatar Foundation that

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hosts most of the IBCs. The author has also participated, attended several events organized by these IBCs, and maintains good relations with their academic staff and students in Qatar. The significance of this study stems from the fact that it is relatively comprehensive in terms of the scale of topics covered; up-to-date in terms of data; and original in terms of referring to primary sources and references. It begins by providing an overview on Qatar history, geography, socio-political and economic setup. Then, it explains the education system and its key institutions including Qatar University, Qatar Foundation and the IBCs. The body of analysis provides a critical discussion of three major policy as well as three sustainability issues. The author concludes by highlighting the findings of this study including that the policy and sustainability issues are resolvable as far as the Qatari leaders, policy and decision makers are committed to the cause of IBCs and their positive role in the society and the government endeavors to diversify the economy and sustain the IBCs in many ways. This study deems successful, if it provokes more scholarly debates on Qatar's unique model of hosting foreign university branches.

## 1. Country Profile

Qatar is a relatively small peninsula located on the coast of the Arabian Gulf with a total area of approximately 11,627 sq. km. It shares a land border with the Kingdom of Saudi Arabia to the South and a maritime border with Bahrain, the United Arab Emirates and Iran. Qatar's capital city Doha, has emerged as a center for education, culture, media, and business. (Hukoomi n.d.; Al-Sharqawi 2013, 189)

Qatar is inhabited since 4000BC however the origin of the country's name is uncertain, but according to some references it dates back at least 2,000 years since the term "Catharrei" was used to describe the inhabitants of the peninsula by Pliny the Elder (1st century AD), and a "Catara" peninsula is depicted on a map by Ptolemy (2nd century AD). The Ottomans ruled Qatar for four consecutive centuries until 1915. Then, the country became a British protectorate from November 3, 1916 until it gained independence on September 3, 197. The Al-Thani family has been prominent in Qatar society and ruled the country since 1868 AD. (Al-Sharqawi 2013, 196-198; Hamdan 2012, 111-113; Central Intelligence Agency n.d.)

Among prominent leaders of the State of Qatar Sheikh Khalifa bin Hamad Al-Thani ruled the country from 1972 to 1995. Some observers viewed him as the real founder of the State of Qatar for amending the Provisional Constitution, forming the first Council of Ministers, establishing the different government structures such as the Ministries, *Shura* (consultative) council, and the Audit Bureau. The Father Emir, HH Sheikh Hamad bin Khalifa Al-Thani ruled Qatar from 1995 to 2013. He is regarded as the father founder of modern Qatar for the reform and changes he introduced in almost all aspects of the Qataris life particularly education, socio-economic, political, and media. HH Sheikh Hamad peacefully abdicated on June 25, 2013, and transferred power to his son, the current Emir HH Sheikh Tamim bin Hamad Al-Thani who became the ninth Emir since the beginning of the rule of Al-Thani. (Hamdan 2012, 111-126, 155; Weber 2014, 63)

Qatar society traditionally consists of nomadic Bedouin tribes, also Indian and Iranian trading families clustered in villages of Doha, Al-Wakra, Al-khor and Al-Zubara. Traditional Qataris dependent on pearl diving, fishing, farming, hunting, camel breeding, and trade. Their social and cultural values such as tolerance and generosity are rooted in the Islamic tradition. They are family-oriented people; consanguinity and arranged marriages are widely practiced; segregation of men and women in education and workplaces is enforced; and respect of kinship ties and the elderly is widely observed.

As of 31 March 2019, the total population of Qatar is about 2,76 million with a gender distribution of over 2 million males and about 0.7 million females. However, based on the latest United Nations estimates, as of April 15, 2019 Qatar's population is equivalent to 0.04% of the total world population making the country number 142 in the list of countries by population. The total population includes some 11.6% Qatari and 88.4% non-Qatari, whom are mainly male immigrant workers arriving in Qatar on work visas without their families. Population growth rate estimated at 2.27%. Qatar is a young society with the median age of population is 31.4 years - more than 25% are under 25 years old; over 70% are under 55 years old; only 1% are over 65 years; and life expectancy is 78.9 years. Over 99% of the population lives in Doha city and the suburbs on the eastern side of the peninsula with a considerable community clustered in Dukhan and Al-Khor villages. Arabic is the official language in Qatar, with English commonly used as the second language. Islam is the official religion of the State of Qatar and Islamic Law (Sharia) is the principal source of legislation. Qataris are generally conservative Sunni Muslims but there are other religious groups living in Qatar namely Christian, Hindu and Buddhist. (Ministry of Development Planning and Statistics n.d.; Central Intelligence Agency n.d.; Worldometers n.d.)

Qatar is one of the world's most dynamic and fastest growing economies. In the second quarter on 2018, its GDP stood at approximately US$47 billion. With its US$124,900 GDP per capita in 2017, Qatar ranks the wealthiest nation in the world. According to the official figures, the real GDP growth stood at 1.6% in 2017 and the IMF projects an overall 2.7% GDP growth for 2018. Qatar started exporting oil in 1949, and oil and gas revenues have huge positive impacts on the society particularly the living standards and welfare of Qataris. During 2017, the non-hydrocarbon and oil and gas sectors were the main drivers of GDP growth with a share of 67.3% or and 32.7% respectively. Revenue from oil and gas in 2017 stood at US$36.35 billion and represented the main source of public

revenue with a share of 88.7%. Qatar's vigorous economy has enabled the country to boost its investments in general infrastructural development and mega projects in line with the Qatar National Vision 2030. A few examples include US$45 billion for Lusail City, US$25 billion for Doha Rail, $11 billion for Doha International Airport, and US$5.5 billion for new Doha Port. Backing Qatar's booming economy and society is the Qatar Sovereign Wealth Fund (SWF), which currently stands at US$335 billion. (Ministry of Development Planning and Statistics n.d.; Qatar Central Bank 2017; IMF n.d.; Weber 2014, 64) Public spending has witnessed an increase in the pace of economic development to achieve the Qatar National Vision 2030. With this in mind, Qatar has earmarked 3.5% of its GDP for public spending on education. The youth literacy rate is above 98% of the total population and unemployment is 0.3%. (Hukoomi n.d.; Ministry of Development Planning and Statistics n.d.; Al-Sharqawi 2013, 189; World Economic Forum n.d.; Central Intelligence Agency n.d.)

## 2. The Education System

### 2.1. Historical development

Traditional education in Qatar before the 1950s was based on few schools and informal classes (*kuttab*) offering religious, Qur'an reading and reciting, and Arabic language lessons. Traditionally trained teachers usually conduct these classes at mosques or at home. However, some families have sent their children to pursue their traditional studies abroad mainly in Egypt and Lebanon. Qatar's modern education system has only been formalized in 1951 with the establishment of the Ministry of Ma'arif (education) by which the state has replaced the within-family education and became directly responsible and involved in supervising and developing education from all angles, in addition to allocating substantial budgets. The education system is guided by three principles; (1) protecting the heritage of the Muslim nation, (2) preserving the Arab-Islamic identity of the people, and (3) developing the education system and curricula through benefiting from the modern era achievements in technology and educational methods and techniques. The government built modern public schools and relevant infrastructures in the 1950s and 1960s. For instance, the first school for boys established in the school year 1952-1953, the first school for girls established in the academic year 1954-1955, adult and illiteracy education began in 1954. The first secondary school for boys began operating in 1961 and the first secondary school for girls started operating in 1965. The tertiary education system began with the establishment of the College of Education in 1973 with a vision to place education as a priority in the country's expansion. In its first year, the College enrolled 57 male and 93 female students. The primary, secondary and vocational education has remarkably expanded throughout the years because of rapid demographic growth and the government support and spending on education infrastructure, employees and development. For instance, the government covers costs of schooling in public schools and provides textbooks, stationary, health services, electricity and water free of charge. The Supreme Education Council (SEC) founded in 2002 and the Emir of the State himself oversees it. SEC is the highest educational authority responsible for the education policy, planning, development and enforcement. It includes three executive departments that are the department of education, the department of evaluation, and the department of higher education. (Hamdan 2012, 199-207; Al-Sharqawi 2013, 203-206; Powell 2014, 258-259) In the quality of education systems' ranking "Qatar is the highest among the GCC countries." (Tripathi and Mukerji 2008, 157)

### 2.2. Qatar University (QU)

After the establishment of the Ministry of Education in 1951 and due to the country's rapid development and need to provide additional areas of specialization, Qatar University was founded in 1977 as the national institution of higher education in Qatar. The university currently offers a wide range of academic programs including five PhD programs, 20 Masters, 45 Bachelors, three Diplomas, in addition to 13 PhD and seven Maters programs that are available in 2019. The university is also the home of more than 15 research centers. QU currently boasts a population of over 20,000 students, and an alumni body of over 43,000. It also employs over 2,000 local and international highly experienced teaching and research faculty. Since 2003, the University embarked on an ambitious strategic reform plans to increase the efficiency of its administrative and academic processes, promote quality education and research, and effective services to meet the needs of the public. Qatar University has recently launched its five-year strategy (2018-2022) 'From Reform to Transformation'. This strategy is in line with Qatar National Vision 2030 and seeks to promote excellence in four key areas; education, research, institution, and engagement with a view of occupying an outstanding position in the map of excellent education providers at the international and regional levels. (Qatar University n.d.; Hamdan 2012, 207) Qatar University seeks to "promote the cultural and scientific development of the Qatari society while preserving its Arabic characteristics and maintaining its Islamic cultural heritage." (Powell 2014, 267) It strives to make an impact on a global scale and to this end Times Higher Education (THE) ranked Qatar University 401-500$^{th}$ in the World University Ranking and 3$^{rd}$ in Arab World Ranking. QU ranked seventh in QS Arab Region Universities Ranking (Qatar University n.d.). In 2017, Qatar University registered three patents within the top Patent Cooperation Treaty. (WIPO n.d.)

### 2.3. Qatar Foundation for Education, Science and Community Development (QF)

His Highness Sheikh Hamad Bin Khalifa Al-Thani, the Father Emir, and his wife Her Highness Sheikha Moza bint Nasser founded QF in August 1995. The *Sidra* tree (*Ziziphus spina-christi*) in the logo of QF symbolizes the essence of the vision and mission of the organization. It is a native tree, which grows in the wild and flourishes in the harsh and arid climate. Its deep roots regarded as a strong anchor, connecting contemporary learning and growth with the country's culture and heritage. Poets, scholars and travelers would traditionally gather in the shade of the *Sidra's* spreading branches to meet and talk. This aspect of the *Sidra*'s role is reflected in QF's commitment to education and community development as well as being a naturally healthy and comfortable place at which to gather and exchange knowledge and opinions. The *Sidra's* fruit, flowers and leaves provide the ingredients for many traditional medicines, which reflects QF's science and research objectives. The branches of *Sidra* represent the diversity of QF today meanwhile the leaves, flowers and fruits equate to the individual lives that the tree nourishes, with the fruits going on to produce seeds that guarantee sustainability and a healthy future. The Foundation consists of about 50 entities and it is the largest non-profit organization in Qatar. Among its main objectives is to help shape the future of the Qataris through advancements in education, R&D, community development, make Qatar a vanguard for productive change in the region, and a role model for the broader international community. Through its wide range of activities and institutions, the Foundation promotes a culture of excellence and furthers its role in supporting an innovative and open society that aspires to nurture the future leaders of Qatar, develop sustainable human capacity, social, and economic prosperity for a knowledge-based society. QF's Education City is a 2,500-acre campus launched in 2003, and today it is the home of Hamad Bin Khalifa University (HBKU), eight of the eleventh IBCs such as Georgetown University, Texas A & M, Weil Cornell Medical College in addition to several research establishments such as Qatar Science and Technology Park (QSTP) and many world platforms for creative thinking, research and innovation such as the World Innovation Summit for Education (WISE) and the World Innovation Summit for Health (WISH). (Qatar Foundation n.d.; Al-Sharqawi 2013, 216-217; Hamdan 2012, 207; Powell 2014, 269) The QF "Education City's vision is about more than education, it is about establishing Qatar as a leader in innovation, education and research." (Stolarick and Kouchaji 2013, 232)

### 2.4. International Education

The Qatari government began investing in higher education more than 40 years ago. It has adopted a unique policy, which consists of two programs; (a) to sponsor Qatari students to study abroad, and (b) to contract prominent universities from around the world to open branches in Qatar. The first program began since the 1970s, whereby the government had designed a scholarship scheme and provided generous scholarships for Qataris interested in studying undergraduate and graduate programs in four geographical regions which are: Qatar, Arab region and Australia, United Kingdom and Europe, and United States and Canada. To institutionalize this system, the government established the Higher Education Institute (HEI) under the Supreme Education Council (SEC) in March 2005. HEI's primary role is to manage the scholarship system including administering the previous (pre-HEI) scholarship programs, which consist of Emiri; Hamad bin Khalifa Al-Thani and Tamin bin Hamad, the National, and the employee scholarship programs in both undergraduate and graduate study options. The prime goal of this program is to broaden the intellectual and cultural horizon of the students and help them make educational and career choices based on their interests, abilities, and values as well as the needs of the Qatari labor market. Ultimately, the students acquire knowledge and skills at an international standard and bring them back to Qatar. (HEI n.d.; Stasz et al. 2007, 71-75)

After almost three decades of the launch of first scholarship program, and based on the principle that every Qatari should have equal premium higher education options within the country, the second program came into existence. Hence, the government has invested substantially in attracting the best international higher education institutions to open branches in Doha. The policy adopted by the government is that instead of finding one worldly renowned university to open various schools in the country, it is more useful to contract different institutions from around the world, which would each provide one specialty in which it had a particular strength. Therefore, in the period from 1998 to 2012, Qatar entered into agreements with 11 of the best higher educational institutions in the globe particularly from USA, Canada, UK, France and the Netherlands. Each institution has been selected for its ability to educate and train students in fields that will help Qatar grow and diversity as well as prepare students for employment and for global citizenship by emulation of global principles and norms adapted to local or national contexts of Qatar. The IBCs offer specializations and programs, that are accredited by the same bodies as their home universities, such as medicine and health sciences, engineering and applied sciences, IT and design, foreign affairs, journalism, and tourism and hospitality (see Table 1). Admission standards into the IBCs are high, English is the language of instruction, and the offices and classrooms are equipped with cutting-edge facilities. The general goal set by QF is that each of the IBCs is to have at least 50 percent of its undergraduate students Qatari citizens. QF Education City is an impressive academic hub that hosts eight out of the eleventh branch campuses including six American universities, a British and a French

university. In terms of finance, Qatar Foundation covers all expenses for the IBCs and guarantees them academic freedom. For instance, the Foundation spends more than US$400 million to fund the operations of the six American institutions hosted in Education City excluding construction expenses. In return, the IBCs pledge to provide educational programs that are equal in quality to those in their mother campuses. They also agree not to establish similar programs elsewhere in the Middle East and consult the foundation about the choice of each branch's dean and vice deans. The IBCs basically share the same mission which essentially endeavors to achieve Qatar's National Vision 2030, help develop Qatar knowledge society, and produce global citizens. (Ministry of Education and Higher Education n.d.; Hamdan 2012, 123; Powell 2014, 259-270; Bollag n.d.; Havergal n.d.) It is worth mentioning that Mr. Omran Hamad Hamad Al-Kuwari, executive director of Qatar Foundation, indicated that each program offered by the IBCs has come for a reason and the government has no plans to increase the number of foreign campuses. (Bothwell n.d.)

## 3. Policy Issues

### 3.1. English as Medium of Instruction (EMI)

The IBCs use English as medium of instruction, research and communication. Their graduates are well known of their excellent command of English and the fields they study. These two factors enhance their competitive power in the job market. Obviously local employers and even abroad would easily consider recruiting them. However, the issue of foreign language such as English as medium of instruction is a bit contentious not only in the Qatari context but in the Arab region in general. Therefore it is important to address the language policy and ultimately come to a clear conclusion.

Arabic is the official language of Qatar and it has been used since long time as medium of instruction in both traditional and modern education. However, due to some social and economic factors, and the need for response to the globalized English as language of science, diplomacy and business. Also the low scores of Qatari students in international assessment tests such as PIRLS, TIMSS, and PISA. For example, in the year 2009 PISA tests, Qatari students scored 368 in Mathematics meanwhile the OECD average was 496, scored 379 in science whereas the OECD average was 501, and scored 372 in reading while the OECD average was 493 (Weber 2014, 71-72). Moreover, most of the Qatari employers showed concerns about the poor English and communication skills of Qatari graduates. Hence, in 2001 the government initiated the reform of the education system, and a part of it, was "the introduction of English as the medium of instruction (EMI) in K-12 mathematics and science classes." (Eslami, Seawright and Ribeirto 2016, 132) This policy instigated some tension, controversies, and frustration among Qataris. The people responded differently to such policy as for instance some students, parents and members of the community showed their dissatisfaction and viewed it as a threat to their Arab-Islamic identity, cultural values, and heritage. Meanwhile, others, particularly students, have positive attitude toward English and consider it as extremely important to their future career and are effectively using it in campus and even outside.

However, in January 2012, the Supreme Education Council (SEC) changed the policy and decided to revert to Arabic as the language of instruction in both government schools and at Qatar University with either abandoning or lowering the English language requirements for some courses. Apparently, the two main reasons that prompted this decision are: first, the poor English language preparation of Qataris taught in Arabic government schools. Second, the fear that young Qataris lose competence in Arabic language writing and speaking, and lose their cultural heritage too. However, it is generally admitted among most contemporary scholarship that the general perception of Arabic and English in both country and university is gradually changing. Besides, there is a growing sense of acceptance of the fact that they are two key languages and English should not be viewed as a threat to Arabic and students' national identity. (Weber 2014, 72; Eslami, Seawright and Ribeirto 2016, 132-145; Powell 2014, 268; Stasz et al. 2007, 29) This conclusion is therefore in favor of the IBCs and support their current smooth running and future endurance.

### 3.2. Mix-gender Education

Gender is a controversial matter which involves complex questions of social, cultural, religious, economic and political nature. Arab and majority Muslim societies are obviously viewed by some Westerners as patriarchal and gender bias. This view point could be attribute to the bad treatment of women in some Arab and Muslim cultures and communities whether in the past or modern times. Most often, the problem with this is the difficulty in making distinction between the ideals and values of the Islamic faith and the Arab or Muslim cultures relating to gender issues. In some cases, cultural and lifestyle differences are not tolerated and this has been observed in both "developed societies" and "developing/underdeveloped societies" alike. For instance, some liberal communities and cultures view single-gender education as a sign of backwardness and injustice toward women. They also think it is not right and beneficial for teaching and learning and in the education setup in general. Meanwhile, developing communities could regard mixed-gender education as something not right, a source of some moral problems, and would affect the academic achievement of students as such education setup perhaps lay the ground for disruption and gender tension. Yet, the debate on the cost-benefit analysis on these issues is still going on. However, it is obvious that

"developed societies" and liberal values tend to exercise some kind of hegemony on other cultures and communities particularly through globalization mechanisms.

However, the issue of mixed-gender education in the Qatari context takes an interesting form that is worth highlighting. Despite the fact that the Qatari society is conservative, it recognizes the great value of the family institution and considers it as the nexus of the society. Men and women are socialized to complete each other roles with respect and courtesy. The Permanent Constitution as well as Qatar National Vision 2030 do not make any distinctions between males and females. All Qataris, weather men or women, enjoy fundamental rights to various services such as education and health, and are equally held accountable for their actions before the law. Despite the fact that gender segregation in educational institutions such as in government schools and universities, or in accessing some government services is widely observed in Qatar, the Qataris, residents and visitors cope with it as social reality without problems. Besides, mix-gender environment in education, workplaces and some services is available as an option. Within this context the IBCs provide education services in a mixed-gender environment enabling female student both Qataris and residents "to have an international education without traveling abroad." (Stolarick and Kouchaji 2013, 241) However, according to a study, many Qataris interviewees believe it is essential to preserve the single-gender study environment option because "some women do not want to study in a mixed-gender environment and are therefore unlikely to pursue post-secondary education unless a single-gender option is available." (Stasz, et al. 2007, 76) Yet, studying at local universities in single-gender environment is perhaps the perfect option for some female students and their families. This perhaps explains the fact that "the large majority of female students at Qatar University results from their higher probability of seeking higher educational opportunities close-to-home." (Powell 2014, 269) The most important result of both single and mixed gender setups, is that female students have more options and flexibility to further up their post-secondary studies in Qatar whether in IBCs or local universities and that they have the opportunity to become better educated over time and earn respected university degrees.

### 3.3. 'Glocalization' of the IBCs

There are some concerns regarding the potential of marginalizing the national education system understood from the government excellent full support of the IBCs. Moreover, some people viewed that the IBCs could disturb the traditional Arab-Islamic values that are well observed in the society. They think that the IBCs provide Western model of education, which not only bring in high standards academic programs, but also values and culture. (Powell 2014, 269-270; Bollag n.d.) The leaders and policy makers in Qatar are aware of the importance of both the global character of the IBCs system and programs, as well as the national educational and societal value systems. Therefore, they are exerting enormous efforts on various fronts to keep the global character and world standards of the IBCs, and at the same time indigenize it in the local social and cultural atmosphere. Stasz, et al., (2007) highlighted some of the gaps in the education business and emphasized on the need for the coordination and cooperation in all aspects and phases. It seems, the Qatari government and policy makers have seriously taken their input and thus endeavored to integrate the IBCs in the tertiary education system and support all types of planning, coordination and cooperation among the IBCs and across multiple organization including SEC, QF and QU in post-secondary education projects. While doing this, they did not overlook employers' feedback because it is useful for understanding the labor market demand for educational services.

One of the striking examples of coordination and collaboration mechanisms is the cross-registering between IBCs in general and between the six American universities in the Education City in particular. Students who officially belong to one college can have access to six universities and have their courses cross credited. Bothwell (n.d.) reported that Mr. Omran Hamad Al-Kuwari, executive director of Qatar Foundation, explained that such collaborative approach creates a very unique innovative environment for students and it is indeed rare as some universities hardly accept cross-registering. Some IBCs went a step further in collaboration and improving the integration between them by offering joint courses and programs. For instance, VCU, TAMU and WCM in Qatar have co-designed a new course "happy society" launched in January 2018, and made open to any education city students in their junior year. (VCU-Q n.d.; TAMU-Q n.d.; WCM-Q n.d.; Bothwell n.d.) Further examples include strong collaboration between GU and NU in Qatar as they begun allowing students to study a major subject at one institution and a minor at the other. (GU-Q n.d.; Bothwell n.d.) Moreover, in the academic year 2018/2019, CMU is offering registration of joint programs, training and workshops in between Education City universities (Al-Sharq n.d), and NU is considering Master's program in health communication in collaboration with HBKU, and launch a Master's program in Sport Media and communication in collaboration with mother University in USA. (Abdurahman n.d) WCM went with its collaborative efforts beyond the Education City and IBCs to work in partnership with Qatar University in medical education, health care, and research in Qatar (International Universities n.d.). QF leaders have also realized that cooperation and coordination is vital in recruiting students and faculty. Therefore, the Foundation has adopted a marketing strategy to advertise Education City as a 'whole value position'. (Bothwell n.d.)

## 4. Sustainability Issues

The huge financial and human recourses investments in contracting the 11 IBCs and facilitating their smooth operations in Doha obviously face the challenge of sustainability. This particularly in view of some questions and concerns raised by some observers that **"**these investments have been oriented mainly to Western models without sustained reflection on and tackling all of the contextual conditions needed to implement and sustain them." (Powell 2014, 266) Besides, there is an emphasis on the need for balanced policy approach, which integrates local and foreign institutions and supports the development of both of them. Therefore, it is important to highlight three important factors that would ensure the stability and endurance of the IBCs in Qatar.

### 4.1. Political will

The political leaders and the government of the State of Qatar have always been in favor of and highly committed to promoting education, science, research and innovation. They also have a clear vision and abundant resources to achieve their strategic goals. For instance, HH Sheikh Hamad bin Khalifa Al-Thani, who ruled Qatar from 1995 to 2013, is considered as the pioneer of building the knowledge society where education is the prime drive of all aspects of reform and development. He founded Qatar Foundation, which among its roles overseeing the IBCs. Moreover, during his rule, the Permanent Constitution was ratified and the National Vision 2030 was launched. The Permanent Constitution includes 150 articles that regulate all aspect of life in the country pertaining to rights and duties. There are numerous articles that explicitly refer to the right to education and emphasize on the role of the state in promoting sound education, fostering and encouraging scientific research, helping disseminate knowledge in addition to making general education compulsory and free of charge. For instance, Article 25 states that "Education is one of the basic pillars of social progress. The State shall ensure, foster and promote education." (The Permanent Constitution of the State of Qatar 2004) Besides, Qatar National Vision 2030 has explicitly emphasized on education and knowledge production activities. (Qatar National Vision 2008) Her Highness Sheikha Moza bint Nasser, wife of HH Sheikh Hamad bin Khalifa, initiated the World Innovation Summit for Education (WISE) in 2009. WISE is an international, multi-sectorial platform for creative thinking, debate and purposeful action. Its community is a network of education stakeholders; from students to decision-makers, coming from about 200 countries that share ideas and collaborate to seek creative solutions to solve challenges facing education. While WISE leaders recognize that education is lacking innovative approaches in both policymaking and in the classroom, they envision education as the key to addressing the toughest challenges facing communities around the world today. Therefore, WISE is a response to the necessity of revitalizing education and providing a global platform for the development of new ideas and solutions. It has become a global reference for innovative approaches to modern education. (WISE n.d.; Hamdan 2012, 199-206)

### 4.2. Diversification of the economy

Qatar discovered oil in the 1930s but began exporting it after World War II in 1949. It has been reported that Qatar oil reserves is expected to last for next 57 years and its natural gas reserve is expected to last for perhaps the next 100 years. They concluded that the revenue earned from hydrocarbon will not last forever. (Stolarick and Kouchaji 2013, 226) The leaders of Qatar became aware of the fact that oil and gas are depleted resources and their prices are fluctuating, and have sharply declined in recent years. The sharp decline of oil and gas prices has inflicted heavy losses of revenues and consequently crippled the government capability in funding projects and creating uncertainties for national planning since hydrocarbon wealth is the essential fuel of the economy. To this end, the government made considerable efforts to plan for diversification of the economy to reduce gradually the dependency on hydrocarbon recourses and the dominance of oil and gas sectors. The non-hydrocarbon sectors include manufacturing, financial services and construction. For instance, the government founded Qatar Investment Authority (QIA) in 2005 to strengthen the country's economy by diversifying into new asset classes for long-term strategic investments that help complement the state's huge wealth in natural resources. The QIA is structured to operate at the very highest levels of global investing and adhere to the strictest financial and commercial disciplines. For example, Qatar Sovereign Wealth Fund (SWF) currently stands at US$335 billion. (World Economic Forum, n.d.; Qatar Central Bank 2016) Moreover, an action plan has been put in place to develop the infrastructure by using the most advanced technology and production methods in the existing oil and gas fields, create new sources of renewable energy, and encourage recycling projects and systems. In addition to crude oil and natural gas production, the Qatari government has also introduced other industries such as ammonia, fertilizer, petrochemicals, steel reinforcing, aluminum production, and plastics. The hydrocarbon sector still constitutes one of the main sources of public revenue. For instance, In 2017, oil and gas returns stood at about US$36.35 billion and represented the main source of public revenue with a share of 88.7%. However, the share of hydrocarbon in real GDP marginally declined to 48.2% in 2017 from 53.2% in 2014, while the share of non-hydrocarbon in real GDP increased from 46.8% in 2014 to 51.8% in 2017. (Ministry of Development Planning and Statistics n.d.; Qatar Central Bank 2016, 2017; IMF n.d.; Weber 2014, 62-69) Another aspect of economy diversification is to reduce the dominance of the public sector on the economy and engage the private sector and Small and

Medium Enterprises (SMEs). This would enable them to play an essential role together with the public sector in contributing to the economy and achieving sustainable development. (Ministry of Development Planning and Statistics n.d.; Secretariat for Development Planning 2008; Weber 2014, 68-69) Despite the fact that the dependence on the hydrocarbon sector is gradually reduced, the implementation of the long-term reforms to diversify the economy is moving toward a sustainable development system. This system would enable the government to ensure and preserve the right of present and future generations to benefit from their wealth recourses and finance existing and strategic projects particularly in education such as the IBCs.

### 4.3. Contribution of IBCs to the Qatari present and future wellbeing

The positive impacts of the IBCs on Qatar society and economy are extremely important in the survival and sustainability of these institutions. To develop an understanding of this matter within the limitations of this research, the author adopts the qualitative method because the quantitative method, which includes study techniques such as the questionnaire and interview, could be used in another study to measure the scale and scope of the IBCs on the Qatari economy and society. The huge financial and human resources investments in contracting the 11 IBCs and supporting them to continue operate in Qatar are basically meant for a strategic purpose which is to feed the country, the region and the world with highly qualified graduates ready for employment. It is very hard to size all the contributions of the IBCs to the present and future wellbeing of the Qataris. Nevertheless, some illustrative examples are discussed in the following paragraphs.

The IBCs have been present in Qatar for almost two decades whereby the eldest is 20 years-old and the youngest is about six years old (see Table 1). The most striking example of the positive impact of the IBCs on the Qatar society during these years, is the large number of graduates who presumably most of them are employed in various sectors of Qatar economy such as government services, engineering, business, media, design, tourism, and health. For example, there are some 6200 students who graduated from College of the North Atlantic with degrees in applied sciences (CNA-Q n.d.), 800 students graduated from Carnegie Mellon University with various degrees in computer science (CMU-Q n.d.), some 750 students graduated with engineering degrees from Texas A&M (TAMU-Q n.d.), about 680 students were awarded degrees in design from Virginia Commonwealth University (VCU-Q n.d.), more than 600 students obtained their degrees in tourism and hospitality from Stenden University (SU-Q n.d.), some 450 students earned their degrees in foreign affairs from Georgetown University (GU-Q n.d.), about 440 student graduated with different degrees in nursing and health sciences from University of Calgary (UC-Q n.d.), and in May 2008, Weil Cornel Medical College graduated its first class of 15 doctors. (WCM-Q n.d.)

The IBCs did not only feed the local work force with thousands of qualified employees, but also play an active role in building capacities and contributing to the efforts toward establishing a modern knowledge society. For instance, Weber (2014) highlighted the significant role of Northwestern University in the growth of the media industry in Qatar including journalism, film and computer media, by offering journalism and communications program in QF Education City. The demand for the graduates from NU-Q is very high as many employers such as Al-Jazeera Media Network, Qatar News Agency, Ministry of Foreign Affairs, and the communication departments especially in the universities compete to recruit them. The University of Calgary is also playing a leading role in delivering world class health care in Qatar. It is assisting the Qatari government in its efforts to redefine health care in Qatar and the Gulf region. (International Universities n.d.) VCU-Q is deeply involved with emerging design companies in Qatar (Universities in Qatar n.d.). GU-Qatar houses a large library, which is open to public patrons. Furthermore, it conducts many public lectures and panel discussions addressing current issues in local, regional and world politics. (ibid.; Redden n.d.) Moreover, Bollag (n.d.) highlighted the impact of research published by Georgetown University faculty members over the past years about work conditions for foreign construction workers on helping the government lead the reforms. HEC Paris management programs are designed to meet the specific needs of high-potential professionals and executives already in senior management positions in Qatar. For example, since launch of the HEC Paris Executive Masters of Business Administration (EMBA) program in 2011, 500 students graduated, 75 percent of the them are Qatari off whom more than half were women. Moreover, in April 15, 2018 HEC held a Public Masterclass, titled 'Understanding Accounts and Financial Strategy in 60 Minutes' which is tailored to advance the financial strategic skills of the attendees. (HEC-Q n.d.; Redden n.d.; Qatar Tribune n.d.)

The cultural influence of the IBCs has also been noticed in the society. In addition to bringing their educational systems and world-class academic standards, the IBCs also brought their culture and values. All IBCs provide the same Western-style education as at their home campuses. For instance, classes are co-educational, and students are expected to have strong opinions and to voice them in-class and beyond. All IBCs students and alumni communicate in English so this language has become widely beyond campuses. This is perhaps what prompted one researcher to say: “the American culture and educational methods exert a strong cultural impact on the country as Education City graduates enter the work force.” (Weber 2014, 63)

## Conclusions

Qatar is a relatively new country, which has changed from a tribal community to contemporary state in a matter of few decades and has achieved prominent position in the world in human development and literacy. Qatar leaders, decision and policy makers recognize the strategic importance of education and its strong correlation with comprehensive development. The government spends generously on education as it earmarks 3.5% of the GDP to provide free education in primary and secondary levels and scholarships for tertiary studies in Qatar and abroad. Qatar's education system is sustained by the favorable government decision to engage and support prominent foreign universities to open their branches in Doha and become part of the education setup with internationally accredited programs. It is an endeavor to bringing world-class education to Qatar's doorsteps.

Qatar's model in dealing with the IBCs could be viewed as unique in a sense that almost all these branches belong to the top ten ranked universities in the world, they all use English as medium of instruction, and conduct their classes in a mix-gender environment. This model faced serious challenges and controversies particularly in relation to certain policies as well as raised some concerns on the sustainability of this project for Qatar present and future generations. This study addressed three important policy issues which are English as medium of instruction, mixed-gender education, and 'glocalization' of the IBCs into the national education system.

It has been stressed that the issue of the medium of instruction is controversial as Arabic is the official language in the country as well as in government educational institutions. There were ad-hoc debate on the rationale behind the introduction of English as medium of instruction. Despite the fact that the matter is quite sensitive as English was viewed as threat to the identity of the young Qataris and the future of Arabic language, the general trend is now going toward considering English and Arabic as necessary and complementary. Similarly, the issue of mixed-gender education is sensitive as many families and female students still want to study in a single-gender environment. But in the current Qatari context both single-gender and mixed-gender education are considered as rivaling options more than conflicting choices. Maintaining the global nature of the IBCs programs and academic standards and integrating them in the local tertiary education system which is rooted in the Arab-Islamic heritage and value system proven to be a challenging policy issue. The government in general and Qatar Foundation in particular endeavored to sustain the process of 'glocalization' of the IBCs by favorable policies like the language and mixed-gender education policy and by encouraging cooperation and coordination mechanisms and activities such as courses cross-registering, join programs, and activities. However, it is important to highlight that the collaboration and coordination mechanisms and efforts have gain momentum only in recent years and the challenge of relying on the expertise of the expats in teaching, research, and other education services need careful planning in the long run. This long-term planning should be supported by review and development of existing labor laws and policies to be well aligned to the nation educational goals. Besides, it is vital to provide more financial as well as performance incentives for the national tertiary education institutions to uplift their level to an adequate international standard. This balanced policy approach will ensure the sustainability of the 'glocalization' process.

The question of whether or not the engagement of the IBCs is sustainable is legitimate essentially in view of the substantial financial and human resource engagement in it, the instability of hydrocarbon revenues due to the sharp fall of oil and gas prices in the past two years, and the feasibility of the positive impact on the job market as well as on the economic and social wellbeing of the present and future generations. The political will of the Qatari leaders, government and policy makers was favorable to host and support the IBCs to operate and endure in Qatar. Therefore, the government decision to diversify the economy is a significant step in the right policy direction to avoid any potential risks that might affect the availability of adequate funds for the IBCs to continue operating and grow. The current situation of the proportion of the oil and gas and non-oil sectors shows that the hydrocarbon sector is still the main source of the public revenue and the non-hydrocarbon sector is growing in a slow motion. Besides, the IBCs have proven their significance by their enormous contribution to the Qatari economy and society quantitatively and qualitatively. Thousands of graduates from the IBCs have joined the workforce and the demand for their expertise is very high. Moreover, some of the IBCs have visible contribution to some projects, institutions, and the overall development of Qatar. Nevertheless, the IBCs have yet to make Qatar self-sufficient in professionals and their impact on the Qatari economy and society needs further investigation particularly by conducting field studies using quantitative research techniques such as the questionnaire and interviews to measure the scale of their contribution.

Table1. International University Branches in Qatar

| Institution | Home Campus | Field | Established |
|---|---|---|---|
| University College London (UCL-Q) | UK | Museum Studies | 2012 |
| HEC Paris (HEC-Q) | France | Business | 2012 |
| Northwestern University (NU-Q) | USA | Journalism | 2008 |
| University of Calgary (UC-Q) | Canada | Nursing | 2007 |
| Georgetown University School of Foreign Service (GU-Q) | USA | Foreign Affairs | 2005 |
| Carnegie Mellon University (CMU-Q) | USA | Computer Science | 2004 |
| Texas A&M University (TAMU-Q) | USA | Engineering | 2003 |
| Weill Cornell Medicine (WCM-Q) | USA | Medicine | 2001 |
| College of the North Atlantic (CNA-Q) | Canada | Applied Sciences | 2001 |
| Stenden University (SU-Q) | The Netherlands | Tourism and Hospitality | 2000 |
| Virginia Commonwealth University (VCU-Q) | USA | Design | 1998 |

**Source: (**Ministry of Education and Higher Education, n.d.; Powell 2014, 256).

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# EFFICIENCY, EFFECTIVENESS AND EQUITY IN PUBLIC ADMINISTRATION - THE ROLE OF THE PUBLIC ADMINISTRATOR

**Constantin BRAGARU***

*"I think there's no higher calling in terms of a career than public service, which is a chance to make a difference in people's lives and improve the world. "*
**Jack Lew** *Service, People, Think, World, Chance*

**Abstract**

*The public administrator (city manager) has to be a professional in mastering the science of planning, organizing, directing, coordinating, reporting, and budgeting. He must be equipped to research issues and offer solutions, draft proposals for legislation and regulations, prepare statements and presentations for testimony, conduct negotiations, build coalitions, and advocate client positions to legislators, other elected/appointed officials, and their staffs. Public administrator must provide representation at the state and other levels of government for businesses, associations, individuals, and non-profit organizations.Having as a role model the good politics from the other european union member states,the institution of public administrator has proven it's utillty in Romania due to full initiative of several mayors and presidents of county councils.*

**Keywords:** *Public Administrator, city manager,capabilities, planning, organizing, directing, coordinating, reporting, budgeting, research issues, solutions.*

## 1. Introduction

There are various roles that are played by the Public Administrator. It must be important that the role of the administrator is not to be confused with his or her job, although, the role of the administrator may be defined by his or her job. For example, an administrator may have a job where he or she compiles data gathered from subordinates and analyzes the data to develop effective solutions to a problem in the form of policies. This may be his or her job, and the job may be titled Assistant Administrative Analyst, but this may not necessarily be his or her role. Given the description of duties, one may infer that the role of this administrator may be that of a problem Solver. This study distinguishes between various roles of the public administrator.

## 2. A brief review about public administrator terms of evolution,various roles and bureaucracy.

In a study of democracy and Public Administration, John P. Burke focused on the tension between democracy and bureaucracy. It is here that the role of the Administrator is defined as a guide that is responsible for taking the efficient bureaucratic organization through the moral aspects of a responsive democracy. Burke does not go into detail on how the administrator guides the organization but his next depiction shows how the organization may have an affect on the role of the administrator. Burke addresses the dilemmas faced by officials on a daily basis. Officials have their morals tested and are expected to follow organizational protocols impartial to what their personal beliefs may entail. Burke gives administrators the role of actors because they have their personal beliefs and agendas in their private lives, but once they come into the work place, they are expected to act accordingly to the demands of an efficient and effective organization. Some may feel sorry for administrators but as Burke points out, "Administrators, in choosing careers in public service, are often well aware of the moral pitfalls"[1] . They are analogous to the stunt persons who are aware of the dangers the stunt may do to their bodies in an attempt to perform a spectacular act for the enjoyment of the moviegoers (clients/citizens) in exchange for the appropriate pay. They have come undercontract and have agreed to perform such duties even at the possibilities of such risks.

In another study conducted by Pamela B. Teaster , the term Guardian was used to describe the role of the Public Administrator. This study focuses on care given to the indigent, the senior citizens, the people with diseases, and the children who are neglected and have insufficient care. The term "Parens Patriae" is used and is defined as "the duty of the sovereign to care for its citizens who cannot care for themselves"[2] .

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[1] John P. Burcke ,*"Reconciling public administration and Democracy:The role of the responsible administrator"* ,Public Administration Review,pp 181, 1989.

[2] Pamela B. Teaster ,"When the State Takes Over a Life: The Public Guardian as Public Administrator", ,Public Administration Review,pp 397,2003.

This has vast implications in that it means that the role of Public Administrators come with the responsibility of providing medicine, shelter, clothing, and food to those in need. Being that there may be an enormous population of people who need these services, developing methods for effectively and efficiently distributing these services may become intricately burdensome. After all, how is one to define and measure the criteria for who should get what services, when, where, how much, and for how long? In addition, because resources may be scarcely limited and not everyone may be able to receive services, where should the lines of priority be drawn? It may fall into the jurisdiction of the Public Administrator to make such decision, which is another problem in its own: discretion. This discretion is the administrator's ability to make decisions when it may not be clearly defined or described in their agencies contract or manual or when there may be multiple options on various steps that may be taken concerning a certain situation.

Teaster , when describing the responsibility given to administrators concerning wards of the state, labels administrators as Surrogate Decision Makers. Some of these decisions, according to Teaster, "included medication and other medical decisions, habilitation decisions, financial decisions, and care and quality-of-life decisions"[3] . These decisions are not necessarily made according to a schedule or some seasonal activity but may spontaneously arise in the event of new wards entering into the system, wards becoming ill, or other factors that may submerge. The administrators must be aware of what procedures they may take, where available resources are located, and have the proper funding and planning available in the event of contingencies. If the administrators are not prepared in the event of catastrophes, the affected parties may file litigation against the agencies responsible for rendering these services.

Another author focuses on the actor role of Public Administrators the Theatre Metaphor used by many to portray officials and administrators in different lights. Larry D. Terry has discussed how in the Reagan era, administrators were portrayed as villains and in defense of that categorization, supporters of Public Administrators attempted to cast the role of hero on these officials. Sometimes it is not necessarily the administrator that attempts to assume these roles, but most of the time they are type cast for these roles. For example, when a person attempts to get a straight answer from a bureaucratic organization and is transferred from one administrator to another without completely having his or her concern addressed, the administrators may have the role of villain attributed to them. When the disaster resulting from Hurricane Katrina struck New Orleans, Louisiana, and FEMA was slow to respond to the needs of the people, their administrators also received the role of playing the villain. On the other hand, when administrators develop effective programs that address the concerns of a specific population, the role of Hero is attributed to them. Even though the overall role may be that of an actor, the individual roles are given favorable or detestable attention depending on the outcomes resulting from the actions or inaction of various administrators. Terry points out that both of these roles may be problematic because when administrators are depicted as villains, government is given less credibility and is seen as "an evil force that must be conquered and destroyed" [4]. In addition, the depiction of the administrator as a hero may be problematic because this gives the officials an unrealistic level of expectations to which that may not be able to meet. Some problems may be wicked and unsolvable, and deeming administrators as heroes may be setting them up for failure.

For the purpose of this discussion, one final role will be included. Not that there are not more than the roles listed here, but it would serve to keep the attention of the viewer focused on the issue at hand b listing more than one role so that he or she may know that there are various roles taken on by Public Administrators. The final role discussed here was described with due recognition by Charles T. Goodsell ; Goodsell described the role of the Public Administrator as that of an Artisan. In his own words, Goodsell states,*"It is, rather, to argue that the carrying out of common professional duties by public administrators can, with considerable payoff for both administrator and citizen, be viewed as the execution of an applied or practical art… it embodies a specialized skill that is capable of creating results that are both usable and pleasing to behold. Specific objects are created and tasks performed, yet in ways and with consequences that establish in the minds of both creator and audience a sense of intrinsic satisfaction, above and beyond the utilitarian purpose at hand."*[5] .

The specialized skill here may be analyzing data, evaluating data, conducting research using various methods of polling and surveying constituents. These tasks performed may bring about plans, policies, and legislation which may be the objects referred to by Goodsell. When these "objects" bring about social services that provide shelter to the homeless, food stamps to those in hunger, clothing to those without, and even jobs for the disenfranchised, the intrinsic satisfactions becomes salient. Using the term science alone to describe what administrators do seems to take away the human creativity that is put into the tasks performed by administrators. The depiction of the administrators as artisans denotes that the work done by them is a work of beauty in its most precious form.

There may be hundreds of roles fulfilled by Public Administrators. This discussion has presented a

[3] Ibidem, pp 399.
[4] Larry D. Terry, "Legitimacy,history and logic:public administration and the constitution", Public Administration Review,pp 58,1997.
[5] Charles T. Goodsell, "*The Case for Bureaucracy: A Public Administration Polemic",* 4th Edition, CQ Press,pp 247, 2003.

few of the roles that are most often seen among people who come into contact with various agencies and their officials. These roles include guides that lead the organization on a path that serves the people, actors who are to put personal issues aside for the sake of performance, guardians who care for and act on behalf of the helpless, surrogate decision makers who utilize discretion concerning issues that affect the lives of the disenfranchised, villains when things go wrong, heroes when things go right, and artisans who utilize artistic talents and craft objects that bring forth satisfaction. These roles give the field of Public Policy and Administration romanticized features that most would not recognize when thinking about bureaucracy. Administrators can be seen as daring, compassionate individuals who take on the difficult task of being the problem solvers in society. Some may see it as a dirty job, but someone has to do it.

## 3. The European experience in practicing public administrator (city manager)[6] position

The quality of public administration is important for Europe's competitiveness. Modern, innovative and efficient public administrations is essential to sustaining the recovery and unlocking Europe's growth potential.The growth-friendly public administration scoreboard was published as part of the Member States' Competitiveness Report in September 2014.

The scoreboard is the first EU-wide exercise to analyse how "fit for purpose" the Member States' public administrations are, as regards promoting growth and competitiveness. It analyses a number of features important for competitiveness, so as to encourage improvements in government and public administrations.

The scoreboard delivers mixed results:

- Overall, government effectiveness has not improved for the EU over the past five years;
- Member States' budgetary, regulatory and implementation capacities vary;
- Red tape and high compliance burdens are negatively impacting on those wishing start a company and obtaining licences, pay taxes, participate in public procurement, export goods and services, or settle legal disputes.

Political and administrative organizations of local authorities in European Union countries have a number of basic characteristics in common.First, the political bodies in each municipality representative,is the result of democratic elections. In almost all municipal entities there is a political leader, recognized as such, whether the function of such person is mentioned or not. This leader can be elected directly by citizens or by the governing board members or appointed by the central government. Political and executive powers of the people can vary greatly.

Also, in most municipalities have at least one person whose role is to:

- manage, coordinate and supervise the organization of government;
- to provide advice to politicians;
- to ensure rational use of public resources, efficiently and in accordance with law.

These three features reflect the principles governing the organization of local government. Two decades ago, City Manager was usually a senior civil servant (age than in the organization), with a basic training in financial and legal. Experience in local government was seen as the most important requirement to fill such a post. This experience was gained through specialized training programs in public administration training institutes in their respective countries.

As regards public administration, legislation in European countries has not institutionalized a stable space professionalized management that can be separated from politics. The legislature has often opted for a president of local government, leaving the option of delegation of management tasks. The political dimension as prevail in the executive or management functions, the administrative expense of the organization[7].

Therefore, in recent years, European governments have chosen to modify some parameters bureaucratic organization for flexible management methods, with emphasis on the economic side and individual performance. Attitude in the City Manager has changed as a result of awareness that managerial skills are more important than specialized training. Effective management of public institutions realizes that an organization requires management skills and specific knowledge on effective use of human resources. Currently, among the decisive factors for the appointment of a City Manager holds the largest share of the management skills, combined with experience in local government.

"Professionalization" management has its sources in the need to differentiate the role of elected officials from that of technical professionals in other words; policy must be distinguished from the implementation [8].

Among European countries now applying a model of coordination of local public services by a person other than the Mayor, City Manager shall include: Belgium, Denmark, Germany, Ireland, Latvia,

[6] City Manager – institution which has it's origins in anglo-saxon administrative system that has inspired also the establishment of romanian public administrator.

[7] J.I. Soto, „Los secretarios de administración local entre la gestión y el control. Un rol en evolución", în Revista de Estudios Locales, iulie 2003, p. 163.

[8] C. Ramió, „Desenvolupament organitzatiu de l'ajuntament gerencial", in *Diputació de Barcelona: L'ajuntament gerencial: reflexions i propostes per gerencialitzar*, Barcelona: Diputació de Barcelona, 1999, p. 53.

United Kingdom, Netherlands and Sweden. Given the strategic position they occupy City Manager, it is preferable to have higher education.

Expertise is less important because the management team, City Manager working with department heads, who have specialized training. Implementation of effective management in public administration has its origins in the United States and Western European countries (especially Anglo Saxon), where community services are organized based on specific mechanisms of the private sector, in coordination with City Manager / Executive Director.

Such notice the existence of the following items from the U.S. literature the role of City Manager is defined and explained so well (Journal of Public Administration Research and Theory): "Many times the city manager faces an important issue that influences political existence. According to this article, which has as its main subject study investigating the mechanisms that lead officials elected to postpone work to develop policy manager, city manager faces a number of factors such as experience, professionalism, relationship with Council members, which is the main reason of failure. Data from this study show that city managers leading image detrimental earn their administrative authority through their ability to manage and develop policies to achieve objectives. Thus, managers must reconcile the inherent tension between responsibility and respect. "In other words the content of this journal of public administration refers to the City Managers ability to impose its political influence in their activities, to achieving the targets. Such notice, the influence of a City Manager gets stronger at the expense of their administrative authority.

The definition of the City Manager in foreign literature we find in Elgie McFayden Jr.'s conception, in his "City Managers: Impact on Citizen Participation in Local Government", that the objective side of this concept: "A city manager is a administrative officer, who is usually appointed to serve as chief administrative officer within the Board. A city manager is clearly responsible for the City Council, but is much less likely that the image of responsible dethrone a strong mayor. To be held accountable for their decisions often unpopular fiscal policy they should respond to voters. Another fact to consider is that it is difficult for voters to hold board members responsible for inadequate social and fiscal policies, because power is decentralized; city manager is appointed and usually has a contract with well established tasks legal point showing their performance in some time. This paper analyzes the impact of the Government Board on the relationship between citizens and local Administrative. The objective of this paper is to determine whether a current city manager has a negative peace on the level of interaction between citizens and local government and if it decreases the influence of citizens in social and fiscal policies

On the other hand as "The International Conference on Business and Commerce" on the topic "The city manager: from the U.S. experience to Romanian reality" city manager is seen as an entrepreneur, a bureaucratic set in contrast with the political entrepreneur is relatively more prudent in the proposed policy and more likely to support new ideas that have been "verified" their associated professionals. The literature offers another perspective on the city manager. This route to success is their move to larger cities and better paid, but there are still a few city managers who enjoy office in small towns, poorly developed.

## 4. The actual stage of public administrator evolution in Romania

Having as a role model the other E.U. states know-how and good politics,the institution of public administrator has begun to prove it's utility also in Romania,through the initiatives of certain mayours and county councils presidents. The main tendencies in developing public administrstor's function are aiming for implementation and also research and evaluation above the influence of those measures in reforming local public administration system. All these eforts were synthetized in the project called "*Public administrator – a key for a succesfull local management",* financed from Social European Funds and having as a purpose developing public administrator institution by increasing the level of informations regarding the employment of public administrators and supporting the creation of a functional operational network in this case.

In Romania, public administrator function was regulated by Law no.286/2006 amending and supplementing Law no. 215/2001 local government. One of the innovations introduced by Law no.286/2006 is the introduction of public administrator, creating the legal framework for delegating certain tasks to the mayor / chairman of the county public administrator.

The legislative framework provided by this law allows mayors / presidents of county councils to engage, under a management contract, a public administrator responsible for coordinating specialized device or public service at local / county. By delegation, he may exercise the chief quality officer. Public administrator may be employed on a proposal Mayor / Chairperson of the county, with approval of the local / county as a result of competition, the maximum number of posts approved. Appointment and dismissal of public administrator are made by the mayor / chairman of the county on the basis of procedures and specific tasks approved by the local / county.

Also, intercommunity development associations may decide to appoint a public administrator for management services of general interest subject association.

Recruitment, appointment and dismissal of public administrator intercommunity development associations are made according by Law.286/2006

amending and supplementing Law no.215/2001 on local public administration, republished, based on specific procedures by their boards of directors and approved by decisions of local and county councils concerned. (Law no.215/2001 on local public administration republished, Chapter VIII, Art.114).

Institution as a public administrator is bottom up initiative of local government in an attempt mayors and presidents of county councils to delegate a multitude of their duties. Romanian public administrator has increasingly become a reality in communities inspired model City Manager. Its presence has emerged as a viable solution for local officials in the separation of attributes specific management representative and current activities. Public administrator function comes as an alternative local Romanian, was introduced into law in mid 2006.Local realities require a change in system performance by redistributing tasks locally by primary and / or presidents of county councils, to streamline administrative act.

Although the institutions of public administrator work in some administrative units, it was not yet introduced a bill. No local government law.215/2001 does not restrict the adoption of local development policies, but does not specify the nature of these initiatives, which required an amendment.

The main duties of public administrators in Romania are: exercise main credit quality, coordination of various public services (Service Management and Community Public Service and Fire Emergency, Community Police Service, security and order of services for social assistance, Department of Population, education, health service, sports, culture, public service for local public finance, local taxes), direct relations with the public (audience, addressing petitions), media relations, relationship with non governmental organizations, writing extra budgetary funded projects. Note that these duties are not distributed uniformly in terms of public administrator job description, at the county councils and / or municipalities (of city, town or village). Not all public administrators have the same powers, but they differ from one political subdivision to another. For example, not all public administrators have been delegated the task of authorizing officer. Others were delegated this authority, limited to a certain level or not.

Justifying its delegation to the mayor, it may concern different aspects, some referring to the trust and loyalty capabilities.

On the status of public administrator, it is not a public official in the mayor's specialized unit, but has the quality of contract staff, as reflected in the law which states a contract of management between primary and under which the administrator will accomplished latter duties. Moreover, this is strengthened because the not specifying text Law 188/19994 or within Law 286/2006 of any references that we could conclude that the public administrator would be considered a public official.

Quality staff and not official contract implies a lower wage regulating public administrator, which increases the primary instruments available to motivate his subordinate, or to reward their merits. Thus, according to O.G. 10/2007, salary of a public administrator will fall within certain "limits, with the minimum basic salary of secretary administrative unit and the maximum salary of the mayor, president of the county or the mayor of Bucharest, as appropriate" (Government Ordinance no.10/2007).

## Conclusions

With national policy-making gaining in complexity and becoming increasingly exposed to international and European coordination, as is the case in all EU Member States, there is an even greater need for public administrators to have a broad perspective and the ability to coordinate their work with national, European and international institutions. In this regard, the EU context and development of multi-cultural skills should be emphasised and included more in the competency frameworks and the training and development activities for top public managers. New ways of developing public administrators in a more structured way have to be found, taking into account their responsibilities and time restrictions. Given the importance of the European environment of public administration, more emphasis should be placed on this dimension in the future. The development of leadership skills is still important in many Member States in order to add long-term strategic thinking and team and people management to the management competencies. To lead permanent change, public administrators have to develop into top public leaders.Long working hours are still the norm for top management positions, whilst telework or flexible working Latest trends in Top Public Management in the European UnionTop public managers (TPM) should perform as leaders instead of only as managers, while being able to bring movement and change to the organisation in a way that encourages most of the employees to want to be part of the movement.time arrangements are still rare. Consequently, establishing flexible working arrangements that help reconcile professional and private life should be allowed also in higher and top management positions so as to enable more women to take up top positions. Another valuable stimulus is a well-designed parental leave system. In the countries with a long-established leave system, it is generally not part of the organisational culture to allow public managers to benefit from these working conditions. The main problem continues to exist, because women or men who are taking care of a child or family often thereby limit their chances of promotion or career development. This is one of the elements that will have to be considered throughout the EU. Political support for changes in this area is essential.

Regarding the presence of a public administrator in administrative units in Romania, the benefits are

undeniable. Such advantages are to improve the efficiency of the administrative record, following the introduction of this feature. Streamline flow of documents and information are other arguments in support of the model adopted by other local government units, as a guarantee of professionalization of Romanian modern public management. In these circumstances, an administrator could then support duties Mayor / Chairperson of the county and could secure a more efficient administrative system.

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# SOCIAL INTEGRATION OF TURKISH IMMIGRANTS IN ROMANIA? SYNCOPES IN THE CONFIGURATION OF A DETERRITORIALIZED IDENTITY

**Abdullah DEMIR**[*]

**Abstract**

*David Lockwood[1] highlights the distinction between systemic and social integration. If social integration focuses on cultural values, traditions, and identities, the systemic one operates with rules according to which the host community of the immigrant functions, whether they are judicial, economic, civic or political. Although ideally social integration would complement systemic integration, the former is more difficult to achieve, since it presupposes the configuration of a deterritorialized identity of the immigrant. The paper concentrates on the relation between social integration and the configuration of the deterritorialized identity of the Turkish immigrant in Romania. Methodologically, a content analyses of some interviews conducted with Turkish immigrants in Romania will be carried out, by following a series of indicators, such as: the development of social relations outside the ethnic group, the accessing of the various cultural services and those for informal education, the Turkish immigrant's openness toward the values promoted by the Romanian and European culture as well as the attachment toward traditions.*

**Keywords:** *social integration, identity, third-country migration, Turkish immigrants, Romania*

## 1. Introduction

The research endeavour materializes starting from David Lockwood's model according to which the integration process presupposes on the one hand the *systemic integration*, namely the economic and civic integration – and on the other, the *social integration*, which involves in turn the configuration of a *deterritorialized identity*. The paper will concentrate on the manner in which the Turkish immigrants relate to the social integration, on their efforts to configure a deterritorialized identity. Deterritorialized identity is a type of identity that forms as a result of cultural interactions that the immigrant has in the new community and it presupposes as well changes at the level of their value and belief systems. Certainly, the immigrant already holds an identity formed during their time in Turkey. However, as they internalize the values and practices from the new culture, they develop as well a new identity, outside the territory from which they emigrated. More often than not, during the first years after the immigration, the immigrants *feel Turkish*, but after a period of time, they state that they *feel Romanian as well*. This is how the entire process of identity configuration outside the country of origin, also called deterritorialized identity, could be summarized.

The process of social integration is closely connected to the configuration of a deterritorialized identity, so that, as the immigrant assimilates values, codes and norms from the new culture, they configure for themselves a new identity as well, outside the territory of origin, an identity that gives support in the process of social integration and facilitates this process.

In order to highlight the resources but also the barriers in the Turkish immigrant's process of integration, I have interviewed, during November 2017-February 2019, a total of 60 individuals of Turkish ethnicity who have been living in Romania for at least 2 years, namely 19 women and 41 men, with an average age of 39. Of the 60 individuals, 34 have a university education, 10 have a post-university one, 11 have a high school education, while 3 have a middle-school education.

11 out of the Turkish immigrants hold Romanian citizenship, 1 is a German citizen, 1 a French citizen, 1 a British citizen, 23 desire to obtain Romanian citizenship, while the other 23 do not have a plan to this end. The field research followed social integration indicators such as: the development of social relations outside the ethnic group (I1), the accessing of the various cultural services and those for informal education (I2), the immigrant's knowledge about Romanian culture (I3) and European culture (I4), and the role of traditions in the configuration of the new type of identity (I5).

## 2. Conceptual aspects

According to the Universal Declaration of Human Rights (article 13) any person has the right to emigrate and live within the borders of any state. Migration is defined as a phenomenon that consists of the movement of an individual or a group of individuals from one territorial area to another, followed by a change in

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[1] David Lockwood, "Social Integration and System Integration", in Lockwood, David (ed.), *Solidarity and Schism: "The Problem of Disorder" in Durkheimian and Marxist Sociology* (Oxford: Oxford University Press, 1992), 399–412.

residency and/or an engaging in a form of activity in the area of arrival.[1] The movement can be internal when it is done within the territory of the same country or external/international when the migrant[2], as a result of a voluntary act, decides to emigrate (from the country of origin) and to work in another country in order to improve their quality of life. Migration is the result of a multitude of actions of individuals who are considered rational agents and who evaluate the costs, benefits and risks (including emotional ones). The decisions of individuals to emigrate are also a consequence of the traits of the economic, political and social systems from where they originate.

International migration is done under different forms: workforce migration, the migration of the immigrants' family members, migration forced by political or religious persecutions, by calamities and war. To this end, a conceptual specification is welcome related to the frequent confusion between immigrant and refugee. The Geneva Convention[3] stipulates the criteria that are at the basis of categorizing a person as a refugee: the person who has "... justified fears of being persecuted based on race, religion, nationality, affiliation to a certain social group or their political opinions ...". A series of political and social causes are found at the basis of the act of forced emigration: political persecutions, personal insecurity and that of family members, extra-judicial detentions, generalized corruption that blocks the functioning of state institutions in the service of the citizen, the lack of resources for daily living, the lack of access to healthcare and education, humanitarian crises determined by armed conflicts, hunger, diseases, massive violations of human rights.

Any international migrating act is at the same time an *emigration* and an *immigration* process. Emigration corresponds to the immigrants' process of movement from their countries of origin, while immigration is associated with the process of entering the destination countries. In the majority of cases *territorial, geographic mobility* is accompanied by a *social* mobility, meaning by the change in the social status of immigrant individuals.

Being considered a spatial social mobility (territorial, geographic) the clarification of the concepts of social mobility, status and social role is required. Social mobility generally represents the movement of individuals or social groups in the social space. Peter Sorokin treats the process of social mobility in his paper *Social Mobility* from 1927, but a richer literature in the field appears after World War II, with authors such as Otis Duncan[4], Martin Lipset and Reinhard Bendix[5], Raymond Boudon[6], Arnold Anderson[7]. If we consider George Gurvitch's[8] perspective, according to which society is formed of social levels, social mobility represents the individual's movement from one level to another (vertical mobility) or within the same social level (horizontal mobility).

*Social status* represents the position occupied by an individual or a group of individuals in a society. Ralph Linton considers that status is the collection of behaviours that an individual is entitled to expect from others. Talcott Parsons distinguishes between *attributed* and *gained* statuses[9]. The *attributed* status is the collection of attributes that the individual has at birth (sex, name, ethnicity, financial situation etc.) while the *gained* status is obtained as a result of social mobility, and personal efforts and investments made by the individual. The direction of the mobility can be ascendant or descendant, so that an individual could have an ascendant or descendant vertical social mobility. In the case of the *ascendant vertical* mobility, the individual changes their status, as a result of socialization and education, having the possibility to accumulate social prestige and economic rewards, but also to develop contacts and exchanges with individuals situated on a superior position within the society. In meritocratic societies, which emphasize the individuals' efforts to gather information and new competences, this type of mobility is frequently encountered. In closed traditional societies, mobility is done on the basis of family ties, blood ties or according to the economic capital held by the families of origin. The *descendant vertical* mobility is the opposite to the ascendant mobility, the individual goes down the social hierarchy. The *horizontal* social mobility is associated with the movement of the individual within the same social and professional category, within the same social level/layer, without any change in status (only in the social role in certain cases). *A social role* corresponds to each social status, in other words the social status is emptied of content without exercising the role. *The social role* of an individual is considered to be the collection of behaviours that other individuals are entitled to expect from the former. An individual is thus equally characterized by several statuses, such as

[1] Cătălin Zamfir & Lazăr Vlăsceanu (eds.), *Dicționar de sociologie* (București: Babel Publishing House, 1993), pp. 355-357.

[2] Chris Lee "Sociological Theories of Immigration: Pathways to Integration for U.S. Immigrants", *Journal of human Behavior in the Social Environment*, 2009, 19(6): 730-744.

[3] *Convention and Protocol Relationg to the Status of Refugees* (Geneva: UNHCR, 2010), Available at http://www.unhcr.org/3b66c2aa10.pdf, accessed April 2019.

[4] Otis Dudley Duncan, "Path Analysis: Sociological Examples," *American Journal of Sociology*, 1966, 72(1): 1-16.

[5] Martin Lipset & Reinhard Bendix, *Social Mobility in Industrial Society*, (New York: Columbia University Press, [1959] 2018).

[6] Raymond Boudon, *L'inégalité des chances. La mobilité sociale dans les sociétés industrielles*, (Paris: Armand Collin, 1973).

[7] Arnold Anderson, "Lifetime InterOccupational Mobility Patterns in Sweden" *Acta Sociologica*, 1955, 1(1): 168– 202.

[8] Jean-Christophe Marcel, "*Georges Gurvitch, La conception gurvitchienne de la sociologie"*, Available at https://www.universalis.fr/encyclopedie/georges-gurvitch/2-la-conception-gurvitchienne-de-la-sociologie/, accessed April, 2019.

[9] Ralph Linton, *The Study of Man: An introduction*, 1936, Appleton-Century-Crofts. INC, Available at https://archive.org/stream/studyofman031904mbp/studyofman031904mbp_djvu.txt, accessed April 2019.

social, economic, cultural, political, but also by the roles that correspond to these statuses. More often than not there are conflicts and tensions both within the statuses and roles, and between them. The constellation of statuses and roles, the cultural medium in which they are exercised contribute to the configuration of the individuals' identity.

Alan Simmons[10] considers that together with *a change in residency, place of employment or profession*, the immigration process presupposes a *major change in the sphere of social and cultural relations* as well. As a result of the social and cultural interactions developed in the new community, there are changes that occur in the values and beliefs system of the immigrant. On the other hand, new beliefs are developed, as well as new frameworks of value that contribute to the configuration of a new identity, outside the territory of origin.

James Fearon defines personal identity as being "a set of attributes, beliefs, desires or principles of action" that distinguish a person from a social point of view and direct its behaviour[11]. The personal identity refers to the unique characteristics of a person, to aspects of their life that are different from those of other individuals.

On the other hand, social identity is defined as the process of the individual's *identification* with others at the basis of the criteria related to race, gender, nationality, and religion. Social identity offers the individual the possibility to form a self image[12] for themselves. *Cultural identity* has in turn to meanings, namely individual identity and collective identity. At the individual level it refers to the cultural dimensions, to the cultural medium in which a person was socialized: linguistic context, religious and moral education, attitudes attained in the social medium, manners, etc. Another use of the term takes into consideration the belonging to a cultural group, being thus a synonym to collective cultural identity. A group is considered cultural when its cultural characteristics are combined so as to characterize the way of life of its participants, which determines a type of culture to be different from others.[13] From a cultural point of view, collective identity is different from the personal one since the former does not represent the sum total of individual identities, but the manner in which a group "gets along" and "perceives" itself[14]. Identity takes into account the relation between the self and the other as well[15]. Thus, it is based on differences and it is built through inclusion/exclusion mechanisms.

For Claude Levy Strauss identity is a polysemantic term that is centred on value axes that evoke *similitude* -the character of what is identical-, *unity* -the character of what is "One"-, *permanence* -the character of what remains identical to oneself-, *recognition and individualisation* -a person is a distinct entity for another person-. Identity is for Strauss similar to a "virtual house". What is to be recalled is that identity does not have a real form, it cannot be tangible but it does explain many connections and processes of a particular relevance.

## 3. The social integration of the Turkish immigrant in Romania

We have considered it necessary to address a series of questions related to *the social relations* developed by the Turkish immigrant outside the ethnic group, so that this *first indicator* translates the availability and resources of the immigrant to explore other social and cultural spaces as well. From our open discussions we have noticed a tendency of the Turkish immigrant to conserve their own cultural customs that they mainly find in their ethnic group. As a result, they mainly frequent persons with the same cultural background. This tendency annuls in many situations the development of social relations with citizens belonging to the society that represents the destination of the immigration. We wanted to verify this presumption by addressing a series of questions that have targeted the types of activities undertaken together with Romanian citizens, the frequency of the visits done by the immigrants to Romanian citizens, the causes for which the Turkish immigrants prefer/do not prefer to develop friendships with Romanian citizens outside the professional medium. *The second indicator* took shape as a result of a focus group organized in October 2017, when we discovered that all of the 17 participants had not accessed various services offered by associations or NGOs that activate in the field of migration. Although they complained that they feel excluded, that they would like to be supported, helped in learning Romanian traditions and culture, and Romanian, they did not conduct any documentation regarding the existence of associations/NGOs that organize activities of formal/informal socialization with immigrants and refugees. We would like to highlight the motivation of the Turkish immigrant to explore existing resources in the host society and to

[10] Alan B. Simmons, "Mondialisation et migration internationale: tendances, interrogations et modèles théoriques", *Cahiers québécois de démographie, L'immigration*, 2002, 31(1): 7-33.

[11] James D. Fearon, *What is identity (as we now use the word)*, 1999, Stanford University, California, Available at https://web.stanford.edu/group/fearon-research/cgi-bin/wordpress/wp-content/uploads/2013/10/What-is-Identity-as-we-now-use-the-word-.pdf, accessed April 2019.

[12] John B. Davis, "Identity and Commitment: Sen's Conception of the Individual", Tinbergen Institute Discussion Paper, 2004, Available at https://www.researchgate.net/publication/4785801_Identity_and_Commitment_Sen's_Conception_of_the_Individual, accessed March 2019.

[13] Paul Gilbert, *Cultural Identity and Political Ethics* (Edinburgh : Edinburgh University Press, 2010), pp. 3-4.

[14]Gerard Delanty & Chris Rumford, *Rethinking Europe. Social theory and the implications of Europeanization* (New York: Routledge, 2005), p. 52.

[15] Gerard Delanty & Chris Rumford, *op. cit.*, p.51.

utilize them. *The third indicator* translates as well the immigrant's efforts to hold a minimum of knowledge about Romanian culture, a minimum without which one cannot establish certain value reference points in the relation between the immigrant and the society chosen for immigration. Similar to the third indicator, *the fourth indicator* highlights the efforts made by the immigrant in learning basic notions about European culture, considering the fact that the majority of those interviewed want to spend the rest of their lives in Romania or in other countries in Europe. Moreover, following the open discussions, we were able to deduce that a large part of the immigrants who participated in the study admit that there are important differences between the European culture and the Turkish one, that they present difficulties in understanding certain social and cultural practices. *The last indicator* makes reference to the role of traditions in the immigrant's process of social integration. The informal discussions revealed that for the majority of the interviewed immigrants the traditions are a substantial component of their lives, an element of distinction and a permanent resource that supports them and guides them in their daily life. Moreover, the act of immigration is considered by a part of them as "a betrayal of the traditions". This indicator was meant to highlight whether traditions truly represent a real resource that support the immigrant in the process of social integration.

*Indicator 1.* The development of social relations outside the ethnic group

22 (7 men and 15 women) of the 60 interviewed have not developed friendship relations with Romanian citizens. They consider that they feel more comfortable with friends from the same ethnicity or with colleagues coming from Libya, Lebanon, or Syria. A total of 28 out of those interviewed stated that they meet up with Romanian citizens only to discuss business. Another 8 stated they participate, on average, once a year to various activities together with Romanian citizens as follows: sport, eating together, and attending performances. Only two male individuals out of the 60 interviewed stated that 3 times a year on average they exchange visits with other Romanian families and they participate in various Romanian holidays at the invitation of their Romanian friends. 14 of the interviewed men consider that they prefer to invite Romanian citizens in their own houses or to the restaurant, rather than be invited by them. The number of women who did not establish social relations outside the family is larger than in the case of men, with only 4 out of the 19 interviewed women having friends who are Romanian or of a different nationality. They consider that the traditions do not allow them to develop friendships or to visit other individuals without being accompanied by their husbands.

*Indicator 2.* The accessing by the Turkish immigrant of various cultural services and those for informal education

What is noticeable is the fact that neither of those interviewed did not know, during the research period, names of associations or NGOs that organize cultural activities, Romanian language courses, courses for obtaining citizenship, recreational activities, encounters between Turkish immigrant children and Romanian children, film viewing, games, etc. Despite the fact that 37 of the Turkish immigrants have denounced difficulties in correctly speaking Romanian, only 11 of them seemed interested in the courses organized by Romanian associations and NGOs to this end. The 11 Turkish immigrants who obtained Romanian citizenship answered that the existence of such associations and NGOs is useful, but only 4 of them stated that they would have attended the classes and activities organized by them. Only 10 out of the 23 Turkish immigrants who are planning to obtain citizenship have shown interest in accessing such services with the specific purpose of obtaining detailed explanations about the manner in which a citizenship exam is conducted. Only 9 of those interviewed consider as useful the organization of family cultural activities, such as visits at museum or exhibitions, viewings of cultural shows that have a Romanian or international character.

*Indicator 3.* What the Romanian culture means for the Turkish immigrant

7 of the respondents do not have knowledge about Romanian culture although they immigrated to Romania over five years ago, 4 consider that it is similar to the Turkish one, 7 consider it a mix of cultures mainly formed from Western and Eastern elements. 3 of the Turkish immigrants associate the culture with the people, namely a culture with warm and welcoming people. A majority of the 39 associate Romanian culture with the name of certain poets, painters, rulers, and sportsmen, such as: Eminescu, Grigorescu, Ștefan cel Mare, Carol I, Hagi. 4 respondents added as well the name of former president Ceaușescu to the four names, while two others complete the aforementioned list with the names of certain entertainment presenters. 10 of those interviewed consider it important to have knowledge about Romanian traditions, customs, and culture in order to better integrate in the Romanian society. A number of 5 individuals visited the Village Museum, 2 visited that of the Romanian Peasant, while 2 visited the History Museum. Although they went through a citizenship exam that contains a series of questions about Romanian culture as well, 19 of those interviewed admitted that they memorized the answers and did not feel the need to visit museums or to read a stanza from the poem of a Romanian author. Only 4 of the 23 individuals who have citizenship stated that in preparation for the exam they felt the need to visit the Village Museum in order to better understand Romanian traditions and customs.

9 of the respondents know the significance of Romanian holidays such as Easter and Christmas.

*Indicator 4*. The European culture for the Turkish immigrant

9 of those interviewed do not know what European culture means, with 12 of them associating it with democracy, human rights and free travelling. Only 4 of the 60 respondents have attended classes in universal literature within courses organized at the faculty in Romania. Even so, they admit they were not passionate about them and they did not further their studies outside the classes, reason for which they hold vague information about important trends in art, literature, and music, about famous works, painters, composers, and writers from the European cultural space. Only 6 of them have knowledge about the main historic landmarks, such as colonization, world wars, the Holocaust, the Cold War, etc. Neither of those interviewed was able to explain what Renaissance or Enlightenment meant. In regards to the great names from European literature, only two individuals mentioned Emile Zola, Honoré de Balzac, William Shakespeare, and Plato. Only 3 of those interviewed mentioned painters such as Picasso, van Gogh, Michelangelo, Leonardo da Vinci, and Rembrandt. 4 of the respondents know composers such as Vivaldi, Beethoven, and Chopin. 20 of the respondents have visited cities such as Rome, Paris, London, Amsterdam, Luxemburg, Frankfurt, Berlin, and Vienna. Only 8 of them visited historical monuments as well, 4 allocated time for art museums, and 2 for open-air exhibitions.

*Indicator 5* The conservation of the traditions of Turkish immigrants

52 of those interviewed consider traditions as being a highly important part in their lives, when organizing their lives. The majority of them have named the following as being a part of the wider category of traditions: respect for parents, religion, prayer, food, dinners with friends, and the help they offer others. Two of the Turkish immigrants consider that in Romania traditions might be lost, but even so they have to remain here, for only here can they develop businesses. 43 of the respondents consider that the supreme force that sets things in motion and that helps them "go forward in life" is Allah. 10 of the Turkish immigrants who participated in the research are married with Romanian women. They consider that it is the duty of the wives (and not of the husbands) to respect the traditions and to learn the customs of the Turkish culture, although they live in Romania. 19 of those interviewed consider that although traditions are very important, these impede them from understanding other cultures. 12 of the respondents stated that after an average of 5-7 years, their perceptions concerning traditions and religion changed over time in a "good way". They shared the fact that they went through major changes to the better at the level of understanding, approach, relating to themselves or to the exterior social medium.

On the one hand, the interviews looked at the *efforts made* but also *the cultural, intellectual resources of the Turkish immigrant*. On the other, what was analysed was how the *respect and attachment for traditions* can facilitate or burden the Turkish immigrants' process of social integration.

In regards to the *efforts made* by the Turkish immigrants we found that the social relations developed by them outside the professional medium are channelled mainly on businesses as well and less on the immigrants' curiosity or openness toward exploring the new culture in which they decided to immigrate. The tendency of the majority of the target group is to withdraw to the groups of friends belonging to the same ethnicity.

Despite the fact that a series of specialized associations and NGOs develop services meant to help immigrants get used to the cultural medium in Romania, the immigrants did not seem sufficiently motivated to access them, although they thought them as being useful. The data obtained show attitudes of inertia, inaction and even of rejection from behalf more than half of those interviewed. The accessed group is still the ethnic one. The immigrants consider that the friends and colleagues who have been in Romania for a longer period of time tell them "how things happen, what is good to do, what is not good in Romania, what is good to avoid".

A series of questions regarding the familiarization of the immigrants with the values of Romanian and European culture did not have the intention to be a knowledge test. We considered that certain information about the main moments in universal and European history, the main cultural trends, the great names in European art can constitute a useful resource for immigrants, a resource that could attenuate the culture shock, or that could be an intermediary bridge between the pre- and post-immigration stages. The schools frequented by immigrants in their past did not ensure a familiarization with notions of European culture and civilization, even less so with respect to the Romanian one. The supplementary readings and activities conducted by the immigrants were not directed this way. These are also the reasons why a part of those interviewed did not have the curiosity to decipher the codes and cultural values of the new medium, and in addition, they are found in the situation of not understanding, of denying, rejecting and retreating to what they know best, namely their own cultural group. This tendency was encountered in several of the individuals with higher studies. We consider art as a universal language and a resource that could be explored more in the integration processes of Turkish immigrants in Romania.

Both the *personal resources* and *the efforts made* are found in a constant competition with the *traditions* that are considered as the centre of existence for Turkish immigrants. The formal and informal socialization mediums, the family, school and friends have promoted this type of cognitive and affective model based on traditions. Even more, they promoted its superiority in relation to other cultural models. This is also the reason for which the majority of those

interviewed consider that the women of other ethnicities and religions married to Turkish citizens have the duty to convert religiously out of respect for their husbands and they have the duty to respect their traditions. Only one of those interviewed answered affirmatively to the question regarding a possible renunciation of this own religious system. Turkish immigrants a priori place faith in the centre of existence and through it they justify for themselves many of the cultural and social facts, phenomena and processes that they are a part of, without resorting to logical or factual arguments.

## 4. Conclusions

The content analysis of the data obtained from the unstructured interviews highlights the fact that *social integration* is a slow process, which is at an early stage with over half of the Turkish immigrants, although the immigration took place on average at least two years ago. Moreover, in certain cases, the immigrants who record more than 10 years since they decided to immigrate in Romania, what was noticed was a tendency to become stuck in these early stages. This process of social integration is slower with the interviewed women, since they mainly frequent the familial medium or groups of friends that are very close to this medium.

Although in the present paper we did not focus on *systemic integration*, the research conducted has highlighted as well the fact that the *systemic integration* was done more rapidly than the social one, outrunning it. As mentioned in the first part of the paper, *systemic integration* is focused on economic and civic integration, in other words, on respect for the rules of the economic game but also on the respect for the civic rules that ensure institutional, formal relations for the immigrant in the Romanian society. The majority of immigrants stated that the main cause for their immigration is economic, a fact that shaped their professional and social trajectory after immigration as well. In order to develop their businesses, they learnt to respect the rules imposed by the Romanian society to this end. The situation is different in regards to the *social integration* that operates with values, beliefs, social interactions, the immigrant's potential to understand and assimilate certain codes, and cultural values. The new culture encountered in Romanian society, constitutes itself as a medium different from the cultural medium where the immigrant configured *their identity of origin.*

*The efforts made* for social integration, *the cultural and intellectual resources,* and *the attachment for traditions* represent elements that configure the *deterritorialized identity* of the Turkish immigrant. This type of identity supports in turn the process of *social integration* that is conducted as aforementioned, at a more profound level, that of cultural values, of cognitive and affective beliefs. The data analysed in this paper highlights the fact that the Turkish immigrant is not prepared to invest in the new type of identity – called *deterritorialized* in the present paper -, an identity that would ensure *social integration*. The tendency of the majority is to return to the *identity of origin* and to protect it, with the risk of feeling isolated in the new immigration medium that they have chosen. This tendency manifests itself even if the configuration of the *deterritorialized identity* does not presuppose the annulment of the *identity of origin*. It presupposes in fact its maintenance and, moreover, using it as a basis for building the deterritorialized one, meaning a nucleus of interactions, and cultural values and codes that can ensure the immigrant the understanding of the new social and cultural medium.

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# WOMEN LEADERSHIP: CHARACTERISTICS AND PERCEPTIONS

**Adina-Loredana DOGARU-TULICĂ***

**Abstract**

*Over the years women have won many fights during their road to emancipation. One of the main victories took place in the last decade when politics have become a won battle to the feminist representants. After more and more women began to occupy key positions in politics, administration, or the private environment, researchers were interested in the ways women lead. Scholars like Judy Rosener, Alice Eagly and colleagues, Catalyst or Carli have tried to find differences in leadership between women and men, but also the dominant characteristics of women leaders. Common views were that women are more concerned with the welfare of other people (helpful, sympathetic, nurturant etc), women lead in a more democratic and participative style than men and use relational skills to influence others, encourage participation, share power and information. The present research presents chronological references of women emancipation during the history, brings into discussion, according to the reviewed literature, gender differences in leadership, looks over women in leading position worldwide and makes some consideration about public leadership. This paper also highlights, through the focus-group qualitative research method, the main characteristics of women leaders in Romania, also trying to briefly describe how women politicians are perceived by the public. This paper is part of a wider research work that approaches the online communication of women political leaders.*

**Keywords:** *leadership, women leaders, feminism, gender differences, women emancipation*

## 1. Introduction

For several years now, there has been a particular concern about gender relations in leadership. This concern is due, on one hand, to the increased number of women in leading positions and, on the other hand, to the fact that men are the ones with the most influential positions in all areas.

All leaders nowadays, no matter the gender, – political leaders, corporate leaders or civil society leaders – "have to act within the context of a dynamic system of global pressures and trends. (…) Leadership is often seen as one of the most important and effective responses to the challenges and opportunities presented by the global context."[1]

Many scholars have defined the leadership concept over time. To introduce this paper, the author of the present research will refer to some of the most relevant definitions. M. Shanmugam, R.D.G. Amaratunga & R.P. Haigh from *Research Institute for the Built and Human Environment*, University of Salford, argue that leadership is „ process in which an individual influences a group of individuals to achieve a common goal".[2] Rost sees leadership as "an influence relationship among leaders and collaborators who intend significant changes that reflect their mutual purposes"[3] A integrated and complete definition is presented by Winston and Patterson who argue that "A leader is one or more people who selects, equips, trains, and influences one or more follower(s) who have diverse gifts, abilities, and skills and focuses the follower(s) to the organization's mission and objectives causing the follower(s) to willingly and enthusiastically expend spiritual, emotional, and physical energy in a concerted coordinated effort to achieve the organizational mission and objectives."[4]

The definitions seem simple at first glance and all all point to the leader's power to influence. That is why we ask ourselves the natural question: are not women capable of influencing a group of individuals to achieve a common goal? Are not women smart enough to do this? The author of the present research tries to find the answer to this dilemma, revising the literature and studying people's perceptions about this topic through a focus group.

## 2. Women emantipation - chronological references

The beginnings of feminism could be marked by Mary Astell's influential work - A Proposal to Ladies (1694). Astell's had dreamed then, in the seventeenth century, about a world where women are able to learn useful things and bring their contribution to society. She claimed that women could become scientists and experts in many fields, even in politics, and stressed

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[1] Global Definitions of Leadership and Theories of Leadership Development: Literature Review, University of Cambridge, Institute for Sustainability Leadership, 2017

[2] M. Shanmugam, R.D.G. Amaratunga, R.P. Haigh, „Leadership styles : gender similarities, differences and perceptions" , in: *7th International Postgraduate Research Conference in the Built and Human Environment*, (28th - 29th March 2007, Salford Quays, UK).

[3] J. Rost, *Leadership for the twenty-first century*. (Westport, CT: Praeger, 1991), p 102

[4] Bruce Winston, Kathleen Patterson, „An Integrative Definition of Leadership", *International Journal of Leadership Studies*, (2006) p7,

that it is essential for women to improve their knowledge and become smarter. Her text was a philosophical one but claimed that women were in a lower moral position than men. After determining the causes of this problem, Astell insisted that women should become rational citizens with the right to a male-like education, to a education based on the right to liberty, with the opportunity to hold any office, with the possibility to be political representated and to have personal dignity. [5]

The second woman that remains important in the history of the feminist movement is Mary Wollstonecraft (1759-1797) known especially for providing a systematic analysis of the subjugated state of women. Like her predecessor, she realizes that the only major difference between men and women is education and insists that women have access to education. Mary Wallstonecraft is famous for the question that feminists had to find the answer, namely: "If all people are born free, how is it that all women are born slaves?" Given that some women were struggling with survival (black women, working women, women in rural areas), the struggle for development and affirmation ranks second among the priorities of these women.

The two mentioned researchers are in the first wave of the feminist movement because, through their work, they have responded predominantly to the problems of certain categories of women: the white, of European culture, belonging to the middle class.

In Romania, the first wave of the feminist movement unfolds in parallel with the Western one. It is a feminist movement of the elites, category of educated women with access to information coming from outside the country. However, it should be noted that at that time 80% of Romania's population lived in rural areas, therefore the Romanian feminist movement can not be integrated or compared with the feminist movement in Europe or around the world, becoming very active and strong only after World War I. The most important period for women in Romania is the period preceding the Constitution of 1923, considered to be the most democratic. In this period, the Romanian women have engaged in intense lobbying to obtain equal civic and political rights with men, got involved in having acces in all institutions, dignities and public functions like men, and in politically prepare women to exercise their rights. The year 1929 also gives Romanian women the right to vote, but we are talking about a restrictive right for educated women aged over 30 years. In the same year the law on administrative reorganization is adopted, whereby women receive the right to be elected in local elections. Only if they had certain studies, they were war widows, women decorated for wartime work, or women running cultural, philanthropic or support societies at the time.

The female vote was not compulsory, however, and the presence of women in the polls was discouraged by men's irony at their expense. Ten years later, for the first time in Romania's history, women also receive the right to be elected in Parliament. As in the case of men, this right applies only to educated women aged over 30, but they were few, because most women did not even have primary education. Only the first Communist Constitution, issued in 1948, states that "all citizens, regardless of gender, nationality, race, religion, degree of culture and profession, have the right to vote and to be elected in all the organs of the State. All citizens who have reached the age of 18 have the right to vote and all citizens who have reached the age of 23 have the right to be elected ".[6]

If the first wave of the feminist movement has achieved its goal of introducing into law equal rights for women with men, the second wave aimed to put them into practice in everyday life, by annihilation of gender differences because women did not want to remain second-class citizens. The second wave of the feminist movement has been a significant gain since many of the feminist policies have turned into state policies: equal pay for work of equal value, access to professions deemed specific to men, policies to combat sexism in education and all areas.

The third-wave of feminism started in 1990's and the followers of this trend "work outside the power/victim framework, aiming to investigate the complicated picture of young feminism and to re-theorise gender". [7] Feminists from the third wave integrated in their work contemporary subjects related to immigration, class conflicts, multiculturalism, globalization and also environmental issues, human rights.[8] Romanian feminism after 1990 has a hybrid approach, representing a combination of the agenda of the second wave, missed as a historical integration due to communism, and the integration into political generation of a network located in cyberspace. [9]

## 3. Gender differences in leadership

Men played a very important role in the development of mankind because they were the ones who led the world, but the world is evolving and from one decade to another there are major changes in every respect. Thus, in a century marked by unprecedented changes, revolutions and innovations, the most visible and lasting transformation can be considered the

[5] Mary Astell, *A Serious Proposal to the Ladies*, in: https://1000wordphilosophy.com, accesed March 1, 2019

[6] Ionuț Dulămiță și Ionuț Sociu, *80 de ani de când femeile pot vota în România*, https://www.scena9.ro/article/votul-femeilor-in-romania-cronica-unei-lupte, accesed March 1, 2019

[7] Jiaran Zheng, *New Feminism in China: Young Middle-Class Chinese Women in Shanghai*, (2016), p 23

[8] Rhonda Hammer, Douglas Kellner, „Third Wave Feminism. Sexualities, and the Adventures of the Posts in Women", *Feminism, and Femininity in the 21st Century: American and French Perspectives* pp 219-234, 2009

[9] Mihaela MIROIU, *Drumul catre autonomie. Teorii politice feministe* (Editura Polirom, Colectia „Studii de gen", Iasi, 2004), p 83

involvement of women in the development of humanity.

Arnie Cann and William D. Siegfried[10], professors at Ohio State University, conducted a research examining the perceived gap between men's leadership behavior and women's leadership behavior and concluded firmly that there were differences in how women and men are thinking about driving. Their belief is that men and women differ in their approach of management and therefore offer different qualities.

The theories of gender differences in leadership have started from the most varied assumptions, but at the root of all differences are probably biological differences. Biological theory starts from the premise that leadership is genetically determined, innate in men and therefore inaccessible to women[11]. Another theory, which starts from the concept of gender role, recognizes the role of socialization and explores gender-specific roles as determinants of leadership. A third perspective involves identifying other factors that might make a difference, for example women's attitudes towards leadership, women's confidence in themselves, previous experience, and the predominantly male style of the organization.

Research that compares the leadership styles of women and men can be extended. Alice H. Eagly and Blair T. Johnson of Purdue University (US) evaluated the male and female leadership styles and concluded that women tended to adopt a more democratic or participatory style, a less autocratic style or directional to the style promoted by men[12]. Another point of view would be that women are less assertive and less inclined to promote and negotiate for them, unlike men[13]**.** These observations and other findings are interpreted in terms of a theory of the "social role of gender differences in society" [14].

A Giddens[15] draws attention, however, that there is a clear distinction between the terms "sex" and "gender". If the first term refers to biological aspects, more specifically to physical differences of the body, the second term refers to the psychological, social and cultural differences between men and women. In his opinion, the distinction between gender and gender is fundamental. According to his theory, the main differences between men and women are not biologically determined, as we are tempted to believe most of us, but rather the results of social-cultural processes, the outcome of a learning process that begins early in childhood. He argues that learning gender roles through all the influences of the social environment (gender socialization) is a process that starts right from the birth of the child. According to his opinion, through "gender socialization", the child learns the behaviors considered appropriate for his or her sexuality and teaches the values accepted at the cultural level with respect to what is specifically male and specifically female. Gender socialization therefore contributes not only to gender awareness, but also to the social recognition and acceptance of gender social stratification in any society, and to the perpetuation of the inviolability of male-female dichotomy. So the male-female dichotomy and all the differences (including inequalities) that it implies are highly naturalized.[16] This also results in practices that are "appropriate" or "inappropriate" for a given genre, as well as prohibitions. These gender differences, which appear to be natural, and which may appear in the form of skills, skills, behaviors, practices, activities, shared knowledge, etc., often take the form of stereotypes that give each gender a number of cultural representations. They have both a descriptive component - traditional concepts of how women and men are, how they behave and what characteristics are specific to each gender, and a prescriptive component - the generally accepted rules on how women and men should be and how they should to behave[17]. Socially shared expectations of an individual's behavior, depending on their gender, have often been conceptualized as "gender roles". Gender roles are different from one culture to another and refer to those behaviors deemed appropriate or acceptable to members of each gender (men and women) respectively. What is typical and therefore "normal" for each gender is learned early in the life of each individual through the socialization process.

Extending these theories in the sphere of leadership, we begin to understand that gender differences lead to an erroneous assessment when one category is supposed to be superior to the other, but research shows that these discriminatory attitudes and behaviors have brought inconveniences to both organizations and societies, and individuals by the limits imposed on how people can contribute to the evolution of society on the basis of the uniqueness and particular characteristics they have[18], therefore, starting from pragmatic arguments, figures and verified results, there is a growing awareness of the need for gender balance and diversity.

As far as leadership styles are concerned, there are researchers who say that women's leadership style differs from that of men, in the sense that women are

[10] Arnie Cann & William D Siegfried „Gender stereotypes and dimension of effective leader behavior*"*, in *Sex Roles* 23(7):413-419 , 1990

[11] A. Popescu, *Diferențe de gen în leadership*, (București, 2006) pp.1-3

[12] H. A Eagly & T.B Johnson., „Gender and Leadership Style: A Meta-Analysis", *Psychological Bulletin* by the American Psychological Associalion, Inc. 1990, Vol. 108, No. 2, pp. 233-256

[13] S.Sandberg & N. Scovell, Lean In: *Femeile, munca și dorința de a conduce*, (București, Editura Litera, 2015)

[14] Idem 6

[15] Antony Giddens, *Sociologie.* (Bucureşti: Bic All, 2000)

[16] Pierre Bourdieu, *The Social Structures of the Economy*, Polity; 1 edition (April 22, 2005)

[17] Thomas Eckes, „Geschlechterstereotype: Von Rollen, Identitäten und Vorurteilen". in Ruth Becker; Beate Kortendiek (coord.). *Handbuch und Geschlechterforschung. Theorie, Methoden, Empirie*. (Wiesbaden: VS Verlag für Sozialwissenschaften, 2004) p. 165–176.

[18] J.S. Hide, „The Gender Similarities Hypothesis". *American Psychologist.* 60(6), 2005,581-592

willing to collaborate and cooperate more with others, and encourage subordinates to self-valorisation.[19]

The research of Eagly, Wood and Diekman[20] shows that men leaders have more agentic characteristics: they are aggressive, ambitious, dominant, powerful, independent, self-confident, competitive characters. In relationships within the organization, men struggle to attract the attention of others, influence others, distribute tasks. On the other hand, women leaders have more communal characteristics: interested in the well-being of others, understanding, interpersonal sensitive. In the relationships within the organization, women do not want to focus on themselves, accept the directions given by others, support their subordinates and colleagues, guide their subordinates, help solve relational and interpersonal problems.

In terms of the five types of leadership types mentioned in specialty literature, Eagly et alii, attribute to each kind of typology a genre. So:

- Autocratic leaders are rather men leaders
- Democratic leaders are women leaders
- Transformational leaders - with many communal charasteristics, are closer women leaders
- Transactional Leaders are rather men leaders
- Laisser-faire – more likely to be men.

Summarizing, leading women have a behavior oriented towards interpersonal, democratic and transformational relationships, while leading men are self-oriented and autocratic.

By studying the literature, we have established that there are gender differences, and we have also clarified where they come from, so it is natural for women and men to behave differently and obviously to adopt different leadership styles. So, which of these styles is more effective? A woman leader, who helps subordinates, who pay attention to their development needs, which is available and friendly, or the a man leader - task-oriented, which requires and expects employees to abide by rules and procedures, that sets high performance standards and maintains the subordinate relationship?!

Of course, we can not say which of the two variants provide the recipe for success, but we find that in recent years organizations have promoted a new leadership style, regarded as visionary, charismatic, inspirational, which led to the emergence of transformational leadership. It involves monitoring and increasing the performance of subordinates, agreements between the leader and subordinates about objectives and tasks, but also rewards for valuable employees. Female characteristics appear to be more appropriate to transformational leadership.[21] New values (sometimes called feminine values) are starting to arise in the business environment, values that contrasts with the competitive and authoritarian approach traditionally associated with masculinity, and are based on consensual relations. Therefore, the success of the interactive leadership style of women has led to a tendency to adopt it by men as well. Organizations begin to appreciate the leadership style that includes behaviors such as: encouraging employee participation, sharing information and power, promoting others and motivating them, which has given leaders flexibility to survive in a competitive and diverse business environment.

## 4. Women liders in figures

Transformational leadership in organizations seems to be the key to success for many women who want to hold leadership. However, although the number of women in leadership positions in companies is increasing, women are still under-represented in managerial positions. In Poland, for example, in 2016 only 10% of women had leadership positions.[22] In addition, their earnings are even lower today by 20% compared to men. Even in Romania things are not better. In 2016, the number of women serving in large companies was 37%, of which 10% held management positions, 12% had a non-executive role, and 15% were in the supervisory board.[23] The opposite case is Denmark, where women occupy 23% of all managerial posts and over 70% of women have jobs.[24]

A recent research of *The Economist* [25] shows that in the field of scientific research - men dominated, women have begun to gain ground. Thus, in the European Union and in eight other countries researched, the proportion of women authors increased from about 30% in the late 1990s to about 40% at present. In Japan, on the other hand, only a fifth of the researchers are women, with women being best represented in health-related topics. In fact, this area and that of psychology are the only examples where women are more numerous than men in many countries, including the United States and the United Kingdom. In contrast, less than a quarter of researchers who publish papers in physical sciences are women. Probably as a consequence of this, inventors who register patents are still almost all men. Such large imbalances suggest that there are innumerable physical discoveries and innovative products to be made, because the scientific world do not take full advantage of the intellectual capital of women.

[19] E. W Book, *Why the best man for a job is a woman*, (New York: Harper Collins, 2000)

[20] A. H. Eagly, W Wood, & A. B. Diekman, "Social role theory of sex differences and similarities: A current appraisal." in T. Eckes & H. M. Trautner (Eds.), The developmental social psychology of gender, (Mahwah, NJ: Erlbaum, 2000) pp. 123–174.

[21] A. Popescu, *Diferențe de gen în leadership*, (București, 2006), pp.1-3

[22] A. Górska, „Gender Differences in Leadership", *Studia i Materiaïy*, 1/2016 (20)

[23] R. Moldoveanu, „Inegalități de gen pe piața muncii", *Revista Română de Statistică*, 12, 2015, pp 42-43;

[24] European Commission Report, https://ec.europa.eu/eurostat/data/database, accesed at 20 February 2019

[25] „The gender gap in science. Scientific research remains male-dominated—but women are catching up", The Economist, No. 10 mart., 2017

In another study, Gender Differences in Leadership, conducted on 353 companies in the world, it was found that the highest financial results were recorded by companies where the number of women in senior positions is higher, as opposed to companies where they are less represented.[26]

The International Labor Organization, concerned with the issue of gender differences, has found an explanation for the slow advancement of women in leadership positions, especially in male-dominated departments. Thus, the Organization believes that "women lack adequate leadership." From women managers in male-dominated environments is expect a style of leadership that suits the "world of men" to get a status. The so-called "male modes of management"[27] are characterized by competition, hierarchical authority and focus on control. Loden argued that there is a man type of management characterized by qualities such as competitiveness, hierarchical authority, high leadership, and solving analytical problems, arguing that women prefer and tend to solve problems, relying more on intuition and empathy than on rationality.

## 5. Some considerations about public leadership

Leadership is not an activity that mobilizes only the resources of an institution or organization to make progress with the difficulties it faces, but also the resources of people, countries[28]. At the same time, we are talking about a process of influence within which a person receives the trust and support of others and, without taking advantage of the formal position or the authority of the function, guides the group towards accomplishing one or more tasks[29] Therefore, leadership plays an extremely important role in achieving public reform of a country, being a precious tool for promoting and managing change for all peoples who have engaged in public sector reform.

Leadership is the most powerful and important weapon that any form of government can have. Poor leadership will direct governments and institutions of a country to failures, while strong leadership will lead any form of government to remarkable results. The need for leadership in this area is largely determined by the nature and scale of the reforms. Countries that have chosen the path of progressive reform are less inclined to mobilize a larger number of public leaders at the same time to drive change, but countries that have chosen the path of profound reform, both socially and administratively, need higher leaders in the public domain. The success of a public administration reform is conditioned by organizational aspects, a strategic planning capacity, a leadership change capacity, an ability to promote and coordinate the development of the organization, and the leader is extremely important when it comes to relations between members of the organization motivation of staff within the public organization.

The public leadership, associated by some researchers in the theory of new public management, refers to the ability of public managers to have an intuitive understanding of development, an understanding of the challenges and the changes needed in order to adapt public organizations to the permanent future[30]. Leadership is, in fact, the basic component of good governance, and politically responsible leadership is extremely beneficial to a state, because it will cope both with global changes and with day-to-day problems a government has. That is why a true political leader needs a strong personality, an ethical and cultural character, the ability to mobilize the crowds, bargaining skills, maximizing and streamlining resources. Understanding this concept, politically involved people can help both the development of the public and the private sector.

Political scientists argue that good political leadership requires a combination of charisma and integrity, as well as the ability to assess a situation and make a decision based on what would be best for the greatest number of people. Above all, being a political leader means more than just being a politician, because in order to lead at political level, integrity and desire to sustain what is good are needed, even if this could lead to the loss of a position in a government or the loss of elections for important positions in the state. Political leadership requires focusing on the long-term good evolution of a country, beyond any personal gains. In Hsin-Yi Cohen's opinion[31], a good political leader is: someone who serves as an example of integrity and loyalty to the people he or she represents, for both the public and other political leaders, someone with good communication and interpersonal skills who can work with a series of other people, irrespective of party or political opinion, in order to obtain the greater good for the general population, Also someone who can withstand the various temptations and baits of the political arena, someone with a strong character, with conscience and charisma, someone willing to listen to the needs of ordinary people and to represent them with faith, someone with the courage to stand up and say what it needs to be said - rather than tell the general public what it wants to hear, someone who is willing to make difficult (and possibly unpopular) decisions for the greater good. Therefore, a true political leader needs a lot of qualities and most of them can be acquired.

[26] A. Popescu, *Diferențe de gen în leadership*. (Bucuresti, 2006;
[27] M. Loden *Feminine Leadership. How to Succeed in Business Without Being One of the Boys*, (1985)
[28] Ronald A. Heifetz, *Leadership Without Easy Answers*, (Harvard University Press, Cambridge, 2009)
[29] Walter Ulmer, *A Military Leadership Notebook: Principles into Practice* (2017)
[30] Marius Lazăr, „Dezvoltarea leadershipului public, o resursă pentru modernizarea guvernării", in *Revista Transilvană de Ştiinţe Administrative*, 1(10), 2004, pp. 62-68
[31] Hsin-Yi Cohen, *A Political Leader* in: http://www.leadershipexpert.co.uk/political-leader.html, accesed at 15 February 2019

## 6. Methodological design. Case-study: women leaders in Romania

The qualitative research of this paper, based on the focus group method, aimed at identifying the main characteristics of female leaders in Romania and started from two research questions:

- - What distinguishes women leaders from male leaders?
- - How are the leading political women in Romania perceived?

The focus group was defined by researchers either as a group interview[32], a rigorously planned discussion group to obtain information on a subject proposed by the researcher[33], or any discussion between selected individuals on a particular topic as long as the researcher promotes and is mindful of participants' interactions[34].

The present paper used focus group as qualitative research method because it is based on the plurality of responses, the objective being to obtain data through perceptions, feelings, attitudes and opinions of a group of people, stimulate the participants' creativity and the sense of co-participation, with specific interactions between the moderator and the participants (in the form of questions and answers), but also among the participants (debates).[35]

The focus group was of semi-structured type, meaning that discussions were held around the pre-set theme, but the theme and the questions only had the role of guidance.[36] The questions were clear, in order not to create confusion for the participants, open (to produce elaborate answers), univocal (they referred to a single subject).[37] The focus group was an advantageous method of research because communication was more natural than in the case of an individualized interview, the moderator was able to see how opinions were built and how the interviewed people interact. The research obtained a variety of views and opinions on the debated issue and the focus group has favored the spontaneity and opportunity of each participant to express themself within the limits of availability and competence.

The objective study group was composed of eight participants, both women and men, with different social statuses and different age categories, being selected primarily for their leadership subject interest - they are graduates of a leadership course titled "Leadership. Motivation, Recognition and Success" taught by former minister and ambassador Cristian Diaconescu. As for the professions and occupations of the eight participant, they are: business woman, economist, political communication specialist, engineer, manager, esthetician, doctor in economics - former general manager of a company, philologist. The focus group took place on 4 March 2019 and lasted 45 minutes.

The interview guide contained the following questions:

1. Do you know women in leadership positions in international or Romanian organizations / companies?
2. Are there differences between the way women and men lead an organization?
3. What Romanian female political leaders do you know?
4. How do you feel about the proportion of women and men in Romanian politics?
5. What should women politician do to get more leadership positions?
6. How are the leading political women perceived in Romania?

Regarding the first question related to leading women in Romanian or international organizations, the participants at the focus group have appointed leading women from their own fields of activity, women who were related with their profession and, at national level, they distinguishing names such as: former head of DNA, Laura Codruta Kovesi, Princess Margaret, Prime Minister Viorica Dancila and Mariana Gheorghe, Petrom's first general manager. To note is that most of the names mentioned by the participants are public figures, highly publicized.

Concerning how leading women lead, the second question, focus group participants unanimously agreed that the leader has no gender, in the sense that women leaders and men leaders, once at the top of an organization, must achieve the same goals. Women leaders are not better than the men leaders and vice versa, but different and equally good at leading. There is no stereotype. However, in an in-depth analysis of the way women lead, the following directions of intervention have been noted:

- Employee valorisation is much stronger in leading women. Women have a more human approach, focus on the added value of the team, do not have an approach that stimulates differences between team members, do not encourage competition.
- Men leaders are efficient, quick decision-makers and communicators. The leading women are more personal, much more nurturing.
- Women leaders communicate better than the men leaders.
- Leading women are more emotional, they react emotionally in relation with their subordinates. Leading women treat their employees and work as their own child, with the same love and care.

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[32] Iluţ Petru, *Abordarea calitativă a socioumanului, concepte şi metode, (*Editura POLIROM Iaşi, 1997), p.92-98;

[33] J. Smithson, (2008). „Focus groups" in P. Alasuutari, L Bickman, & J Brannen, *The SAGE handbook of social research methods* (London: SAGE Publications Ltd doi: 10.4135/9781446212165, 2008), pp. 357-370

[34] Jenny Kitzinger, „Qualitative Research: Introducing Focus Groups". BMJ (Clinical research ed., 1995). 311. Pp. 299-302 https://www.researchgate.net/publication/1556638

[35] Idem 34

[36] Idem 32

[37] Richard A. Krueger, Mary Anne Casey, *Metoda focus grup: Ghid practic pentru cercetarea aplicata,* (Iasi: Polirom, 2005) pp. 58-66;

- Woman by definition is the leader, because she is the de facto leader of the family.
- Leading women treat women employees more coldly.

Also, during the discussion, it was stressed that in order to succeed in the organization she leads, woman leader should be supported by her life partner, meaning that he takes over the family responsibilities. This is because Romanian society still perceives women as being primarily responsible for maintaining the family core and taking care of children.

Regarding leading women politicians, whom the participants at the discussion know, among the mentioned names were: Elena Udrea, Olguta Vasilescu, Alina Gorghiu, Monica Macovei, Corina Cretu and Raluca Turcan. During the discussions on the above question, an idea unanimously accepted by all the participants was outlined, namely that there are no women political leaders in Romania, but women who gain a position at a certain moment, but who do not really have leadership qualities.

As far as the proportion of women and men in Romanian politics is concerned, all respondents agreed that women have a low representativeness, women are not listened because there isn't a strong voice of a woman leader and, ultimately, this reduced participation of women in political and public life is closely correlated with the level of education and social culture of the people. For example, at the local elections of June 5, 2016, the number of men mayor's mandates was almost five times higher than the mandates earned by women. Thus, 3040 men and just 147 women became mayors, the share of the latter being 4.61% of the total number of 3187 elected mayors (Romanian Permanent Electoral Authority 2016). Also in the Parliament voted on 11 December 2016, the people mandated 90 women out of a total of 465 deputies and senators, which represents almost 20 percent.

Focus group participants have failed to identify the way how women can get more positions in the Romanian political space.

At the last question, related to the way in which the women political leaders are perceived in Romania, all the respondents highlighted the preconceived and outdated ideas that the Romanian people in general and the voters in particular have about women in important political and public positions, the cultural filter of the Romanians, the legacy of the inequality between women and men remaining from the Communist era. Also, the focus group participants reiterated that citizens' preconceptions are fueled by the fact that there is still no strong female voices in Romanian politics. The respondents underlined that the general questions of the public when a woman reaches a political position are not related to her competencies but to how she obtained this position and which man leader helped her.

## 3. Conclusions

Leadership has no gender. Competence should be the only factor that recommends someone to take a leadership role. As the participants at the above presented focus-group stated, women leaders are not better than the men leaders and vice versa, but different and equally good at leading. There is no stereotype. However, by analyzing the differences between the way women and men lead, the focus group presented in this paper verified the theory that Eagly, Wood and Diekman argued in their research from 2000, meaning that women leaders have more communal characteristics than men leaders. Among this characteristics, based on the focus-group analysis, this research highlights: dedicated to valuing their employees, a more human and personal approach of problems, more nurturing with their team, better communicators, more emotional and interpersonal oriented. In other words, women leaders are have a more democratic leadership style than men.

Another idea that emerged from the case-study was that in Romania there are no political women who have leadership qualities, there are no women political leaders or powerfull voices of women in this public field, only women who gain a position at a certain moment. The underrepresentation of women in Romanian political scene is due to the level of educationin gender equity and social culture of the people, to the general perception that women are primarily responsible for maintaining the family core and taking care of children.

Also, this research states that, in Romania, leading women from politics are still seen with preconceived and outdated ideas, through a cultural filter tightly bound of the legacy of the inequality between women and men remaining from the Communist era. Women political leaders are not perceived in terms of competencies and leadership style, but in terms of how they have gained a certain leading position.

It is clear that in Romania women leaders in all fields are at the beginning of their journey to make their voice felt in the public space, but also in the popular mind, political space being a particular case, especially because of the deep masculine rules governing this field.

A future line of research regarding the subject of political feminine leaders in Romania could be how they respond in terms of communication at crisis situations, differently or not from men in similar positions.

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# ABOUT THE UNIONS OF THE STATE

**Milen IVANOV**[*]

**Abstract**

*The report examines the current problems related to the mechanisms of the country's accession to different types of alliances. Analyzing the processes and mechanisms for decision-making at the state level, are made the logical for the state administration decisions, related to the adequacy of the inclusion of a country to such groups. The report examines the adequacy of the Bulgarian practice against the international standards for strategic decision making in the state policy and makes important practical conclusions and gives specific recommendations for optimization of the strategic planning and forecasting processes.*

**Keywords:** *Strategic planning, forecasting, military/political situation, alliance, policy, management, solution, dilemma, conflict, threat.*

## 1. Introduction

The main subject of international political relations are states and groups of countries. Nowadays, there are about 200 countries in the world. All of them are formally equal subjects of the global community, but their role and status in world politics are not the same. The role of each state in the international political process depends on its geopolitical position, which is determined by the aggregate of data about its current state and the prospects for its future development. These data include information on the location and size of the territory, natural and human resources, methods and purposes of their use, the existing political regime and the general ideological and political orientation of society, etc.

The second kind of subjects of the international political process are international unions. These are different political, military-political, political-economic and other unions, blocs and coalitions. The foundations of their creation lie in the coinciding interests and objectives of the participating countries. These associations may be of a bilateral nature (for example, economic agreements between two countries) and the jurisdiction of such associations does not extend beyond other countries, but may also be multilateral alliances bringing together diverse interests in a common purpose.

With larger geopolitical weight are multilateral interstate alliances. They are, in principle, formed on a regional principle such as the Organization of American States (OAS); Organization for Security and Cooperation in Europe (OSCE), members of which, in addition to european countries, are the United States and Canada; Organization for African Unity (UAE), etc. Much of the oil-exporting countries are united by the inter-state organization - OPEC. Islamic countries are participating in the Organization of Islamic Conference (OIC). Body of collective security in Europe (and not only in Europe) is the North Atlantic Treaty Organization (NATO).

Any effective integration alliance begins with economic integration entails in most cases and political and military integration, but no matter how diverse fields of cooperation remains mainly political cooperation. Since its effectiveness depends largely on solving tasks interactions in other areas as essential acquires political integration, which is closely linked to economic integration, but not identical, and does not represent a phenomenon of a different nature. Political integration is a process by which two or more political units enhance mutual contacts and mutual co-operation. As a desirable or logical end result of the integration process, political unity is often seen.

## 2. The decisions

Theorize the topic of a union of states, we must clearly realize what is the mechanism that generates the idea of deciding to join a union. Who is the decision maker, what are his or her motives, is there a mechanism that prevents the state from engaging in a conspiracy under the influence of the emotions or ambitions of a separate state governor?

Such solutions should be the result of analysis, forecasting, optimization, economic justification, and choice of alternatives from multiple options to achieve a specific management system goal. The impulse of decisions is the need to reduce the severity or complete elimination of the problems, i. approach in the future of the actual parameters of the object to the desired ones (the forecast).

To solve any problem it is first necessary to answer the following questions:

- for what needs to be done (realization of ideas, solving problems);
- what to do (what new needs must be met or what quality level is needed to meet old needs);
- how to do (technology);

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- what costs;
- in what amount;
- in what terms;
- where (place, staff);
- for whom and at what price;
- what does it do to the investor and society as a whole?

The management decision is a choice of alternatives carried out by the decision-maker within his / her duties and competencies, aiming at achieving the organization's goals. However, when we talk about the state decision-making process, we have to look at the problem in two ways: either as a separate act, the moment of choosing goals, determining an optimal alternative, or as a sustainable interaction, a process that, in its basic parameters, government as such. Every decision-making should be seen as the epicenter of the government process that concentrates all the efforts of the heads of state bodies, the functions of the structures and institutions, their resources and capabilities in the process of planning.

The state decision-making process can be decomposed into the following milestones in the overall process:

1. Identify priority issues and shape the political theme of the day. At this initial stage, the preliminary information needed to make the political decision is collected, selected and analyzed. The interests, queries and demands of individual individuals, social groups and social unions are studied, identifying priority issues requiring their resolution, and creating a socio-political agenda for the actions expected from government or other state bodies.
2. Development and consideration of alternative options for political solving of public problems. The development of the options for solution is related to the objective necessity of optimization of the choice of the best solution from several alternatives, as well as the subjective goals and pressure to the decision making process by different social forces, often competing with each other and trying to realize project through a political decision.
3. Final choice, formulation and legitimation of state decisions. This is also the main stage in the decision-making process, which in the democratic countries is technologically implemented by the state government with different means of voting or consensus. At this stage, the decision takes on a generally binding form for all citizens within their competencies.
4. The realization and enforcement in the political practice of the state decisions taken. At this stage, management decisions are actually being implemented and transformed into real life. The state administration, depending on the political regime of the country, uses a combination of means (coercion and persuasion) and separate socio-technical means (manipulation, maneuvering, etc.) in order to implement the strategic decisions taken.
5. Control the implementation of decisions and feedback on the results. This is the final stage of the entire decision-making cycle. The lack of control and feedback leads to the fact that the state solution is either distorted or simply ceases to be implemented or even leads to the opposite of its initial outcome. The essence of controlling the realization of a state solution is the constant comparison of practical events and technological operations with the initial model of the political solution, plans and programs.

The practice of implementing state decisions is closely related to two important aspects of public policy: the regulation of public resources and institutional means, tools and means of managing people, that is, the functioning of the political regime in the country.

## 3. The Knowledge

The logical to this point leads us to the conclusion that the basis of the problem is the adequacy of the decision that the state should join one or another alliance and the correct orientation in the surrounding environment by the decision-makers - the political leaders.

In ordinary life, people make decisions based on the general picture of situations. But when we talk about the statesman, the leader of the state, knowledge at the level of the intuitive, even if it is the level of science, can not be enough. Such knowledge is called practical[1], and when it comes to state policy, it is actually laic, inadequate ...

In the process of political activity higher stage of knowledge is characterized most often by assessing the military-political and military (operational and so on..) Environments. But defining this process simply as an "assessment of the environment / security environment" (as is done in most models of the decision-making process) is not quite right for the following reasons:

1. This stage involves not only assessing the situation, i. E. Considering the value in coordinates ( "good - bad", "useful - harmful", "profitable - unprofitable," "desirable - undesirable", "important - unimportant "," Interesting - uninteresting ", etc.). Here is a synthesis of cognitive and value-Orientation activity, but in particular the dominant role of knowledge. The evaluation is dominant at the previous stage. Here, it is important to gain objective knowledge of the environment.
2. To call what is taught at this stage "environment" is not correct, as is taught not only the environment

[1] Dmitriev L.P. Introduction to the logic and methodology of military research. M., ВАГШ, 1996;

but also the object, the means and the subject himself. The meaning at this stage lies in the intellectual preparation of the subject for purpose-making, decision-making and practical activity. At the knowledge stage, the object of the activity is finally determined, its properties and relations are studied in detail, and the conditions and factors of the situation are studied in the required volume.

That war and politics are different things, say only those who do not understand military art. War and politics are aimed at reforming society on the basis of an idea. Therefore, it is more correct to talk about the more comprehensive and more generalized term "assessment of the military-political situation". It is the comparison of the most important components and factors of the real military-political situation with its imaginary image, the standard, on the basis of a certain system of principles, methods and criteria in the interest of the subject of politics. By its nature, this assessment can be retrospective, ongoing, and prognostic. Conclusions made on the basis of the assessments must include the characteristics of the composition, the location and the ratio of the military-political forces (opponents, allies, neutral forces).

The level of tension and stability of the relationship between them and the overall balance between the military, political and economic power of the countries must be determined. Under wartime conditions, it is also important to identify the possibility of impact of these circumstances during and after the end of the war. Criterion for assessing the military-political environment is the practical activity in this sphere. The main method used is the systematic approach method, which allows to identify the elements, the structure and the main factors that influence the formation of the situation and the tendencies for its change. Mathematical modeling, conducting military-political games, imitation, etc. are used as special methods.

The evaluation requires an analysis of a vast amount of information covering many different areas of public life and people's spheres of activity. Therefore, the process of studying and assessing the situation is divided into three main stages:

**Preliminary (preparatory) stage**. It is related to the decision of organizational, methodological and methodological tasks.

Clarification of the learning object (global, regional, local), objectives and tasks (current or prospective evaluation, purpose of evaluation, issues requiring particular attention). The performers are defined, the system of their actions, the time to solve the tasks, the form in which the results of the analysis should be presented.

**The main stage** includes the actual process of analysis, evaluation and summarization of the military-political environment, forecasting its possible changes in the near and relatively distant future.

**The final stage** involves designing and presenting the results obtained in the form of a military policy review, notes, and in some cases also in the form of proposals.

This activity may end with the inclusion of the results obtained in the relevant documents as the basis for the development and adoption of military policy decisions. The main objective of the assessment of the military-political situation in peacetime is to determine the sources and the extent of external and internal military and other (hybrid, traditional, non-traditional, asymmetric, etc.) threats and dangers. In wartime, the purpose of the assessment is to reveal the factors that can decisively affect the course and outcome of war or armed conflict.[2]

Military-political analysis and forecasting is one of the key stages of the governance process in the formation of foreign policy strategies in their parts of securing state security and is used to assess the development of the military-political environment in the world, in individual regions and at the borders of the state.

The main complexities of military-political forecasting are determined by:

- the existence of a large number of varied uncertainties and the incompleteness of the source information;
- limited opportunities and in some cases the inability to confirm the data from the forecast or the results of the experiment;
- the extraordinary complexity of predicting processes (military projection scale, establishing the size of the criteria, etc.)
- the high cost of the forecast error due to unpredictable consequences;
- the limited time to predict dynamically developing events;
- the need to take into account subjective factors.[3]

The main scientific methods of military-political prognosis are system analysis, mathematical (physical) modeling, probability analysis, and heuristic predictive method, a special case of which is the method of expert assessments. When we talk about these purely scientific methods, we can easily conclude that the problem of pragmatic efficiency and immoral, unfair decisions and actions in state politics arises.

## 4. The role of the head of state

State policy must be geared to national interests and reflect the interests of the majority of the people. In this regard, the State Chief often faces the dilemma or maximum efficiency of political decisions and practical actions in terms of preserving and using their power, or

[2] Lutovinov V.I., Motin Yu.N. Military-political processes in the world and in Russia. M., 2004.

[3] Bogatyrev E. Makiev Yu.D. Malyshev, VP Analysis of the methods of military-political forecasting // Civil Defense Strategy: Problems and Studies. 2013. No. 2. V. 3.

observing moral and legal constraints and caring for national interests. From a philosophical point of view, this dilemma can be presented as the question: What is more important - personal or social, national or all-human interests and goals?

This question, broken in the light of what has been said above, leads us to the uncertainty of how and why the State Chief decides to include the state in an alliance or to come out of another. Why do we join or not join a formation? By joining a union, we win an ally and all its enemies - both secret and obvious. Why, however, will someone want us ally? Because we have common interests? No! The main reason is that he wants either our resources or our territory. No third component!

That is why, with the sharpness, it must be placed on the agenda how this decision maker takes this decision. Here are three main hypotheses:

Hypothesis One: The state governor takes a decision on the technology described in the report after all the decision-making procedures have been completed and an assessment of the military-political situation.

The second hypothesis: The statesman decides on the basis of his personal knowledge and experience and intuitively determines the state policy and the most beneficial for state and society.

Third hypothesis: The statesman makes decisions as a result of external (apparent or secret) impact.

## 5.Conclusions

In order to ensure a prudent and moral government, it is necessary to build a system that eliminates the possibility that various random factors may influence decisions on the accession of the state to different unions. This should only be done when all "for" and "opposing" arguments are examined and analyzed by rigorous scientific methods and according to a standard procedure that minimizes the emotional factor in such state decisions. In order to be able to achieve this in practice, the following must be done:

1. Strengthen the leading role of the National Security Council at the Council of Ministers in the process of drafting and formulating state decisions. The Secretary of the Council should actively contribute to the analytical provision of this process by establishing the links between the purpose and the structures that can provide the scientific and analytical support of the process - the Bulgarian Academy of Sciences, universities, research centers and others.
2. Organize and become a tradition in bulgarian political life so-called "schools for politicians". Because of the peculiarities of the formation of the Bulgarian political elite, people who do not always have the necessary qualities to take on the heights of their responsibility for such decisions fall into positions where important state decisions are to be made.
3. It is high time to create the Academy of National Security to become a specialized research unit where to concentrate the expertise that is needed for the state organization of political processes related to national security, strategic development issues of the state and nation and to ensure that adequate decisions are made on national causes.

The modern world, characterized by turbulent processes in geopolitics, poses a serious challenge to our political elite, and it must react with the necessary wisdom and foresight to bring the state into the calm waters of a safer future. If this elite fails to do so, it will lose its legitimacy and status as an expression of the nation's aspirations and will step up processes aimed at decaying statehood and losing geopolitical weight on our part of the country on the international arena. Such scenarios will put us at the brink of uncertainty and fear of the future and the emergence of uncontrolled political, demographic and economic processes, the ultimate result of which will be chaos - both mental and paradigmatic.

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# HEREDITARY AND SOCIAL FACTORS OF DRUG USE

**Bogdan MARINESCU***

**Abstract**

*The child acquires through education norms, values, models that then manifest as personal choices in his behaviour. The formation and development of human personality is therefore an oriented, organized process award thru education. In this regard, E. Surdu points out that: "Education traces the hereditary provisions, differentiates them, modifies them, speeds up their functioning, adds to their strength, and makes them qualities[1]." At the same time, "the unorganised influences of the environment are directed by education, giving them to man in the pedagogical form, to make them sustainable and consistent.[2]" It is rightly said that one of the defining elements of contemporary society is change. The new millennium we steped in has inherited many social, economic and political problems that, although they have largely marked the last half century, are far from finding their solutions. Among these issues, international terrorism, racism, trafficking and drug use, increasing the number of the poor, the illiterate and the unemployed, etc. Education seeks to help alleviate these issues through specific prevention actions. Because of the failure to find solutions, we can say that education is in a crisis situation, through crisis understanding the gap between the learning outcomes and the expectations of society.*

**Keywords:** *Education, drugs, contemporary society, behaviour, heredity*

## 1. Introduction

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In this regard, E. Surdu points out that: "*Education traces the hereditary provisions, differentiates them, modifies them, speeds up their functioning, adds to their strength, and makes them qualities.*"[1] At the same time, "*the unorganised influences of the environment are directed by education, giving them to man in the pedagogical form, to make them sustainable and consistent*."[2]

It is rightly said that one of the defining elements of contemporary society is change. The new millennium we steped in has inherited many social, economic and political problems that, although they have largely marked the last half century, are far from finding their solutions. Among these issues, international terrorism, racism, trafficking and drug use, increasing the number of the poor, the illiterate and the unemployed, etc.

Education seeks to help alleviate these issues through specific prevention actions. Because of the failure to find solutions, we can say that education is in a crisis situation, through crisis understanding the gap between the learning outcomes and the expectations of society.

## 2. Education

Essential characteristic of the human being and distinct pedagogical category, educability was enjoyed by the majority of researchers in the field of education sciences, being defined as : "*the ability of man to be receptive to educational influences and to achieve, in this way, progressive accumulations materialized in different personality structures*"[3] or "*the ensemble of the possibilities to influence with educational means the formation of the personality of each human individual within the psychogenetic limits of our species and the innate features that give each one its genetic individuality.*"[4] or "*the ability of the human being to be educated, to be subjected to educational action, to benefit from it in the form of its physical, psychological, behavioral development.*"[5]

From these definitions, we note the fact that regardless of the multitude of ways of defining, educability is a specific attribute of the human being. In this sense, Kant argued that man alone is educated, because he carries in him the possibility of being different than he is. He is perfectible and perfectibility is the *sine qua non* condition of education[6].

Progress recorded in biological and psychological research since the middle of the last century have

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[1] E.Surdu, Lectures on general pedagogy. A socio-pedagogical vision, E.D.P Bucharest, 1995, p.46.

[2] Idem, p.46.

[1] Idem, p.46.

[2] Idem, p.46.

[3] E. Paun, Educability, in the Pedagogy Course, University of Bucharest, Bucharest, 1988, p. 41.

[4] I. Negreț, Educability. Factors of Personality Development, in the Pedagogical Manual, All Educational Publishing House, Bucharest, 1998, p.94.

[5] E. Surdu, Lectures on general pedagogy. A sociopedagogical vision, E.D.P, Bucharest, 1995, p. 35.

[6] Immanuel Kant, Critique of Practical Reason, Ed. Univers Enciclopedic, Bucharest, 2010.

prompted most researchers to focus on the factors that contribute to the formation and development of the human being, to its becoming a biological being in the social being:

- Heredity
- Environment
- Education

The distinction between these researchers consisted in accepting or accentuating a particular factor or another.

### 2.1. Theories about education

On the field of educability of the human being, different positions of pedagogical thinking have been confronted, having as a criterion of differentiation the accentuation to the absolutization of the role of a factor to the detriment of another in forming the personality of man.

Depending on their orientation, the hereditary theories, the ambientalist theories appeared, and the fundamental contradictions between them determined the specialists to adopt a third orientation, namely the theory of double determination.

#### 2.1.1. Hereditary (inherited) theories

These theories support the fundamental role of heredity in becoming the human being, having its origins in biology research. In their view, heredity determines any evolution of man. I. Dumitru and C. Ungureanu[7] believe that the main limitation of this theory is the discovery of environmental factors and education in the becoming of the human being.

Hereditary conceptions inspired extremist theories that claimed the superiority of some races over others.

#### 2.1.2. Environmentalist theories

Unlike hereditary, the representatives of these theories displayed absolute trust in the power and value of socio-educational factors: the environment and education.

They deny the role of heredity. Although they were in the opposite poles, the representatives of ambiental theories, as well as those of hereditary theories, were inspired to support their ideas from the results of biology research:

- Transformational thesis by Jean Baptiste Lamarck, who argued that in the evolution of living creatures, the environment has the fundamental role.
- The theory of heredity acquired: Experienced acquisitions by members of a species would fit into genetic memory and would then be transmitted from ascendants to descendants.

The limits of the two types of ambiental and hereditaryist theories therefore consist in the absolution of the role of a certain group of factors in the formation and development of the human personality, denying others.

#### 2.1.3. The theory of double determination

With the intention of overcoming the unscientific and unilaterally character of these two guidelines, some researchers have adopted a middle position. They recognized the interaction of the three factors: heredity, the environment, education in the process of forming the human being. Future research in human sciences will certainly bring new clarifications on human personality.

### 2.2. Factors of the becoming of the Human Being

The educator is often tempted to "rebuild" the one he is educating and is entrusted to him. So, he does not take into account the past of the one he educates. But this is a wrong point and researcher H. Atlan wrote, "*We always start by going away from something*.[8]" This is an individual marked by past or present individual or sociocultural determinations.

#### 2.2.1. Heredity - a premise of psychoindividual development

Heredity is the biological feature of beings that designate the complex of predispositions that are transmitted from ascendants to descendants through genetic mechanisms[9].

Every human is the bearer of the general features of the human species: the bipedal position, the anatomical-physiological structure, the types of reflections, and the hereditary characters transmitted directly from its own ascendants: the color of the skin, the eyes, the face's conformation, certain features of the blood group, etc.

General and particular heredity make up the material substrate of heredity.The concern of researchers who studied the factors of the human being was centered on the determination of the significance and the weight of the hereditary heritage in the formation of personality. The question they posed was whether heredity can be considered a factor with a determined role in this or vice versa. In conclusion, we can say that heredity does not necessarily determine the types of behavior, but only predispositions.

#### 2.2.2. The environment, framework for existence and psycho-individual development

The environment is the set of natural, material and social conditions that make up the framework of man's existence and give him a diversity of possibilities for psycho-individual development. From this point of view we are mainly interested in:

- what is the structure of the environment;
- which structural components of the environment have a greater influence on human personality;
- how the environment is acting upon the becoming of the human being.

The structure of the environment is as follows: depending on the reference moment in human life, before or after birth, we speak of influences of the

[7] I. Dumitru, C. Ungureanu, Pedagogy and Elements of Educational Psychology, University Paper, Bucharest, 2005, p.26
[8] H. Atlan, *Tout, non peut etre*, Editions Le Seuil, Paris, 1991, p.16.
[9] I.Dumitru, C. Ungureanu, op. cit., p. 28.

internal environment and influences of the external environment.

In the prenatal phase, certain internal influences determined by the intrauterine environment are exerted on the child. This influence is not so important, but it can not be neglected either. The totality of external influences exerted on man throughout his postnatal period is the external environment in which a distinction is made between the influences of the physical or primary environment and the influences of the social or secondary environment.

Physical environment is the natural environment in which man carries out his life and encompasses all the bioclimatic conditions (relief, climate) that influence his biological development and maturity (height, skin color) and the way of life (trades, clothing, specific nutrition). Its influences on human psychological development are regarded by experts as irrelevant. Physical environment does not act and does not directly influence man's mental development. The social-human environment is subjected to social determinations that have a much stronger impact on its psychoindividual development.

From the point of view of becoming the human being, we define the social environment as the set of influences that arise from the interaction of man with all the economic, political and cultural conditions that impose their imprint on psychic development[10]. The influences of the social environment on man are:

- direct, by:

− the schemes of conduct offered by the other members of the community to which it belongs. Man applies these rules throughout his life.

− language as a means of communication and transmission of cultural capital and of the whole knowledge accumulated through the group's experience.

- Indirect, by:

− members of the family who play the role of a medium factor between them and social reality and who themselves are influenced in their behavior by the culture of the group to which they belong.

Human behavior reflects the social culture that is incorporated into its thinking and actions, and thereby ensures its transmission from one generation to another. According to H. Hannoun[11], social culture as a product of the social environment, embodied in certain personality structures, has four components:

1. Technological component

Each social group is characterized by a technique and technology to which all individuals adapt. The European man of the 19th century was adapted to the steam car, the 20th century one at the Information Technology, and tomorrow he will adapt to an environment where the computres will be the basis for communication between groups.

2. The ritual component

The level of social habitus implies specific behaviors for learners. Its members respect a certain ritual, and if a person deviates, she will be marginalized in the group (Eg initiative rituals like baptism, circumcision, polite rituals, etc.).

3. The mythical component

Myths are common ways of thinking more or less stereotypical and characteristic of the group.

4. The language component

Language as a means of communication among the members of the group is a characteristic of their similarity and gives them the feeling of belonging to a certain social environment.

The social environment acts on the psychoindividual development of man through the social group that determines a common habit. The main characteristic of the social environment is diversity, non-uniformity. Depending on their impact and content, as well as their degree of organization, the influences of the social environment are organized and spontaneous.

Organized, institutionalized influences from the social environment are exercised by the family and school, but also by various socio-cultural institutions, mass media, etc.

However, the social environment also exerts spontaneous, unintentional educational influences resulting from everyday activities in the child's entire living environment: urban civilization, village life, age groups, circle of friends, etc.

**2.2.3. Education, a determinant of psychoindividual development**

Education is the decisive factor of the person's psycho-individual development. It systematizes and organizes environmental influences. It has a social function, being the intermediary between man and environmental conditions.

The child acquires through education norms, values, models that then manifest as personal choices in his behavior. The formation and development of human personality is therefore an organized and educated process. In this regard, E. Surdu points out: "*Education traces the hereditary provisions, differentiates them, modifies them, speeds up their functioning, adds to their strength, and makes them qualities.*[12]" At the same time, "*the influences of the environment, not organized, are directed to education, giving them the pedagogical form, to make them sustainable and consistent.*[13]"

It is rightly said that one of the defining elements of our contemporary society is change. The new millennium we step in has inherited many social, economic and political problems that, although they have largely marked the last half century, are far from finding their solutions. Among these issues,

[10] I. Nicola, *Pedagogie*, E.D.P., Bucharest, 1992, apud I. Dumitru, C. Ungureanu, *op. cit*., p. 34.
[11] H. Hannoun, *Comprendre de l"education*, apud I. Dumitru, C. Ungureanu, *op. cit*., p.34.
[12] E. Surdu, Lectures on general pedagogy. A sociopedagogical vision, E.D.P, Bucharest, 1995, p. 46.
[13] *Idem*, p. 46.

international terrorism, racism, trafficking and drug use, increasing the number of the poor, the illiterate and the unemployed, etc. Education seeks to help alleviate these issues through specific prevention actions. Because of the failure to find solutions, we can say that education is in a crisis situation, through crisis understanding the gap between the learning outcomes and the expectations of society.

Among the specific and general solutions found, we mention:

- Innovations in the design and development of educational processes;
- introducing new types of education into the school curricula;
- Strengthening links between school and extracurricular activities;
- Initial and continuous teachers training;
- Cooperation between teachers, pupils, parents and local officials;
- Organizing exchanges of information between European States;
- Rethinking the education process in order to successfully integrate young people into professional and social life.

The problems of the contemporary world have led to the formation of new types of education, including:

- Permanent education or adult education;
- Education for democracy and human rights;
- Peace education;
- Environmental education;
- Health education;
- Intercultural education;
- Leisure time education;
- Education for communication and media;
- Education for change and development;
- Education for a new international economic order;
- Modern economic and modern education.

The content, aims and objectives of the new education propose an approach through which education seeks to respond to the demands of the contemporary world and to bring a change in the educational act in favor of education based on innovative, social and adaptable learning.

The important weight of youth in the contemporary structure of contemporary society as well as its ever-increasing contribution to the different spheres of economic, social and spiritual life reinvigorates older and newer discussions and controversies on the status and role of this highly mobile age group creative. Youth is a social category subject to different bio-psychic and socio-cultural determinations, but individualized through a series of age, thinking, skills, mentality and behaviors.

The experience gained by non-governmental and governmental organizations through its programs of information, education, support, guidance, counseling and practical involvement in preventing and intervening in solving cases where children are victims of various forms of neglect within the family and the society in which we live is particularly important and the fact that many young minors fall prey to drug use and criminal offenses, so many of them reach rehabilitation and penitentiary centers for minors and young people as a result of crimes which they commit, justifies once again the importance of addressing all the resources available to combat this phenomenon.

## Conclusions

One of the most important functions of the family is the education and training of young people with a view to their optimal integration into life and social activity. Studies on juvenile delinquency have shown that the atmosphere of disorganized families, the lack of parental authority, control, and their affection, as a result of divorce, have led children to adopt social and antisocial acts.

Also, there are some families that, although organized, are characterized by accentuated conflicting states that can be of varying intensity and can extend over different periods of time. In these families, because of their great sensitivity, children receive and live intensely any “event”.

The main effect of conflicting interpersonal relationships within the family on the personality of children is the devaluation of the parental model and the loss of the possibility of identification with this model. Not infrequently children who feel strongly the influences of the familial conflict climate run away from home and seek to find different groups of belonging which, in their turn, can be antisocially oriented. The escape of children is associated with the lack of purely extra-family supervision with a great delinquent potential.

Also, the excessive severity, with many rigidities, with bans, sometimes not brutal, with all sorts of deprivations, leaves its mark on the process of forming the child's personality. Keeping a child in a hipersever climate gradually drives serious changes into one of the most important dimensions of personality translated into a phenomena of apathy and indifference to what it has to do or to the relationship with others.

In the face of the over-hater and hyper-aggressive parent, the child has no alternative but blind obedience, unconditional in relation to his claims that also affect seriously the development of his personality. There are also superprotective parents who have simply invaded the child with emotional investment, but not assuring educational treatment can lead to delinquent conduct, mostly explained by low resistance to frustration.

The research also confirms that there it is a correlation between delinquent conduct and schooling level, meaning that juvenile delinquents usually have a very low level of school education.

It can be said that the level of juvenile delinquency of a country sufficiently reflects the interest and capacity of this society to resolve the difficulties of raising and educating younger

generations, and at the same time warns of the gravity and extent of tomorrow's criminality level.

The teenager of these troubled times encounters difficulties and multiple situations of conflict in the course of his integration into the social and legal field. At the microsocial level, preventive programs should aim at revitalizing the educational and social control functions of the main social institutions: family and school.

Measures taken in the family field consist of economic support (eg increasing the current child allowance) or counseling provided free of charge through family counseling cabinets within social welfare networks. The school in turn asks for a rethink of its role and its functioning system. The steps taken in this area were small, perhaps due to the financial difficulties of the last few years.

Organizational changes and changes to the ideas and principles behind school activity are promising ways to prevent delinquency through school.

**Three factors are involved in the formation of human personality**: heredity, the environment and education. At the same time, the decisive and particularly important role of education in relation to the environment and heredity must be mentioned.

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# THE FUTURE OF THE NATIONAL INTEGRITY AGENCY AFTER THE CVM REMOVAL. POSSIBLE SCENARIOS

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**Abstract**

*The National Integrity Agency is an institution whose establishment and operationalizing has been assumed by Romania in the process of negotiation for accession to the European Union, in order to solve the problems of incompatibility, conflicts of interests and unjustified wealth among public servants and dignitaries. Once Romania joined the EU, in 2007, in order to monitor the fulfillment of the most important commitments of our country, including those related to the above mentioned Agency, the European Commission has set up a mechanism for cooperation and verification (CVM), for conformity and evolution status checking. Through it, the evolution is analyzed and, in this regard, periodic reports on progress are published.*

*The Agency's whole evolution has been based on CVM since its inception; due to its pressures, recommendations and alarm signals, the institution has been set up, has become operational and has constantly tried to respond to the challenges and aggression that have come from the political representatives. However, in recent years, especially after Croatia's accession to the EU, which has not been subject to such monitoring, there is an increasing phenomenon of CVM disproof in our country, considering that its elimination is urgent and more than necessary; the reason for this attitude is determined by the selective use of such a mechanism only for Romania and Bulgaria, and not uniformly at the level of all the Member States or, at least, imposed as a condition for the newest states accepted in the EU.*

*Considering the situation of the CVM elimination, which seems to be predictable in the near future, we ask ourselves what will happen to the National Integrity Agency in its absence. An exercise of imagination and a little anticipation lead us to several possible scenarios: 1) the Agency will continue its course according to the progress made so far; 2) it will be discredited, and the political factor will try to eliminate it given the lack of an external pressure and control mechanism – this will affect its efficiency and effectiveness; 3) the Agency will disappear. In this article, all these hypothetical perspectives will be examined one by one, to conclude the feasibility of each of them.*

**Keywords:** *National Integrity Agency, CVM, fight against corruption, asset declaration, unjustified wealth, incompatibility, conflict of interest*

## 1. Introduction

The idea of setting up an autonomous administrative body with a role in combating corruption through administrative means has emerged as a commitment undertaken by Romania to the European Union in the pre-accession process, such authority being considered a solution to the problems existing at national level in terms of integrity. Thus, its role in the institutional structure was to identify situations of conflict of interest, incompatibility and unjustified wealth, by assessing the wealth and interests' statements of dignitaries and civil servants.

From the promise to the promulgation of a law regulating the operational activity of the National Integrity Agency, it has been almost seven years (2000-2007). During this time, several successive attempts were made to allocate similar tasks to existing structures or to newly established and abolished mechanisms at short intervals, which were mainly related to the Government's activity. It turned out that none of them fully complied with the requirements assumed by Romania: they did not cover the categories of personnel concerned exhaustively and did not have the capacity to achieve such a large volume of work, quantified in the number of declarations whose filing had to be monitored, which had to be evaluated, the results of the evaluations made public and, in case of irregularities, the competent bodies referred.

Finally, in December 2006, the establishment of the National Integrity Agency was transformed from a national promise made to the European Union into a conditionality imposed by the latter and monitored through the Cooperation and Verification Mechanism (CVM), in order to ensure that the assumed commitments are implemented in a timely and appropriate manner. Six months after this decision was taken by the European Commission, Parliament adopted Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency. CVM has been both a pressure factor, periodically monitoring the progress, which has involved drawing attention to the skirmishes and exerting the constraint to speed up the process of setting up the new institution, as well as providing support, advice and know-how.

CVM was not introduced for a fixed period of time, the European Commission affirming that it would only be abandoned when all the benchmarks set and monitored were considered to be met. Lately, however, it is almost unanimous to invoke the idea that the

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Mechanism must be eliminated, either definitively or to be replaced by another instrument. In this context, given the link of the National Integrity Agency's dependence on the Cooperation and Verification Mechanism, it is legitimate to ask what will happen to ANI with the disappearance of CVM. Therefore, the purpose of the article is to try to find answers to this concern through an exercise of imagination and anticipation.

In the beginning, respectively in the first part, will be presented the framework that determined the appearance of the National Integrity Agency, including the promises made to the European Union regarding this aspect; successive, abandoned or approved legislative drafts to set up such an instrument; the analysis of more or less independent institutional structures that have been warranted over the years with powers of control in the field of conflicts of interest, incompatibilities and unjustified wealth; recommendations made by the most important internal and external actors interested in this issue, etc. At the end of the chapter, we will be fully familiar with the trajectory of the National Integrity Agency, from idea to materialization.

The second part follows the evolution of the Agency in the light of a synthesis of the elaborated reports within CVM in the period 2007-2018; they show a difficult path, with frequent changes to the legislative framework, permanent political pressures and attempts to minimize the authority of the institution as much as possible. The reports of the recent years outline a mature institution capable of fulfilling the role for which it was created, despite ongoing attacks by political representatives.

The third part gives an overview of the prospects for the future of the Cooperation and Verification Mechanism, showing both the supporters' opinion and the critics' opinion, which will be detailed in the last part of the article. It starts from the hypothesis that CVM will definitely disappear, either permanently or be replaced by a new instrument more suited to current needs. Thus, starting from the existing possibilities regarding the future of the CVM and taking into account the close link between it and the National Integrity Agency, the fourth part was divided in three ways, by means of three possible correlative scenarios regarding the future of the National Integrity Agency with the disappearance of CVM, which we will see at the right time.

## 2. Establishment, evolution and role of the National Integrity Agency

### 2.1. General determinant framework

On December 12, 2001, Romania submitted the Position Paper on Chapter 24 – Justice and Home Affairs to the Conference on EU Accession, where, referring to "Combating Corruption"[1], it is noted that, in order to reduce the phenomenon, Romania adopted the National Program for Prevention of Corruption 2001-2004, which will be implemented in accordance with the National Action Plan against Corruption and with the support of civil society.[2]

The basis for the above mentioned program is the World Bank's 2000 study, which highlighted the problem of seizing the state from private interests, a situation that affects how laws and regulations are shaped. The suggested method of solving is, inter alia, "the introduction of transparency in political life through public declarations of income and goods, the declaration of conflict of interests and transparency in party financing", and among the proposed solutions are the amendment of the legislation on the declaration of wealth and regulation incompatibility regime.

In this direction, the National Action Plan against Corruption 2001-2004 includes two objectives:

1. *Statement of assets* by amending the legislation in force, as well as establishing a mechanism for monitoring the implementation of the legal provisions. The National Crime Prevention Committee[3], together with the ministries and institutions involved, is in charge of this objective, in partnership with the Legislative Council and non-governmental organizations.
2. *Regulating the conflict of interest (incompatibility regime)* by amending the conflict of interest legislation. The Ministry of Justice is responsible for this objective in partnership with the Legislative Council.

It is only after two years that the first concrete manifestations in the fulfillment of the assumed objectives begin to emerge, with the occurrence of a governmental scandal reflected at European level. Hence, the first key moment was recorded in October 2003, when Hildegard Puwak, the Minister for European Integration at the time, left the Government following charges of violating conflict of interest laws, being suspected of facilitating husband and son of a non-reimbursable 150,000 euro funding through the

[1] *Romania's Position Paper Chapter 24 – Justice and Home Affairs*, Conference on Accession to the European Union – Romania, CONF-RO 47/01, Brussels, 12.12.2001, p. 18.

[2] *Hotărârea nr. 1065/2001 privind aprobarea Programului naţional de prevenire a corupţiei şi a Planului naţional de acţiune împotriva corupţiei (Decision no. 1065/2001 on the approval of the National Program for Prevention of Corruption and the National Action Plan Against Corruption)*, published in the Official Journal of Romania, Part I, no. 728 of November 15, 2001, available online at https://lege5.ro/Gratuit/gmydcmzs/hotararea-nr-1065-2001-privind-aprobarea-programului-national-de-prevenire-a-coruptiei-si-a-planului-national-de-actiune-impotriva-coruptiei, accessed on 02.03.2019.

[3] The National Committee for Crime Prevention, with a role in elaborating, integrating, correlating and monitoring the Government's crime prevention policy at national level, was established by the *Government Decision no. 763 of July 26, 2001 on the establishment, organization and functioning of the National Committee for Crime Prevention (*Hotărârea Guvernului nr. 763 din 26 iulie 2001 privind înfiinţarea, organizarea şi funcţionarea Comitetului Naţional de Prevenire a Criminalităţii*)*, published in the Official Journal of Romania, Part I, no. 490 of August 23, 2001, available online at http://legislatie.just.ro/Public/DetaliiDocument/30215, accessed on 02.03.2019.

"Leonardo da Vinci" program[4]. At that time, Prime Minister Adrian Năstase, while publicly asserting Puwak, said that her resignation was necessary "to eliminate the suspicions and the risk that the government would be forced to explain the minor issues instead of dealing with important issues", referring to the accession of Romania to the European Union[5]. This situation had the role of triggering a more serious mobilization at the political level regarding the fight against corruption in Romania. Therefore, there was an attempt by establishing successive mechanisms to act in this direction, which we will enumerate in the following.

### 2.2. Successive attempts to create an autonomous body to combat corruption through administrative means

a) First attempt (concretized): Government Control Body (2003)

By Emergency Ordinance no. 64/2003, in Article 16 paragraph (1), "the National Control Authority is established, a specialized body of the central public administration, with legal personality, subordinated to the Government, led by the delegated minister for the coordination of the control authorities"[6], and through Government Decision no. 745/2003[7], the role and attributions of this public institution have been established. Under the charge of the Authority, a Government Control Body is created, a structure with its own legal personality, which takes over from the duties and staff of the Prime Minister Control Body and of the control bodies within the ministries and public institutions (which are abolished), and which will act on the basis of full functional and decisional autonomy.

According to the Decision no. 766/2003 on the organization and functioning of the Government Control Body[8], among the attributions and competences of this body are: verification of the notifications regarding the conflict of interests, according to the provisions of Law no. 161/2003[9] (Article 3 (b)); ensuring the coordination of the fight against fraud and protecting the financial interests of the European Union in Romania as a single point of contact with OLAF; coordinating the monitoring actions for the implementation of the National Program for Prevention of Corruption and the National Action Plan against Corruption.

The Control Body assesses any referral or self-dismissal by the Prime Minister regarding the conflict of interest in the exercise of the office of a member of the Government, Secretary of State, Undersecretary of State or Assimilated Function, Prefect or Sub-Prefect; the result of the verifications shall be submitted to the Prime Minister, who shall decide the necessary measures, and the person who has filed the conflict of interest shall be notified, in writing, within 30 days, the manner of settlement.

b) Second attempt (not materialized): Integrity Council (2004)

In September 2004, the Chamber of Deputies passed draft law no. 484[10], aimed at amending Law no. 161/2003, invoking, in the explanatory memorandum, the recommendations of the Council of Europe Group of Anti-Corruption States (GRECO), contained in the March 2002 Evaluation Report of Romania, as well as the fulfillment of the undertaken commitments, the acceleration of the process of accession to the European Union and the closing of the Justice and Home Affairs negotiation chapter.

The draft law was destined to regulate the conflict of interests and incompatibilities by extending the scope to the elected or political appointees and

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[4] Vrabie, C., Savin, A., Zăbavă, O., (coord.), *Raport Național asupra Corupției*, p. 15, available online at https://www.transparency.org.ro/files/File/RNC%202004%20ro.pdf, accessed on 27.02.2019.

[5] *Three Romanian ministers quit*, BBC, 20.10.2003, available online at http://news.bbc.co.uk/2/hi/europe/3207076.stm, accessed on 27.02.2019.

[6] *Ordonanța de Urgență nr. 64/2003 pentru stabilirea unor măsuri privind înființarea, organizarea, reorganizarea sau funcționarea unor structuri din cadrul aparatului de lucru al Guvernului, a ministerelor, a altor organe de specialitate ale administrației publice centrale și a unor instituții publice (Emergency Ordinance no. 64/2003 for the establishment of some measures regarding the setting up, organization, reorganization or functioning of some structures within the working apparatus of the Government, ministries, other specialized bodies of the central public administration and public institutions)*, published in the Official Journal of Romania, Part I, no. 464 of June 29, 2003, available online at https://lege5.ro/Gratuit/gq3tgmby/ordonanta-de-urgenta-nr-64-2003-pentru-stabilirea-unor-masuri-privind-infiintarea-organizarea-reorganizarea-sau-functionarea-unor-structuri-din-cadrul-aparatului-de-lucru-al-guvernului-a-ministerelor, accessed on 25.02.2019.

[7] *Hotărârea nr. 745 din 3 iulie 2003 privind organizarea și funcționarea Autorității Naționale de Control (Decision no. 745 of July 3, 2003, on the organization and functioning of the National Control Authority)*, published in the Official Journal of Romania, Part I, no. 496 of July 9, 2003, available online at http://legislatie.just.ro/Public/DetaliiDocument/44872, accessed on 25.02.2019.

[8] *Hotărârea nr. 766/2003 privind organizarea și funcționarea Corpului de Control al Guvernului (Decision no. 766/2003 on the organization and functioning of the Government Control Body)*, published in the Official Journal of Romania, Part I, no. 497 of July 9, 2003, available online at https://lege5.ro/Gratuit/gqzdmobr/hotararea-nr-766-2003-privind-organizarea-si-functionarea-corpului-de-control-al-guvernului, accessed on 25.02.2019.

[9] *Legea nr. 161 din 19 aprilie 2003 privind unele măsuri pentru asigurarea transparenței în exercitarea demnităților publice, a funcțiilor publice și în mediul de afaceri, prevenirea și sancționarea corupției (Law no. 161 of April 19, 2003 on measures to ensure transparency in the exercise of public dignities, public functions and business environment, prevention and sanctioning of corruption)*, published in the Official Journal of Romania, Part I, no. 279 of April 21, 2003, available online at http://legislatie.just.ro/Public/DetaliiDocument/43323, accesed on 25.02.2019.

[10] *Proiectul de Lege nr. 484/2004 pentru modificarea și completarea Legii nr.161/2003 privind unele măsuri pentru asigurarea transparenței în exercitarea demnităților publice, a funcțiilor publice și în mediul de afaceri, prevenirea și sancționarea corupției (Draft Law no. 484/2004 amending and supplementing Law no.161/2003 on certain measures for ensuring transparency in the exercise of public dignities, public functions and business environment, preventing and sanctioning corruption)*, available online at http://www.cdep.ro/pls/caseta/eCaseta.Lista?tip=&ctg=&nrp=484&anp=2004&txt=&dat1=&dat2=&nppag=50&crpag=1&cumul=&maxdc=&ilg=2016&prn=1, accessed on 25.02.2019.

magistrates; defining the public interest and private interest, as well as the opposition between the two; the establishment of a mechanism specific to the Romanian organizational culture, conducting operative research activities and finding conflicts of interests and incompatibilities, called the National Integrity Council.

The Council will be an autonomous body with its own legal personality, under the control of Parliament, organized at national level and functioning in a single structure. It will also have administrative jurisdictional powers and control and sanctioning powers, consisting of 11 members with a technical apparatus, as follows: 1 judge from the High Court of Cassation and Justice and 6 judges from the courts of appeal, appointed by Superior Council of Magistracy; 2 legal advisers from the Ministry of Justice, appointed by the Minister; 2 prosecutors within the Prosecutor's Office attached to the High Court of Cassation and Justice, appointed by the Attorney General.

At the request of any legal or natural person, or ex officio, the Council will initiate the procedure to investigate conflicts of interest and incompatibilities; following the inspection, it draws up reports on the basis of which, by a majority of votes, it notifies the competent authorities for taking the necessary measures (the body or public authority of the verifiable person, the court competent to declare the nullity of the legal acts issued, the competent criminal investigation body).

However, although it was presented "as a success" at the time, achieved together with civil society and EU representatives, the project was rejected by the Ministry of Finance because it considered costly the establishment of a new institution.

c) Third attempt (concretized): Government Control Authority (2005)

By Decision no. 25/2005 regarding the modification of the List of the Romanian Government, the position of delegated minister for the coordination of the control activities was suppressed[11], and the Emergency Ordinance no. 49/2005 on the establishment of reorganization measures within the central public administration abolishes the National Control Authority, whose resources are transferred to the Prime Minister's Chancellery.

Within the Chancellery, the Government Control Authority is established, a structure without legal personality, subordinated to the Deputy Minister for the control of the implementation of internationally funded programs and the pursuit of the acquis communautaire application. Ergo, the Authority has the task of verifying the application of the acquis communautaire, the efficiency and transparency of the activity carried out by the local public administration and exercises the control ordered by the Prime Minister on the activity of the central and local public authorities and institutions[12].

d) External analyzes on the state of implementation of the commitments assumed by Romania in the field of institutional corruption management (2005)

In October 2005, Romania received a new series of recommendations from GRECO formulated in the evaluation report adopted at the 25th plenary meeting in Strasbourg[13]. The document was elaborated following the application of questionnaires to the representative authorities, the analysis of legislation and other relevant documents, as well as the visit of an expert team (GET) on the spot, from 21-25.02.2005.

The overall objective of the report was to assess the effectiveness of the measures taken by the Romanian authorities to comply with the requirements of the three themes subject to evaluation at the 10th plenary meeting (July 2002), namely: corruption damages; public administration and corruption; legal entities and corruption. At the time of the GET visit, many provisions on conflicts of interest and incompatibilities in the public system had not yet been harmonized and some categories of officials were not subject to these rules. There is still no authority responsible for monitoring compliance with legislation on conflicts of interest, although a draft governmental decision provided for the establishment of a National Integrity Agency with supervisory powers in the field of conflicts of interest and asset declarations.

It has been noticed that the existing system for verifying asset declarations is not effective, as the investigative commission rarely acts. To this, the high level of evidence required to initiate such a process and the lack of a preliminary and independent administrative examination of the declarations to identify actual or apparent violations of the law, undue fluctuations in civil servants' financial statements, conflicts of interest, incompatibilities and forbidden gifts.

[11] Hotărârea nr. 25/2005 privind modificarea Listei Guvernului României, aprobată prin Hotărârea Parlamentului nr. 24/2004 (Decision no. 25/2005 regarding the modification of the List of the Romanian Government, approved by the Parliament Decision no. 24/2004), published in the Official Journal of Romania, Part I, no. 367 of April 29, 2005, available online at https://lege5.ro/Gratuit/g4ydsnrq/hotararea-nr-25-2005-privind-modificarea-listei-guvernului-romaniei-aprobata-prin-hotararea-parlamentului-nr-24-2004?d=2018-09-12, accessed on 23.02.2019.

[12] Ordonanța de urgență nr. 17/2009 privind desființarea Cancelariei Primului-Ministru și stabilirea unor măsuri pentru reorganizarea aparatului de lucru al Guvernului (Emergency Ordinance no. 17/2009 on the abolition of the Prime Minister's Chancellery and on the establishment of some measures for the reorganization of the Government's working apparatus), published in the Official Journal of Romania, Part I, no. 599 of August 31, 2009, available online at http://legislatie.just.ro/Public/DetaliiDocument/110920, accessed on 24.02.2019. By this Ordinance, the Chancellery of the Prime Minister is abolished and some measures are being set for the reorganization of the Government's working apparatus; the reason is that there were overlaps with the work of the General Secretariat of the Government, as well as the unjustified disruption of some competencies.

[13] GRECO – Group of States against corruption, Second Evaluation Round – Evaluation Report on Romania, adopted by GRECO at its 25th Plenary Meeting, Strasbourg, 10-14 October 2005, p. 22, available online at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c7c18, accessed on 03.03.2019.

These requests were included by Romania in the 2005-2007 National Anti-Corruption Strategy (NACS) adopted by the Government after the visit of GRECO's experts, whose mission is "to prevent and combat corruption through the rigorous improvement and enforcement of the regulatory framework, through legislative stability and coherence, institutional strengthening of bodies with decisive powers in the field"[14]. According to the Action Plan for implementing the Strategy, one of the measures under the Ministry of Justice is to revise the legislative framework to designate an institution empowered to verify and control the declarations of assets, interests and incompatibilities[15].

At the conclusion of the accession negotiations of 14 December 2004, Romania committed itself to carry out an independent audit of the results and the impact of the National Anticorruption Strategy 2001-2004 and to translate its conclusions and recommendations into a new multi-annual strategy and concrete action plan, to be drafted by March 2005[16]. It was conducted by Freedom House Washington during January-March 2005 and submitted to the Ministry of Justice on 2 November 2005.

The evaluation report "Anticorruption Policies of the Romanian Government", elaborated through the audit[17], shows that during the period 2000-2004, Romania created numerous legal instruments for the fight against corruption, some of which generated positive effects, but others still the impact is expected. Administrative tools to combat corruption are unused, and the alternative seems to be between prosecution (costly, taking into account the level of spread of corruption practices) and the free practice of corruption[18]. Therefore, it is recommended to extend the definition of conflict of interest and to empower a single authority responsible for integrity monitoring (asset declarations, conflicts of interest, incompatibilities), objectives that could be achieved by amending Law no. 161/2003.

It was proposed to transform the National Crime Prevention Council into an integrity check and coordination on the fight against corruption, renamed the Integrity Council. In addition to monitoring and coordination, the Council should ensure that the verification of dignitaries and civil servants at central level is carried out efficiently and objectively. Under the coordination of the Council, a semi-autonomous Integrity Agency (IA) should operate, with a wide range of tasks in the investigation of corruption cases and sufficient human resources and expertise for rapid settlement of cases. The Agency may notify the National Anti-Corruption Prosecutor's Office in case of problems, which, according to Freedom House, should be rebuilt because it is inefficient and lacking in autonomy.

It is considered that the asset and interest declaration forms have been improved. These were introduced for the first time through Law no. 115/1996[19] for dignitaries, magistrates and civil servants, but their content was not public. By Law no. 161/2003, the status of public information was granted to all declarations of wealth and public institutions were obliged to grant free access to them. However, there is no statement completing guide, which leads to a non-uniform practice in this respect. It should be noted that until then, no prosecutor had ever opened a file of forgery in the declaration of wealth.

The NACS 2005-2007 also invokes the "National Report on Corruption"[20], published by Transparency International Romania in March 2005, which characterizes Law no. 161/2003 as imperfect for several reasons: the definition of conflict of interest creates confusion, does not regulate the situations covered by interfering persons, the public interest vs. the personal interest are not defined, and the manner of publication of the statements do not take into account the logistical possibilities of the local public authorities (especially from the rural area), and the local elected ones are omitted from the chapter on conflicts of interest, which has determined the inclusion of the obligation of filing and the form of the declaration of interests in the Law on the Statute of the Local Elected (a solution determined exceptionally by a special law)[21].

Observations on lack of institutional capacity are also relevant to the incompatibility regime. In this respect, the case of the deputy lawyer Iorgovan, against whom no action was taken, was filed, although he represented in court the state secretary of the Ministry

[14] Hotărârea nr. 231 din 30 martie 2005 privind aprobarea Strategiei naţionale anticorupţie pe perioada 2005 - 2007 şi a Planului de acţiune pentru implementarea Strategiei naţionale anticorupţie pe perioada 2005 – 2007 (Decision no. 231 of March 30, 2005, on the approval of the National Anti-Corruption Strategy 2005-2007 and the Action Plan for the Implementation of the National Anticorruption Strategy 2005-2007), published in the Official Journal of Romania, Part I, no. 272 of April 1st, 2005, available online at http://sna.just.ro/Portals/0/Strategia%20Nationala%20Anticoruptie%202005-2007.pdf, accessed on 04.03.2019.

[15] Strategia Naţională Anticorupţie 2005-2007 – Obiectivul numărul 8 (National Anticorruption Strategy 2005-2007 – Objective no. 8), available online at http://www.gov.ro/upload/articles/100063/050401-strategie-anticoruptie.pdf, accessed on 04.03.2019.

[16] Accession Treaty: Protocol, Annex IX, AA 12/2/05 REV 2, Brussels, 31.03.2005, available online at http://www.cdep.ro/ue/tratat/ro/aa00012-re02.ro05.pdf, accessed on 05.03.2019.

[17] Freedom House Washington, Politicile Anticorupție ale Guvernului României, Raport de Evaluare, Washington D.C., 17.03.2005.

[18] Ibidem, p. 8.

[19] Legea nr. 115 din 16 octombrie 1996 privind declararea şi controlul averii demnitarilor, magistraţilor, funcţionarilor publici şi a unor persoane cu funcţii de conducere (Law no. 115 of October 16, 1996 on the declaration and control of the wealth of dignitaries, magistrates, civil servants and persons with leading positions), published in the Official Journal of Romania, Part I, no. 263 of October 28, 1996, available online at http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=9344, accessed on 07.03.2019.

[20] Savin, A., Alistar, V., Zăbavă, O., Codru, V., Raportul Național asupra Corupției – ediția martie 2005, available online at https://www.transparency.org.ro/files/File/RNC%202005%20ro.pdf, accessed on 07.03.2019.

[21] *Ibidem,* p. 14.

of Agriculture, Reman Domocos, arrested for bribery in the SAPARD file[22].

In the matter of property control, TI maintains the finding on the total ineffectiveness of the mechanism provided by Law no. 115/1996, to which were added successive modifications, but without any real effect. The commissions for asset control at the courts of appeal had little but isolated activity, their research being sold in eight years with only two solutions.

Transparency International Romania has made a number of proposals and recommendations, including consolidating in one single institutional mechanism independent of the executive power and the private or group interests of all the powers to monitor conflicts of interest for all categories of persons prescribed by law.

It should be noted that the recommendations made in GRECO, Freedom House and Transparency International Romania's reports on the establishment of an autonomous administrative body to fight corruption by administrative means come after Romania, at the conclusion of the accession negotiations of 14 December 2004, assumed specific commitments, including this. Thus, on this subject, the documents relied on contain in fact only the reconfirmations presented as "recommendations".

e) Fourth attempt (materialized with great difficulties): National Integrity Agency

As a result of the institutional, procedural and normative pressures exerted in the context of Romania's accession to the European Union, in July 2006 an organic law draft on the establishment of the National Integrity Agency appears as a "legislative priority for integration"; it was drafted by Justice Minister Monica Macovei at the time, and it was the subject of heated debates in Parliament[23], where the suitable NGOs also attended[24].

The draft law was amended by the Legal Commission of the Chamber of Deputies (the first chamber notified), for which reason, in the meeting of 23 October 2006, Monica Macovei requested the deletion of the new amendments, arguing that they overlap the activity of the ANI with that of the Police and the Prosecutor's Office, and assign a single purpose to the Agency, to notify the criminal investigation bodies. Representatives of all parliamentary groups have spoken in Parliament to support one or other of the proposed versions of the law, but reaching consensus was far away.

It was not until May 9, 2007 that the Senate (the decision-making chamber) adopted Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency[25]. According to Tudor Chiuariu, the Minister of Justice at the time[26], the basis for the establishment of ANI is found in Decision 2006/928/EC, adopted by the European Commission on 13 December 2006[27], which provided for the establishment of a mechanism for cooperation and verification of progress made by Romania in order to achieve certain benchmarks after accession to the European Union, specific to the reform of the judiciary and the fight against corruption[28].

The decision came as a result of the Commission's identification in the last pre-accession[29] monitoring report of unresolved issues regarding the accountability and efficiency of the judiciary. In this respect, on the basis of Articles 37 and 38 of the Accession Treaty, the Commission established a mechanism for cooperation and verification of progress made after accession, which will operate until the four benchmarks are met. Of these, we are interested in benchmark no. 2, which consists of "establish(ing), as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken".

The Action Plan for the fulfillment of the benchmarks under the Cooperation and Verification Mechanism of Romania's progress in the field of

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[22] Iorgovan violated the provisions of Law no. 280/2004 for the approval of GEO no. 77/2003, according to which "The deputy or senator who, during the exercise of the mandate of a parliamentarian, also wishes to exercise the profession of lawyer, can not plead in the cases which are judged by judges or tribunals nor can he give legal assistance to the prosecutor's offices from these courts. The deputy or senator in the situation stipulated in par. (1) can not provide legal assistance to chargeables or defendants and can not assist them in the criminal cases regarding: corruption offenses, crimes assimilated to corruption offenses, offenses directly related to corruption offenses, as well as offenses against the financial interests of the European Communities, provided for in Law no. 78/2000 on the Prevention, Detection and Sanctioning of Corruption, as amended and supplemented".

[23] *Sitting of the Chamber of Deputies of October 23, 2006. General debates on the Draft Law on the establishment of the National Integrity Agency*, verbatim report available at http://www.cdep.ro/pls/steno/steno.stenograma?ids=6176&idm=8&prn=1, accessed on 08.03.2019.

[24] *Verbatim Report of the Public Debate entitled "National Integrity Agency: Powers, Competencies, Procedures"*, July 11, 2006, available online at http://www.cdep.ro/pls/dic/site.page?id=570, accessed on 08.03.2019.

[25] *Legea nr. 144/2007 privind înființarea, organizarea și funcționarea Agenției Naționale de Integritate (Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency)*, published in the Official Journal of Romania, Part I, no. 359 of May 25, 2007, available online at http://parlamentare2016.bec.ro/wp-content/uploads/2016/09/Lege-144-2007-1.pdf, accessed on 08.03.2019.

[26] In his mandate, Law no. 144/2007 (ANI Law) mentioned above has been approved.

[27] *Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption* (notified under document number C(2006) 6569), (2006/928/EC), published in the Official Journal of the European Union, L354/56, 14.12.2006, available online at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006D0928&from=RO, accessed on 25.02.2019.

[28] Chiurariu, T., *Controlul averilor, incompatibilităților și conflictelor de interese. Legislație, doctrină și jurisprudență*, Hamangiu Publishing House, Bucharest, 2016, p. 31.

[29] *Communication from the Commission – Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania*, COM (2006) 549 final, Brussels, 26.09.2006, available online at https://publications.europa.eu/en/publication-detail/-/publication/4eafcc9e-ec05-4fdf-86fc-3a75918ddaa4/language-en, accessed on 09.03.2019.

judiciary reform and the fight against corruption[30] was elaborated under the coordination of the Ministry of Justice by centralizing its own contributions and those formulated by the institutions with attributions in the field of the judiciary and the fight against corruption, with the involvement of magistrates, representatives of professional associations and civil society. As regards the benchmark no. 2, the necessary measures for the operationalization of the Agency have been established, namely: ensuring the resources of any nature necessary for the good functioning of the Agency; administrative consolidation; design and operationalization of the management system for the conduct of the control activity; increasing integrity in the exercise of public functions and dignities through preventive action.

As a consequence, through Law no. 144/2010 in the consolidated version (the ANI Law has undergone a series of successive changes so that the new institution can become functional), the organization and functioning of an exclusive and autonomous administrative authority with legal personality and permanent activity was regulated. The newly created institution – the National Integrity Agency – has authority to verify the declarations of assets and interests, ex officio or at the request of any interested natural or legal person, and performs the control of their deposit in due time.

## 3. National Integrity Agency: between the national political pressure and the CVM magnifier

According to the Cooperation and Verification Mechanism reports from 2007-2018, the National Integrity Agency's track record was a tough one. Achieving results in investigating cases of unjustified wealth, incompatibilities and conflicts of interest was lenient, despite expectations, since the initial version of the law was incomplete and did not allow for the best possible practical action, which led to successive changes. Following the rectifications to Law no. 144/2007, necessary to ensure the functioning of the National Integrity Agency, the basic staff was hired in 2008 and started the first surveys by taking over the information from the press.

Until 2009 inclusive, the evolution seemed to continue, but the conclusions of the Constitutional Court in 2010, formulated following the lifting of some exceptions of unconstitutionality over the National Integrity Agency Act, interrupted the institution's impetus for several months, its activity being suspended until the entry into force of Law no. 176/2010. According to the European Commission, the new legislative framework weakens the institution, introducing, among other things, prescription terms, which has led the Agency to give up some cases. In addition, the general context at this time is characterized by slow judicial procedures, uneven jurisprudence, insufficient interinstitutional cooperation, few signs to the National Integrity Agency from other bodies, institutions that did not comply with the complaints made by the National Integrity Agency etc.

Subsequently, the scale of the Agency's activity began to increase progressively, following several actions that have used specific risk assessments and prioritization of the worst cases. However, by 2013, although the number of National Integrity Agency's verifications and notifications had become significant, the results were not anticipated. It is only from 2013 that the National Integrity Agency begins to present itself as an authoritative institution: it enjoys the support of the Government at that time, concludes agreements with other government agencies for collaboration, reaches a confirmation rate of over 90% of the decisions challenged in court in situations of conflict of interest, and a high degree of credibility with regard to its actions, is becoming more and more involved in the area of prevention during the electoral moments (2012, 2016), it becomes a model of good practices for other European countries and maintains its position even after the resignation of President Horia Georgescu. Problems remain in court proceedings in cases of incompatibility that continue to last for a long time, and the cancellation of contracts affected by a conflict of interest and the poor performance of the public administration in pursuing such cases lead to losses in public finances.

In January 2017, the fight against corruption was called into question by the adoption of an emergency ordinance aimed at decriminalizing abuse of office and a proposal for a normative act aimed at pardoning, disputed measures at national level, which led to its abrogation. In the penultimate CVM report, the European Commission expresses its willingness to provide additional assistance to ensure the irreversibility of progress and thus complete the oversight process.

All the problems identified regarding to National Integrity Agency are related, in particular, to external factors. Its actions were constantly challenged by the political members, dissatisfied with the checks they carried out, and Parliament and some successive Governments have frequently tried to undermine their authority, both through legislative proposals designed to reduce its attributions and affect its outcomes, as well

[30] *Hotărârea nr. 1346/2007 privind aprobarea Planului de acţiune pentru îndeplinirea condiţionalităţilor din cadrul mecanismului de cooperare şi verificare a progresului realizat de România în domeniul reformei sistemului judiciar şi al luptei împotriva corupţiei (Decision no. 1346/2007 regarding the approval of the Action Plan for fulfillment of the conditionalities under the mechanism for cooperation and verification of progress made by Romania in the field of judiciary reform and the fight against corruption)*, published in the Official Journal of Romania, Part I, no. 765 of November 12, 2007, available online at https://lege5.ro/Gratuit/geydknjtga/hotararea-nr-1346-2007-privind-aprobarea-planului-de-actiune-pentru-indeplinirea-conditionalitatilor-din-cadrul-mecanismului-de-cooperare-si-verificare-a-progresului-realizat-de-romania-in-domeniul-re?d=2018-09-10, accessed on 11.03.2019.

as the lack of transparency of the Parliament in dealing with cases of members who have not enforced the decisions pronounced by final court rulings or contained in the reports of the National Integrity Agency which have remained final through non-contestation in court.

## 4. The Future of the Cooperation and Verification Mechanism

Recent comments on the CVM's role show a unanimously accepted view, both supportive and critical, that **the Cooperation and Verification Mechanism should cease**. The supporters believe that due to the Mechanism, important legislative and institutional progress has been made, often as a constraint on deviations from the commitments made. However, evolution has been slow and frequently attacked, with opposition reactions sometimes leading to regressions, which has led to the need for new accountability tools, perhaps even more powerful than CVMs.

It is not clear what form the new mechanisms might take; several approaches are proposed, such as: the continuation of CVM through the renegotiation of benchmarks with 2-year implementation deadlines; creating a simplified CVM procedure and applying it to all Member States; applying the European semester; the realization of a mechanism adapted to the national context. Other suggestions refer to the continuation of reforms under EU programs applicable to all Member States or under existing national instruments.

Critics have all been of the same opinion that the application of CVM has not led to the anticipated effects and outcomes, so the role of the Mechanism should not be exaggerated. They say that during the European Commission's monitoring, reforms in the pre-accession period have not been maintained, a situation found in the ongoing attempts to amend anti-corruption legislation. It is also noted that models from outside can not be taken and applied without regard to the Romanian specifics and context. There have been no radical reforms, but only surface, because even though official rules have been adopted, they have not been put into practice in real terms. Also, when distinguishing between the impact of compliance and the impact of problem solving, it is found that the view on both is negative – first, due to lack of enforcement powers, and the second due to the deficiencies of the mechanisms, including CVM, reflected by inappropriate recommendations, unconscious practice, etc.

Absence of cooperation and full use of monitoring, loss of motivation in the fight against corruption after accession and its support only at declarative level, lack of mechanisms for guaranteeing the implementation of anti-corruption strategies, constantly changing the requirements and recommendations of the benchmarks, exclusive use only for Romania and Bulgaria – all these affect the efficiency, effectiveness and even legitimacy of CVM. All of the above will be detailed in the next chapter.

## 5. The Future of the National Integrity Agency in the absence of CVM. Possible correlative scenarios

According to the reports developed and published under the Cooperation and Verification Mechanism, the National Integrity Agency's path was extremely difficult, marked by legislative ambiguities, the desire of the political factor to control it (both from a normative and budgetary point of view), lack of interinstitutional cooperation, corruption in the judiciary, amateurism in institutional organization, lack of will to fight corruption in the public system, etc. Thus, one can notice a constant attempt of institutional isolation of the Agency in the public system, as it was perceived as a threat to the traditional practices of dignitaries and civil servants, in the form of incompatibilities, conflicts of interest and unjustified wealth.

In 2010, the institution was marked by major changes. This happened as a result of a contradiction in terms of Myeong-Gu Seo and W.E. Douglas Creed[31]: One of the premises of institutional theories is that the success of an organization depends on factors rather than on technical efficiency; organizations gain the legitimacy and resources needed due to isomorphism with institutional environments, which can lead to conflicts with technical activities and efficiency requirements. Thus, the contradiction takes place between legitimacy and institutional efficiency. The National Integrity Agency had the goal of achieving technical efficiency, which contradicted the rapid gain of legitimacy, as it depended on the proximity to the political factor (legitimacy was offered by politics). The interference of the political factor, however, did not correspond to the objective of establishing the Agency, which wanted to be an independent and impartial control body.

Generally speaking, the vision of CVM reports on the course and functioning of the National Integrity Agency is a positive one, and the delays in its operation are caused not by the lack of professionalism and ethics of its staff but by the interests of the political factor that has always tried to manipulate the evolution of the institution, so that the impact of its actions will be as low as possible for the dignitaries and civil servants in Romania.

According to the latest reports, the Commission's recommendations based on the findings have been fully complied with. The only major issues that remain to be discussed and resolved are those related to the non-

[31] Myeong-Gu, S., Creed, D. W. E., „Institutional Contradictions, Praxis, and Institutional Change: A Dialectical Perspective" in *The Academy of Management Review*, Vol. 27, No. 2, 2002, pp. 222-247.

uniform and non-transparent application by the Parliament of final judgments and the lack of a unitary legislative framework on integrity; these are however independent aspects of the National Integrity Agency and have been consistently repeated in the CVM reports without any response to date.

Lately, there is a growing debate about the need to continue or not to monitor Romania through CVM. Some voices, both at national and European level, consider that all benchmarks have not been fully met, so CVM needs to continue; on the opposite side, it is considered necessary to "lift" the CVM because it is believed, or at least publicly expressed, that Romania has responded to the requirements established by the Mechanism, or that progress is registered and irreversible, and evolution will continue even in its absence. Those who want to pursue the CVM fear that, to the contrary, national anti-European political factors and pursuing certain private interests would have every reason to hinder the continuation of any reform or, even more, to influence things in the sense of regress, in this hypothesis targeting the National Integrity Agency.

Hence, in the sense that monitoring through the Cooperation and Verification Mechanism will cease, it is legitimate to ask what the future of the National Integrity Agency will be in its absence. As an exercise of imagination and anticipation, we can think of a series of hypothetical situations about the National Integrity Agency's path with the disappearance of the Mechanism.

a) *Scenario 1*: The National Integrity Agency will continue its course according to the progress made so far

In tackling this scenario, we are based on an official study conducted at the level of the European Union. Thus, in January 2018, the European Parliament published an analysis entitled "Evaluation of the 10 Years of the Cooperation and Verification Mechanism for Romania and Bulgaria"[32], which aimed to achieve the CVM balance sheet so that a support strategy to be outlined for the coming years.

According to the study, CVM was a compromise solution, given that Romania had applied to join the European Union but was not considered ready; if the Mechanism had not existed, our country would not have been able to join in 2007, or, if this had happened, the reform process would have been longer to achieve results. If at the beginning of the monitoring period the emphasis was on introducing new laws to promote CVM objectives, the focus is now on reforming and strengthening their irreversible character.

The Commission's reports of 2014, 2015, 2016 and 2017 highlight a positive trend. Significant legislative and institutional progress has been made, and civil society involvement has been crucial in encouraging reform of the judiciary and adopting significant anti-corruption measures. The pace of evolution has been sluggish in some stages, mainly due to several areas where the reform has been difficult or encountered resistance: doubting the independence of the judiciary and the authority of judgments, as well as attempts to reverse the reforms that were obvious at beginning of this year, in the Romanian Parliament. Thus, it is considered that reporting and accountability mechanisms should be maintained after the CVM is completed.

Therefore, according to the analysis, monitoring should be continued, even if the stage reached has been appreciated: "(...) measures should be taken to replace the CVM mechanism with a (stronger) monitoring framework, managed even by the Romanian authorities. Otherwise, there is a risk of slowing or even regressing the reform process"[33]. At the same time, if the recommendations of the latest CVM reports are not applied, the issue will be "whether the CVM will be closed if it continues without changes or if a completely different approach is adopted"[34].

Continuing monitoring is necessary for a number of reasons: getting closer to the average European standards, combating organized crime and high-level corruption, attracting investors from other Member States, fighting against European fund fraud, executing court decisions, etc.

Given the above, it is clear that even if the Cooperation and Verification Mechanism was eliminated, it is intended to replace it with a new form of control, which would undoubtedly allow the National Integrity Agency to continue its work and progress so far, with no fear of interference with the political factor.

b) *Scenario 2*: The National Integrity Agency will be discredited and try to eliminate it without having an external pressure mechanism

Sedelmeier & Lăcătus, researchers at the London School of Economics and Political Science, through the article "Post-accession Compliance with the EU's Anti-Corruption Conditions in the 'Cooperation and Verification Mechanism': Bite Without Teeth?"[35], assessed the CVM's influence on internal changes anti-corruption policies.

First, it is mentioned that CVM is a monitoring tool, not a coercive one, so there is no connection with certain sanctions. Secondly, when studying the impact

[32] European Parliament, Directorate General for Internal Policies of the Union, Policy Department for Budgetary Affairs, *Assessment of the 10 years' Cooperation and Verification Mechanism for Bulgaria and Romania*, PE 603.813, January 2018, available online at https://www.caleaeuropeana.ro/wp-content/uploads/2018/01/s_2014_2019_plmrep_COMMITTEES_CONT_DV_2018_01-29_CVM_Bulgaria_Romania_study_EN.pdf, accessed on 10.03.2019.

[33] *Ibidem*, p. 10.

[34] *Ibidem*, p. 11.

[35] Ulrich Sedelmeier&Corina Lăcătuș, Post-accession Compliance with the EU's Anti Corruption Conditions in the 'Cooperation and Verification Mechanism': Bite without Teeth?, London School of Economics and Political, paper presented at the Fifteenth Biennial Conference of the European Union Studies Association (EUSA), 4-6 May 2017, Miami Florida.

of CVM, we need to distinguish between *the impact on compliance* – the extent to which the state meets the requirements and recommendations in the reports – and *the impact on problem solving* – the extent to which corruption effectively diminishes.

The paper notes that there is no clear evidence that the positive image determined by CVM compliance also leads to an effective improvement of corruption issues. However, the authors suggest that a CVM compliance analysis is useful, because it can leave room for optimism, while the analysis of the Mechanism as a tool and its impact on corruption tends to be more critical. The first aspect focuses on institution building and the creation of a legislative infrastructure, and although these do not translate directly or immediately into improved corruption control, they are not negligible as they can create favorable conditions for certain changes.

It is appreciated that in Romania, CVM has supported the creation of strong institutions, including the National Integrity Agency. A new generation of young, motivated and well trained civil servants has used these institutional powers to fight corruption. The creation of this institution has allowed progress in investigating high-level corruption cases, which were very limited until 2010. After the CVM report of July 2010 was extremely critical of the attacks on the National Integrity Agency, the Parliament voted for the restoration of powers, although they have been weakened, by limiting the scope of investigations and eliminating commissions for wealth control. Overall, however, the achievements of the National Integrity Agency have led to a significant increase in public confidence in the institution[36]. Without this body, many cases of conflicts of interest, incompatibilities and unjustified wealth would not have been identified, despite the need for transparency in the field.

However, its impact is still fragile, as a parliamentary coalition seems to intend to limit anti-corruption activities. While this threat weakens progress, this is where CVM comes into play as it has served as a constraint in derailing the fight against corruption, but we must not exaggerate CVM's ability to bring about positive change without an internal initiative. Instead, the impact of the Mechanism is primarily that it limits the ability of Parliament and the Government to openly block anti-corruption efforts and, in particular, to eliminate past institutional achievements.

Therefore, with the disappearance of CVM, there is a possibility that the political factor may continue to try to weaken the authority of the institution and discredit it, this time without hindering in any way the external monitoring tool. Bringing the National Integrity Agency into a shadowy cone and assigning a formal role to it without a real substance seems a situation not far from materializing. The permanent appeal of the Agency from its establishment to the present day determines us to go free to this idea, and the mere fact that the institution is appreciated at European level would cause the political factor not to definitively disband the National Integrity Agency.

c) *Scenario 3*: The National Integrity Agency will disappear with the CVM lifting

The selective use of CVM in the case of Romania and Bulgaria, Sedelmeier & Lăcătuș points out in its above-mentioned paper, jeopardizing its legitimacy, not being applied to all Member States and even to Croatia, the last state that has joined the EU. Thus, one can speak metaphorically about a "hostage-taking" case that threatens negative consequences and decreases the legitimacy of the Mechanism. In addition, although benchmarks have remained the same over the years, the list of requirements and recommendations under each of the criteria is changing permanently, because some issues are abandoned and new areas of interest are added to the agenda. Also, the limited impact on the problems CVM has to address (corruption, organized crime and the judiciary) is determined by its shortcomings – inadequate recommendations, inconsistent application, lack of focus on practical application, and sometimes deeply rooted cultural ties of post-communist societies.

Martin Mendelski, in the "Romanian Rule of Law Reform: A Two-Dimensional Approach"[37], deals with the question of the rule of law from a two-dimensional perspective, namely, a *dimension of judicial capacity* and *a dimension of judicial impartiality*, they being necessary both individually, but which must also be common enough for real progress. In the analysis, the author proposed to show that the two dimensions developed differently in Romania, because, while the judicial capacity has improved for the most part, judicial impartiality remained relatively unchanged. Particular attention is also paid to the role of external and international actors, in particular the potential transformation role of the EU in promoting internal change during and after the pre-accession period.

According to the author, the EU's commitment to the rule of law in Romania has not produced any vertical changes, but has led to superficial reforms that have left the existing power structures unchanged. The result was the adoption of new well-developed rules but which, in practice, have not been implemented, and measures to reform judicial capacity have advanced more rapidly than reforms of judicial impartiality.

Moreover, the pace of reforms has not been maintained after accession. What should be considered are attempts to modify anti-corruption legislation previously adopted or to diminish the power of anti-corruption agencies, recalling here the decision of the Constitutional Court that declared the first version of the law on the National Integrity Agency unconstitutional. According to the European

[36] Ibidem, p. 19.

[37] Mendeslki, M., „Romanian Rule of Law Reform: A Two Dimensional Approach" in *Romania under Basescu: Aspirations, Achievements, and Frustrations during His First Presidential Term*, Lexington Books, New York, 2011, pp.155-179.

Commission, the revised and less strict version of this law seriously undermines the process of verification, sanctioning and confiscation of unjustified assets. The Commission also noted that exceptions of unconstitutionality continue to delay high-level corruption cases and corruption-related crimes remain lengthy, with only a few prominent politicians at first instance.

From the empirical analysis, Mendelski found that some of the issues came from anti-corruption bodies. The selection of staff at the National Integrity Agency was made in an unequivocal manner. The recruitment procedure allowed the recruitment of interviewed persons (rather than written exams) by leaving them room for the preferential treatment of politically connected persons who, although young and reformed, can not always be considered the most competent. The National Integrity Agency and similar bodies were created by emergency ordinances and amendments that are supposed to be inconsistent with the existing constitution. Therefore, ironically, the rule of law was promoted by agencies that might be considered outside the rule of law. The creation of new surveillance agencies does not cause any transformation, unless the actors appointed within them change their mindset.

Creating the rule of law is a complex process in which models can not simply be translated from abroad, and this is demonstrated by the Romanian case. Even when similar formal rules are adopted and judicial capacity is extended, efficacy can be undermined by powerful political actors who use methods of influence in the absence of transparency and supervision. Also, the results are not necessarily better when creating new formal institutions sensitive to the Romanian context. Old habits die hard, especially when they are protected by rooted interests.

Given the above, we are facing a discredited CVM, even considered illegitimate, which did not cause a real positive impact on Romania, but only superficial effects. Consequently, for the authors mentioned above, the lifting of the Mechanism does not affect the situation at all, because internal decisions have not depended on and will not depend on it, but on changing mentalities, a situation that can not occur in such a short time. Power structures remained the same over time, so real progress could not be recorded because there was no interest in doing so. Therefore, with the disappearance of CVM, the National Integrity Agency may disappear too (not necessarily simultaneously but slowly), as the institution is not seen as effective and efficacious in the fight against corruption, given the conditions of its establishment and functioning, mentioned by Mendelski. In addition, it seems irrelevant whether the National Integrity Agency continues to exist or disappears because, without a radical transformation of the way of thinking in Romanian society, this institution does not appear to eliminate considerably the existing practices in the field of conflicts of interests, incompatibilities and unjustified wealth.

## Conclusions

Summing up all of the information presented above, we were able to pursue a four-step structured study of the past and future of the National Integrity Agency. Thus, on the one hand, we tried to understand its place and role on the Romanian institutional map, its essential link with a monitoring mechanism established at the European Commission level (CVM), and its ineluctable dependence on the latter; on the other hand, we figured out what could happen to the National Integrity Agency with the removal of CVM, since its entire course, from its establishment to the present, depended and was influenced by it.

The first step consisted in analysing the moments that preceded the attempts to set up an autonomous administrative body, as a measure taken by Romania in the process of joining the European Union, in order to show its involvement in the fight against corruption. There were listed the structures previously established by the National Integrity Agency, a kind of incomplete political annexes, with a superficial role and a lack of clarity, which is the reason why none of them resisted for a long time. The data presented showed their ineffectiveness and inefficiency, as no quantifiable results were recorded from their activity. It is only from 2005 that the problem of setting up this body has been seriously raised, together with the National Anti-Corruption Strategy 2005-2007, which was based on a series of external recommendations. After two failed legislative projects in 2005 and 2006, the momentum of utmost importance was the decision of the European Commission in December 2006 to establish a Cooperation and Verification Mechanism to follow the commitments made by Romania. It was only in mid-2007 that the legal framework for the establishment of the National Integrity Agency was adopted.

The second step consisted in briefly presenting the National Integrity Agency's pathway as reflected in the CVM reports, whose role is to monitor the smooth running of the work and to formulate recommendations for correction of deviations, when it is necessary. It has been stated difficulties encountered by the Agency in its operationalization and functioning, including issues related to the unconstitutionality of several articles of Law no. 144/2007. Consequently, the debut was a difficult one, but the obstacles were perpetuated, given the constant negative attitude of the political factor regarding this institution.

The third step was defined by general considerations on the future of CVM. We have seen that both supporters and critics want to end it, even if for different reasons: first, in order for the Mechanism to be replaced by a new instrument to take over its functions, but more adapted to the current reality, perhaps even stronger, and the last because they have never seen its usefulness and believe that it has not

produced any real effects, since after Romania's accession, Romania lost its motivation in the anti-corruption fight.

In the last step, the two visions mentioned above were deepened by presenting some representative bibliographic references. The most important aspect was the correlation between the future CVM and the future of the National Integrity Agency, as the Agency was set up and operates as a direct result of the establishment of the Mechanism. Considering the close link between the two, we tried to imagine what could happen to the Agency with the disappearance of the Mechanism. We have reached three possible scenarios: 1) The National Integrity Agency will continue its work in line with its progress, because it has a very good image at the European Union level and its results are considered satisfactory; 2) it will be discredited and try to eliminate it, the only restraint that would prevent this from happening could be the accusations made by European officials; 3) will disappear with CVM, if the views of those who believe that the impact of the Mechanism did not have a real substance and the situation would be similar, with or without the Agency, will prevail.

In the next period, once the destiny of the Mechanism is decided, we will see which scenarios are more feasible. If the course of the Agency is going to follow any of these, future research could start from our study and can be continued by trying to answer the question "Why did you choose this solution?", analysing, in this regard, all the decisive factors. If the scenarios do not come true, the study can be continued by analysing decisions that have determined another perspective. Moreover, new research could extend the CVM's relationship analysis to the other three benchmarks monitored to follow their evolution since 2007, the current stage vs. expectations, as well as launching potential scenarios for their future with the lifting (rising) of the CVM.

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# ASPECTS OF ETHICAL MANAGEMENT IN TODAY'S EUROPEAN UNIVERSITIES

**Elena NEDELCU***

**Abstract**

*The present paper is a theoretical one. Firstly, this paper attempts to reveal to what extent the 21st century universities – with all the characteristics of this period - are concerned about ethical problems.*

*And if universities are still concerned about this issue, this paper aims to point out to what extent universities are able to create their own values and to transmit them to the others within the present context in which there is an unprecedented interdependence of social domains, a fact which generates negative effects on their autonomy.*

*There are ethical problems in all universities, domains and societies. The question is how these problems are tackled and if there is a reaction to them or not. We are particularly interested in the young people's attitude. Do young people react to these problems or do they remain indifferent to the ethical problems existing in the academic world?*

*How do young people relate to the ethical problems in a society that underwent a long period of transition, and of anomie, too? Does ethics remain, like politics, a second hand concern for most of young people in our society?*

*The present paper also deals with important aspects of ethical management in universities. If we consider some European - including Romanian - research work on this issue, we can notice that they simultaneously present the educational managers' opinions and the students' opinions on the characteristics of ethical management in present universities.*

**Keywords:** *ethics, values, autonomy, ethical management, student.*

## 1. Introduction:

Brief analysis of the 21st century education

*Motto: Education must /.../ be a continuous process of training human beings who are fulfilled as far as their knowledge, abilities, critical spirit and the capacity to act are concerned; education must allow individual development, the openness of every individual towards environment; it must allow the individual to play a social role both at work and in community (Delors Report, 2000, p. 14).*

The mentality according to which the main goal of education is to create adapted individuals and capacities that help them face market needs, competitive, conscious and disciplined producers is obsolete and deeply wrong.

Today, everywhere, so much the more in communist countries, where we often identify profoundly individualistic forms and a tight economic and political competition (sometimes quasi illegal or completely illegal), education is meant to contribute to the formation of a new and essentially ethical humanism. Ever since 2000, The Delors[1] Report pointed out that the pressure put by economic and political competition has determined many of those who had a decision-make position to ignore the universities' mission, i.e. "the mission of offering each one the means that are necessary to benefit to the largest extent from an opportunity".

This situation is identifiable especially in the former communist countries, which underwent a long transition period, a period of anomie and of denial of morality.

In these countries and not only, many agree with the idea that there are solid and "multiple reasons for focusing again on the moral and cultural dimensions of education, so that each of us could perceive the others' individuality and understand the uncertain direction that the world follows towards unity (….); this process must begin with self-knowledge, with an inner voyage whose landmarks are knowledge, reflection and self-criticism."[2]

Fast kinetics, technological and communication progress, the ever increasing globalization phenomenon are new challenges for education, which warn it about a paradigmatic modification in its approach. Trying to face this challenge, we can see that more and more perspectives have appeared, which clearly and insistently put the stress on the *training and moral dimensions of today's education*, and on the need to develop a moral society. The Delors Report comes up with these perspectives. Sharing the same vision, A. Touraine underlines the huge importance played by moral values in today's society. He considers that "today's <<IT>> and <<programmed society>> –"is a society in which moral categories play a central role, the role played once by political categories, being

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[1] Jaques Delors, Comoara launtrica –Raportul către UNESCO al Comisiei Internaționale pentru Educație în secolul XXI, Polirom, 2000, pp:69-77.

[2] Ibidem.

followed by the economic ones and, before modernity, by religious thinking".[3]

Other perspectives, and not differently from the first ones, point out the *role of education in creating individuals adapted* to technological changes, to the IT epoch and the globalized world, etc. According to these perspectives, taking into account the characteristics of the 21st century, education should insist less on information and abilities and more on the 4 C's: , i.e.: "critical thinking, communication, collaboration and creativity". The educational system will be able to prepare young people that are capable of facing today's alert rhythm of changes only by developing the "4 C's"[4].

The simple assimilation of the "4C's" may be enough for helping young people keep up with the world; however, nowadays, young people, like the young people of other times, aim at more than that. They are and they want to be the subjects of a new world, they are the ones who build a new and enduring world, at least we hope so. In accomplishing their mission, they need a 5th C, i.e. the ethical compasses, moral principles and values. Young people feel the need of having a moral basis and education that supports their knowledge.

The Delors Report upholds that education has for basic pillars: "Learning to know", "Learning to do", "Learning to be", "Learning to be with the others", offering a special attention to the last one.[5] However, one cannot have a good and pleasant life with the others if he/she does not learn to respect the moral values and norms of our society.

In conclusion, the educational act – at all levels (including the academic one) – should not be a simple transfer of knowledge, but it should also imply an assimilation of values. Education should draw our and the others' attention and make us and the others aware of the ethical mission the the act of "being together" involves us in. In other words, the mission of universities is not only to produce and transmit knowledge and landmarks, it is not only to train specialists and researchers, but it is also to create cultivated and civilized persons, persons who have a beautiful character.

Ever since 1943 Leavis has seen the univerity as "a a shelter of consciousness and humanity in the middle of the inhuman pressure and difficulties of the modern world, and a center in which intelligence /.../ is able to apply an elaborated system of values and to dedicate itself to the problems of our civilization.[6]

## 2. Debates on university autonomy and the capacity of universities to produce and transmit values

The importance of the role played by the university in producing and transmitting values, as well as in teaching the "right behavior" to the young generation, was the main topic of the Colloquium *Institutional Autonomy, Academic Freedom and Imposture in the Academia – Do Academic Core Values Safeguard Against Corruption?"*, which was held in 2018 at the New Europe College in Bucharest. On the other hand, there are departures from a correct system of values and principles (bribery, extortion, favoritism, nepotism, salaries paid to "phantom" teachers, issuing false diplomas, etc.) "represent, maybe, one of the most malign acts that a society can do against itself."[7]

As the principle of competition has started to prevail on social and economic thought, it is necessary for the university to maintain its position as a place where moral values and principles are cultivated, a fact which will be later seen in the common welfare, and also to remain autonomous, i.e. not to let itself be absorbed by the market mechanisms.

The capacity of universities to maintain their autonomy in relation to nowadays society, with its economic and political environment, and to produce and transmit its own values has made room to a series of discussion in specialized literature.

There are points of view[8] according to which universities do not appear to be institutions that are based on fundamental values, but as organizations which are limited to offer technical services, to voluntarily accept the values imposed on them by their main beneficiaries, especially by the government and the industrial sector.

Thus, ethical issues are endangered to become secondary rather than fundamental issues in modern societies, being directly linked to the main mission of the university. In this context, one can notice that, as to teaching, important debates, such as the ones related to the development of the curriculum, are replaced by debates on the policies and procedures that are meant to prevent or punish plagiarism among students.

The same situation can be noticed as far as research is concerned. The ethics of research is no longer concerned with the morality of military or commercial sponsorhip of the research company; it is, instead, concerned with narrow issues, such as the technical ones, e.g.: presenting incorrect practices and maintaining an accurate research methodology.

[3] A. Touraine ,1992, p.414, dupa :http://nou2.ise.ro/wp-content/uploads/2001/08/2001_Raport_cercetare.pdf).
[4] Yuval Noah, Harari, 21 de lectii pentru secolul xxi, Polirom, 2018, p.262.
[5] Jaques Delors, op. cit.
[6] Leavis, F.R. (1943), *Education and the University*, Cambridge University Press, Cambridge.
[7] Ana Maria Sirghi, Despre incredere si valoare in invatamantul romanesc si European, http://www.marketwatch.ro/articol/16167/Despre_incredere_si_valoare_in_sistemul_universitar_romanesc_si_european/
[8] Peter Scott, L'étique « dans » et « pour » l'enseignement supérieur, dans: L'Enseignement Supérieur en EuropeVolume XXIX Numéro 4/ 2004, UNESCO-CEPES, pp:439-451).

Peter Scott[9] noticed that, besides the mitigation of ethical bases, the lower and lower intellectual level and traditional standards, universities are often criticized for their incapacity to act independently and efficiently as critical institutions of our society. However, according to him, presenting the real situation of univerities today requires a more detailed description. Distinguishing between the elite universities and the ordinary ones, according to Peter Scott, the former ones have managed to maintain a critical distance from society – according to the general opinion. They have managed to develop their own values system – which are in line with the ones of our society, but which are, however, different – which they have spread through their research work and the scholarships offered to students, and, especially, thanks to their role in forming elites. On the other hand, the development of a knowledge-based society has led to the disappearance of the borders between politics, market, science and culture.

The university – one of the most dynamic institutions in the knowledge-based society – is among the most affected ones by this erosion. Thus, its success in solving scientific and social issues has also generated a loss of its autonomy. The autonomy loss has been greater in the case of mass higher education, which is „based rather on instrumental than liberal (or academic) values", and which is „more oriented on professionalism and less on the scientific dimension". One cand speak about a loss of its capacity to generate its own and distinct systems of values.

A more subtle and more profound analysis – according to Scott – brings into evidence the fact that the relation between higher education and the knowledge-based society is much more ambiguous and complex. „The higher education institutions go across (..) knowledge-based society at different levels – starting with the advanced research and technologies that are developed worldwide, and continuing with professional and technical elite training, to finish with the training of the alumni that graduate universities. If some refer to an even deeper incorporation of higher education in the knowledge-based society, others, on the contrary, uphold the independence of the higher education system - or, if not its independence, the dependence of other social or economic institutions upon the higher education system (Scott, 1999)."

Professor Lazăr Vlăsceanu[10] - the Faculty of Sociology and Social Assistance, the University of Bucharest – considers that we must ponder over the link that exists between university and society without underestimating the idea of value and without encouraging imposture. He also considers that traditional academic values should neither disappear nor be misinterpreted.

As to the link between the capacity of universities to produce their own system of values, opinions are optimistic, trustful and expressed with courage. In fact, some studies demostrate that higher education could not exist without such a set of values. Thus, we can speak about the existence of a set of values that are common to higher education, i.e.:[11]

- the commitment to search for the truth;
- the responsibility to share knowledge;
- freedom of thought and expression;
- the thorough analysis of proofs and the use of rational arguments when trying to reach a conclusion;
- the wish to listen to other points of view and to judge them in conformity with their value;
- considering the way in which our own arguments will be perceived by the others;
- the wish to consider the ethical implications of certain results and practices.

A research work [12] accomplished in Great Britain in 2007 reveals the young people's opinion as to the difficulties that universities encounter in manifesting their autonomy, in expressing academic values in relation to the traditional ones. This work points out fundamental aspects for understanding the ethical problems with which higher education confronts in its attempt to create and deliver values in our society. Of the key statements included in the questionnaire (with which British students partially or agreed or agreed on the whole), I have selected the ones that seem to be actual for the Romanian academic environment, i.e.:

a) Higher education has lost its role of being a critical consciousness within society;
b) The fear to "speak the truth to those who have power" due to the limits imposed by a culture of brutality and culpability;
c) The pleasure of studying has diminished because attention is focused on developing the skills that alumni will need as labour force at the workplace;
d) The integrity of research work has been doubted: through pressure imposed for publishing a paper prematurely or through commercial pressure or through pressure imposed by the sponsor's expectations (e.g. for project orders);
e) Pression imposed by performance indices has generated a certain lenient attitude at exams for maintaining high admission rates and for maintaining a high number of students;
f) Less effort is made for developing an ethical consciousness and a feeling of civical and individual responsibility among students;
g) The university concentrates more and more on the

[9] Ibidem.
[10] Ana Maria Sirghi, Despre incredere si valoare in invatamantul romanesc si European, http://www.marketwatch.ro/articol/16167/Despre_incredere_si_valoare_in_sistemul_universitar_romanesc_si_european/
[11] Ian McNay, « Valeurs, principes et intégrité : normes universitaires et professionnelles dans l'enseignement supérieur au Royaume-Uni », Politiques et gestion de l'enseignement supérieur 2007/3 (n° 19), pp. 45-71: https://www.cairn.info/revue-politiques-et-gestion-de-l-enseignement-superieur-2007-3-page-45.htm#
[12] Ibidem.

system and less on the people; thus, the human and passionate dimension that higher institutions used to manifest is lost;

h) Competition seen as an ethical value has diminised cooperation among the academic staff;

i) If higher education must serve the public welfare, then the latter is redefined as being economic competitiveness and wealth.

j) Defining and understanding what a mistake/a professional error is are understood today differently by the academic world, so that behavior which previously was unacceptable is now tolerated. This is seen among students, too (or especially) and also among academic staff (to a less extent, however).

k) Nowadays, the students' behavior and expectations are more pragmatic; they are content to obtain a diploma/qualification.

In conclusion, students appreciate that the role of the universities as creators and suppliers of values in society has diminished. They doubt the integrity of research work and the capacity of the university to manifest its role of a critical consciousness within our society They consider that the unviersity is less implied in developing ethical consciousness and civical responsibility among students. Students think that the level of performance and their aspirations, as well as the pleasure of studying, have diminished considerably.

## 3. Apects regarding ethical management in universities.

Today, ethical exigence has become an integrating part of any institution's image, so much the more of an academic one. Actually, functioning on the basis of ethical values and principles is not just a premise, but also an essential condition for a university in its attempt to accomplish its mission and objectives.

Repeatedly breaking ethical values and norms leads to malfunctioning and seriously hinders academic activity. In order to avoid such a situation, drawing up an ethical code in the university – as it sometimes happens with some of our universities – is not enough. It is necessary to disseminate it within the organization, to make sure that is is observed and to solve the potential ethical problems that might occur; in other words, an ethical code serves to imply ethical management. We agree with D. Menzel, according to whom, "ethical management does not imply the control and sanctioning of the personnel's behavior, or pondering over the ethical issues at workplace. It is rather the whole set of actions that are developed by the managers in order to stimulate ethical consciousness and sensibility that would finally protrude all the aspects of the organizational activities. It is, briefly speaking, promoting and maintaining a strong ethical culture at the workplace." [13]

Ethical management – according to this author – can be approached in four ways: the first approach is based on *conformity* (*compliance*), i.e. defining and imposing ethical rules within the organization; the second is the strategy of *including in the cost*, which consists of approaching all unethical actions as a cost factor that has to be deduced, mitigated or eliminated; the third strategy is *learning*, which lays stress on the ethical training processes and on the assimilation of ethical dispositions; the fourth strategy is the one of creating a *moral organizational culture*, which seems to be the most promising of all since it implies all the other ones.

In fact, things are more complicated than theory makes them see. Managers often face up with difficulties related to the possibility of clearly and concretely defining and measuring the morality of an organization. How can we describe an organization that is renowned for integrity? What are the principles according to which a moral organization functions?

C. MacNamara considers that[14] an organization is moral if it respects at least the following four principles: a. It naturally interacts with various beneficiaries and its basic rules make the beneficiaries' welfare be perceived as part of the organizational welfare; b. The members of the organization are extremely sensitive to the topic of impartiality: their basic rules stipulate that the others' interests matter as much as one's own interests; swindling and exploiting clients is their nightmare; c. Responsibility is regarded as being rather individual than collective; one cannot hide behind the organization; its members must be individuals that assume personal responsibility for their organizational actions; d. They regard their activities as objectives; an objective is an operating mode that is very much cherished by the members of the organization and that links them to the external environment.

As it is the case with any organization, universities must define and assess their moral environment and identify the virtues that confirm its existence. According to Kaptein[15], the existence of the following seven organizational virtues assures us that a university is moral:

a) Clarity: the extent to which the university moral exigence in relation to the behavior of its members are expressed clearly, without ambiguities, as a set of rules or behavior directions within the ethical policies and procedures, as well as within informal discussions.

b) Consistency: the degree to which university moral exigence in relation to its members' behavior is coherent and lacks contradictions and it complies

[13] D. Menzel, Ethics Management for Public Administrators, Sharpe, London, 2007, p.10.

[14] C. MacNamara, Complete Guide to Ethics Management, 1997-2008.

[15] Cf. Muel Kaptein, developing and testing a Measure for the Ethical Culture of Organizations, apud.: Valentin Mureșan, Mihaela Constantinescu, *De ce avem nevoie de etică și integritate în mediul academic*? In Etică și integritate academică, ed. Universitatii din Bucuresti, 2018, pp:45-47.

with moral norms comprised in its moral policies and procedures.

c) Accomplishment: the university sets up the moral behavior exigence that may be realistically attained by its members (if they have the necessary resources and authority to accomplish the responsibilities that have been assigned to them).
d) Support: the university encourages its members to adopt an ethical behavior (respecting moral norms brings benefits to its members in their daily activities);
e) Visibility: the university ensures the monitoring of immoral behavior, so that they could be identified and made known to the ones that can react against them;
f) Critical attitude: the university ensures the formal and informal means whereby its members may openly discuss about the ethical issues and dilemmas that they face;
g) Sanctioning: the university sanctions the breach of moral rules and rewards its members' moral behavior; sanctioning and rewards must be proportional to the seriousness of the breaches committed by its members, respectively with the merit of observing ethical rules.

An instrument devised to measure the "ethical climate" of an organization is the ethical audit. This consists of examining the ethical state of an organization in order to see whether it is necessary to adopt changes in its ethical policies. Organizations can be companies, especially the transnational ones (which often face up the conflict of values belonging to different cultures), public administration institutions, ethical committees, programs of scientific research or social action projects that require financing within a competitive context etc.

Ethical audit idenitifies *the moral profile* of an organization, the factors that affect its reputation and the imagine that it has in the eyes of its partners and the public consumers. It is also the process whereby we measure the internal and external coherence of an organization's basic moral values. Ethical audit attempts to determine whether moral values and standards are applied, whether they are observed or not, whether the ethical objectives of an organization are met (internal control) and, on the other hand, whether the organization behaves responsibly and transparently with its partners, considering, when the case may be, cultural and value differences that may appear especailly if partners are located in different countries (external control).

G. Rossouw and L. van Vuuren appreaciate that "organizations undergo an evolution process, in the sense of enhancing the complexity of their ethical performance management".[16] The authors identify five stages of ethical management evolution, starting with the level at which the ethical dimension is totally denied and ending with its total integration in the set of organizational activities. Briefly speaking, these stages are:

a) The stage of *immorality* , of totally ignoring the ethical dimension of an organization. At this level, one can identify slogans like: "the most adapted one survives" (competition cannot be made with gloves), "we live in a world of wolves" (competition is bling), "educated guys stand in row" (ethical behavior is despised), "all that matters is rating (profit)", etc.;
b) The *reactive stage in which* managers realize that something must be done for avoiding the risks of an unethical behavior, whereas ethical competence totally lacks. The organizations that have reached this level "pretend to be ethical but their management does not comply with their set of ethical standards". They formally adopted ethical codes but don't do anything with them.
c) The stage of *ethical compliance* implies the aware involvement of organizations in monitoring and managing their own ethical performance. In other words, "the ethical code does not have only the purpose of giving comfort to its beneficiaries, but also the purpose of becoming the standard/landmark that a company considers for measuring its ethical performance" (G. Rossouw and L. van Vuuren, 2003). The Code is also applied through disciplinary measurements and penalties that are imposed by the administration. The managerial goal is to prevent unethical behavior and to eliminate costs connected to such behavior, i.e. those behviors that affect organizational reputation, e.g. scandals or frauds;
d) The stage of *ethical integrity* is the one which ensures the internal assimilation of ethical values and standards. It requires special managerial competence – i.e. "forming and implying values" in an organization. The aim of this stage is not only profit, but also the enhancing of ethical performance level, however, not so much by sanctioning unethical behavior, but rather by encouraging ethical behavior.

Organizations become aware that "ethical performance is strategically important and it is an asset when it comes to competition", whereas managerial strategy "facilitates the internal assimilation of ethical standards by all its members of the organization"; (G. Rossouw and L. van Vuuren**);**

e) The highest level is the one of *total compliance* , which is characterized by the integration of ethics for the purpose, mission and goals of an organization. Ethics is regarded as part of an organization, without which the latter cannot accomplish its goal and mission". Ethical behavior is regarded as being strategically important, while unethical behavior is only seen as a threat for business success and also as an undermining of its reason of being. Ethical management is meant to

[16] G. J. Rossouw, L. J. van Vuuren, "Modes of Managing Morality: A Descriptive Model of Strategies for Managing Ethics", *Journal of Business Ethics*, 46: 389-402, 2003.

reinforce morality as an *essential dimension* of culture and as an organization's goal. (G. Rossouw and L. van Vuuren, 2003).

Now that we have referred to the 5 stages of ethical management evolution in the universities, we wonder what stage(s) Romanian universities have reached so far. One answer is given by V. Muresan[17] , who in 2009 made a research work based on a questionnaire related to ethical management in Romanian universities and companies.

Without pretending to be an exhaustive presentation, the study that this author wrote brings into evidence essential aspects regarding ethical management in Romanian universities, which still prevail today to a large extent. Thus, this study points out the awareness – of all interviewed subjects – of the importance that moral issues has for universities. Subjects are aware of the fact that observing ethical standards is good for the organization, as they are also aware of the fact that the university is morally obliged to its students. Most of those interviewed think that – in the academic world – there is a pro-ethic organizational culture. Unfortunately, the study also shows that this conviction does not correspond to reality. Here are some of the conclusions that the draws and that question the true existence of an ethical organizational culture in universities:

- All universities drew up an ethical code, however not because this was regarded as an internal need, but rather as an answer to a Minister's order. Many of these codes have an amateur level and are not drawn up by specialists.
- In order to put into practice the ethical codes, ethical committees have been set up in all universities; however, most of them focused on settling down litigation and not on applying and developing the ethical code (for example, by means of ethical training).
- Ethical training is either not done or it is insufficiently done – although this type of training is an important instrument for implementing the ethical code.
- Most universities lack a green phone number for recording the personnel's feedback as to ethical management.
- There are no moral consultants and neither counseling activities.
- There are no ethical audit activities.
- Ethical debates on moral university issues either lack or are not encouraged.
- Ethical criteria are not included in the promotion score sheet.

In conclusion, according to V. Muresan, "the development of moral critical, autonomous thought or the assimilation of ethical decision methods are not clear objectives of our universities; the exercise of public moral debates is also lacking, as the integration of moral criteria in university management is lacking.( ….). Romanian universities find themselves at the conformity stage in the happiest case, of course with differences from one university to another. This stage in the evolution of ethical management has rather a declarative value (….)''[18]

A more recent research[19] comes up with results that we are going to present in the next part of our paper and that on the whole include the same coordinates.

On the one hand, they reveal the existence of a positive perception on the part of managers as to their role and as to the academics' role in creating, developing and maintaining a solid ethical atmosphere in universities.

Other important problems were related to bribe, receiving gifts, nepotism in employment, evaluation of students and the language used by professors or secretaries, each of these issues showing that these aspects are seen by managers as rare phenomena. In other words, while managers tend to exclusively capitalize the positive aspects of an ethical environment, students tend to focus on the negative ones.

The research points out that there are ethical codes and committees in all universities, but, at the same time, ethical codes are poorly communicated through training sessions, debates, the support of specialists etc.

"The research revealed that managers in higher education system from Romania believe in their role as ethical models, but they are not really aware of the possibilities offered by a solid implementation of ethics management. They do not know very well the instruments they can use for raising the ethical level of their institutions (...).[20]

## 4. Conclusions

Contemporary society, characterized by kinetic acceleration, intensified globalization, an unprecedented progress in communication technology etc., challenges the educational system to reshape its mission and goals. The educational act – no matter the level of education we refer to – should not only aim at transferring knowledge, but also at teaching and at morally training people. Education should not only train young people that adapt themselves to the present and sometimes puzzling economic, political and social situation. Beyond transferring knowledge and developing abilities that are necessary for practicing a profession, for adapting to change, universities also have the mission to produce and transmit to the younger generation moral landmarks, values and

[17] Valentin Muresan, Managementul eticii în organizaţii, Ed. Universitatii din Bucuresti, 2009,pp:64-68.
[18] Ibidem.
[19] Silvia Puiu, Radu Florin Ogarca, Ethics Management in Higher education System of Romania, in Procedia Economics and Finance, nr.23, 2015, pp: 599-603.
[20] Ibidem.

principles. The university should not only train specialists and researchers; it should also form cultivated and civilized persons that have a good character and that are able to understand the ethical meaning of „being together".

The university's role of accomplishing this noble mission depends on its capacity to preserve a certain degree of autonomy in relation with the other social domains. The principle of competition dominates today the social and economic thought; however, the university should not let itself subdued to the market mechanism and should not willingly accept the values that its beneficiaries (the government and the industry) impose. To preserve its position of an institution in which moral values and principles are cultivated, the university must preserve a certain degree of independence in society.

The relationship between higher education and the present knowledge-based society is complex, and to a certain degree, ambiguous. That is why it is difficult to establish to what extent can universities preserve their autonomy. However, we believe in the universities' capacity to preserve their autonomy, which is necessary for them to accomplish their goals. Without denying the influence of the other social areas on the university, we believe that the universities also influence them because they are an active subject in economic, social and political life.

We also consider that universities should continuously accomplish their role of a critical consciousness in society and that they should produce and distribute moral values and effects in society, no matter the difficulties that they might encounter; consequently, ethical management strategies should be implemented in universities in general, and, so much the more, in the former communist countries, which underwent a long period of anomie and transition. This is also the case of Romania.

In this respect, research works reveal, on the one hand, a positive perception on the part of managers as to their role and the academic staff's role in creating, developing and maintaining a solid and ethical atmosphere in universities. According to managers, the observance of ethical standards is of good use for organizations; similarly, universities have the moral obligation to respect their students. In their opinion, one can speak of an organizational culture that is favorable to ethics in the Romanian academic environment because there are ethical codes and committees in all Romanian universities. Still, managers do not take into account the low level reached by our universities in communicating ethical codes by means of training sessions, debates and the use of specialists in ethics.

On the other hand, Romanian students have a more critical attitude because they bring into evidence certain drawbacks and shortcomings of the ethical university environment in our country and they underline the necessity of intensifying the implementation of ethical management with all the aspects that this implies.

If managers bring into evidence the role of ethical codes and committees in the universities, the students are more inclined to point out faulty behavior that they have experienced in the academic world, e.g.: incorrect scoring, the violation of the right to confidentiality, plagiarism, small gifts, the erroneous professor-student relationship (arrogant attitude, harassment, etc.).

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# ISSUES ON POLITICAL TRANSITION IN ALBANIA

**Adelina NEXHIPI**[*]

**Abstract**

*Like every other Central and Eastern European country, Albania overthrew the communist dictatorship in 1990 and went on building a democratic country. The Albanian transition period towards democracy was multiple: political transition – from a party - state to political pluralism; economic transition – from centralized to market economy; social transition – from a closed and controlled to a free society; national safety transition – from isolated to a country working towards the European integration. It came out to be a long, difficult process with many ups and downs. Despite deep changes and obvious achievements in every aspect of life, there is still work to be done.*

*This study aims to describe and analyze the democratic processes in Albania and its accompanying issues, determining as main objectives: the analysis of the establishment of the rule of law in Albania, political polarization, election issues and political debate.*

*The study relies upon archive sources of Albanian and European institutions such as: The European Commission, Organization for Security and Cooperation in Europe, Venice Commission, the Albanian Parliament, the press, scientific surveys and monographs of Albanian and foreign researchers.*

*The methodology of the study is concentrated on descriptive, analyzing and comparative method of democratic processes in Albania as compared to those in the Balkans and Central and Eastern Europe.*

*The expected results of this paper are the identification of difficulties hindering the democratic processes in Albania.*

**Keywords:** *Albania, transition, democratic processes, political polarization, legitimacy.*

## 1. Introduction

Albania as well as other Eastern and Central Europe countries suffered the harsh communist dictatorships for almost half a century. The pattern they followed was similar, but unlike other eastern countries, no liberalization element was allowed in Albania; it remained faithful to Marxist-Leninist ideology; no capitalist elements was allowed and after the 1970s the country was totally isolated without being part of any blocs. Liberalizing movements in 1950 – 1960s in the Eastern Europe were forbidden to happen in Albania by the Albanian Party of Labor, whereas the "wind of changes" in the end of 1980s could not be absent in Albania.

In 1989, people from Eastern Europe perceived that the Soviet Union which was almost collapsing socially and economically was unable to brutally suppress the rebellions in the satellite countries. Communist parties that were in power could not oppress the desire for freedom of their people without the support from Moscow. Hence, by domino effect one state at a time, all communist dictatorships collapsed in Central and Eastern Europe. These countries started their transition periods in difficult economic conditions, poor institutions, and lack of confidence. These countries had a lot to do to build democracy and capitalism. Radical and multi-dimensional reforms were undertaken: political, constitutional, institutional, economic and integrating reforms.

Economic reforms were liberalizing, stabilizing and structural and aimed to overcome the crisis and build a capitalist system. "Shock therapy" policy was applied, which aimed deep and fast reforms. Poor public institutions found it difficult to financially control the private sector; therefore fiscal evasion and informality were developed. Economic reforms were followed by high inflation and budget deficit.[1]

Constitutional reform was an important step which would prepare the way for all the other democratic reforms. In East and Central European countries, after the fall of communist governments, old constitutions were amended or new ones were designed that ratified the democratic principles and defined the governance. Institutional reforms differed from one country to another in nature as well as the pace they were applied.

EU integration was the axis of politics in all Central and East European countries. EU membership was considered a return to Europe. As Kadare stated: "*The Balkan people are in a queue to enter the doors of Europe*"[2] in order to have the cooperation agreements signed.

Albania and Central and East European countries are today co-travelers towards democratization. In such path that was started almost in the same time, they have made their own steps, but through the same trails nonetheless. If we compare the paces of such path, Albania is left behind by its counterparts. If we were to

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[1] Adrian Civici, *Transformimi i madh. Nga plani drejt tregut* (Tiranë: UETPress, 2014), 255

[2] Ismail Kadare, *Identiteti evropian i shqiptarëve*, (Tiranë: Onufri, 2006), 60

analyze only one aspect of such process i.e EU integration (which indirectly the democratic consolidation), the majority of former communist countries of Central and Eastern Europe became EU members in 2004; Romania and Bulgaria became members in 2008; Albania (11 – 15 years later) has not initiated the EU membership negotiations yet.

This paper's purpose is to analyze the barriers faced by democratization processes in Albania, the mistakes and their effects. This is an important topic for reflecting and analyzing as well as understanding why Albania is behind from the other Central and East European countries, when they started it more or less the same way and almost in the same conditions. This is important to the Albanian society and the political etite. By describing it in details and analyzing the Albanian transition in depth from a social, political and legal viewpoint, we will try to present a clear and full setting of obstacles that Albania faced towards the democratization process. A series of studies and analyses have been conducted by Albanian and foreign researchers on political, social, legal and economic developments in Albania namely: Shinasi Rama, Elez Biberaj, Fred Abrahams, Miranda Vickers, James Pettifer, etc. Reports have been written and published by Albanian, European and other international institutions such as: the European Commission, US Department of State, OSCE, International Monetary Fund, World Bank, Venice Commission, International Transparency etc. Studies on the Albanian transition process are various and numerous, but unlike some others, this study aims to reveal only the repeated problems and issues of the Albanian politics and delays they caused along democratic developments in Albania.

## 2. Issues of the Albanian political transition

Transition towards democracy in Albania started in difficult conditions: non-functional economy, total loss of confidence, traumatized society, and extreme poverty. As lawyer Hekuran Hysa states: "*the Albanian people came out from communist dictatorship being poor, exhausted, numb, stunned, disoriented, infuriating".*[3] Whereas Fred Abrahams describes Albania of the 90s as "*grey and shabby ... the poorest country in Eastern Europe….. it was as entering a forgotten world, a frozen space, isolated from "imperialist West" and "revisionist East" and forgotten by all*".[4] Foreigners visiting Albania in those years saw *"Dickensian rusty ugliness, robbed and senseless – giant memorials of crooked Hoxha's vision,*"[5] as described by Misha Glenny.

The Albanian transition process needed to heal grave economic, political and social injuries. The process in itself involved a series of important transformations. Democracy building process was associated with devastation too. Hating the communism and everything it left behind, Albanians destroyed everything they had built themselves with so many sacrifices. This is how English anthropologist Clarissa De Waal describes the phenomenon: *"To start from zero" was the enthusiastic motto ... It was devastation craziness, very understandable though, which pulled down trees and vineyards, destroyed cooperatives and machineries, thousands of greenhouses and irrigation systems, broke the glasses of factories and households. … In keeping up with the destroying process and closing of factories and mines when there were no job opportunities, it is not clear what form of genesis or income generation they had in mind …*[6].

"*A tortured path, defined by lost opportunities and deep wounds*"[7]- determined Comelli (an Italian researcher) the Albanian transition process. Apart from inherited wounds, the Albanian transition created some new ones such as: nepotism, illegal demographic and migratory movements, fiscal evasion, informality, high unemployment, corruption, trafficking narcotic substances and human beings, organized crime, lack of efficiency and stability of democratic institutions; non constructive and conflicting political dialogue, issues on low application, politicized public administration, over politicized election processes, lack of independence, transparency and accountability on judicial system, neglect from administration and judicial system on human rights, discrimination of marginalized groups. "*These acrid phenomena, more than products of the new democracy, were direct outcomes of the communism that was dying away".*[8] – were the words of former Prime Minister Meksi in 1992. These phenomena unfortunately, do not belong only to the first transition period, are not sporadic and by being related to one another have created repeated and extended issues in Albania. These phenomena will be treated with details below in this paper.

### 2.1. Demographic issues

Economic and political reforms after 1991 brought about major social transformations in Albania. Economic changes had different effects of different regions of the country. It deepened further the regional inequalities. Coast, central and southern regions of the country took more advantages than mountainous and northern regions. By closing the mines and metallurgic factories, the crisis in mountainous areas intensified. One of the reasons for the crisis was the fact that the

[3] Hekuran Hysa, Një tranzicion i rrezikshëm, 54
[4] Fred C. Abrahams, Shqiperia e re (Tiranë: Dudaj, 2015), 17
[5] Misha Glenny, Histori e Ballkanit 1804 – 1999 (Tiranë: Toena, 2007), 569
[6] Clarissa de Waal, Shqiperia pas rënies së komunizmit (Tiranë: AIIS, 2009), 13
[7] Michele Comelli, Le relazioni tra l'UE e l'Albania, in L'Albania verso l'Unione europea: il ruolo dell'Italia, IAI0912 (2012), 8
[8] "Programi i qeverisë së pare demokratike," Rilindja Demokratike, 118, 22 prill 1992, 4

land for developing the agriculture was poor. In such regions were investments and private companies were missing, employment was limited. This brought about the fact that the population in the beginning of the 90s, settled massively in urban areas. Such uncontrolled flow created problems in accommodation, health services, transport, urban infrastructure, etc. the flow caused an almost depopulation of remote mountain areas and a great difference in the development of different regions. Shinasi Rama describes the situation in grey colors. According to him, the country suffered "*incredible demographic pressures, migration of population within the country, a lot of problems with ownership, massive escapes, unequal economic development between people and regions, high criminalization dhe non-legitimization of state, worsening of public services, permanent political crisis* …"[9]

Economic changes such as: private properties, free initiative, privatizations, immigration brought about social and economic distinctions and not only; there was a huge gap between the rich people (enriching themselves quickly) and poor people (becoming poorer). Such rich class was created by those categories that took advantages by privatization, those were the first who ventured small private businesses or those immigrants who were quickly integrated into societies they entered. According to Sh. Rama's opinion, "*the majority of people became rich by entering the politics, by being related to politics or by being part of governing clans*".[10]

Immigration also was expanded largely all over Albanian regions; almost each household had one immigrant member. Immigration was individual or family, seasonal or permanent, political and economic. Albanian people immigrated mainly to Greece, Italy, Germany, France, USA, etc. The biggest immigration wave was in July 1990 when Albanians entered inside the Western countries' embassies in Tirana; in 1991 when hundreds of Albanians hijacked the ships in order to sail to Italy. These events happened again in 1997 during the economic, social and political crisis. Throughout this period, illegal immigration was ongoing, through Greek mountains or Ion and Adriatic seas towards Italy. Unemployment, lack of incomes, political instability, lack of perspective and hope made hundred thousands Albanian people leave the country toward the "blessed land".

The Albanian households lost their important role. The Albanian traditional family fit in the new social, economic and political conditions. The Albanian stable and safe household was facing aggressiveness. Crime within families increased and violence was growing fast. Divorce has increased substantially through the years. In communist society in Albania, marriage was considered something sacred; divorce or legal annulment of marriage was rarely allowed under special circumstances. Communist politics encouraged the increase of population, whereas after the 90s, number of births declined. Poverty, increase of living costs, willingness of women for building a carrier or being publicly active, lack of institutional support for children wellbeing, brought about the decline of the number of births. In our society before the 90s abortion and contraception methods were prohibited, whereas after the 90s family planning was encouraged and voluntary abortion was allowed. These facts affected not only the decline of births but the average age of population as well.

Political and economic changes brought about a middle class that encouraged the establishment of organizations and intermediate civic groups which related to structure, organization and operation of society. There were no independent activities or groups in communist Albania to play as mediator between the state and society. There was a lack of civic tradition and independent social movements even before the communist regime. Such lack of tradition prevented the creation of a free and active civil society in Albania. Apart from that, in the post-communist society a large number of professional organizations, joint groups, women's organizations, businessmen's groups, environmentalists, etc were created. They stated their objective as civic activity for the common good by putting pressure on public institutions and affecting the political processes, encouraging political participation, demanding transparency and honesty from the government. The issue with these organizations was the lack of real autonomy from state or political parties. In a study conducted from the Albanian Foundation of Civil Society, a series of problems and concerns are presented as related to Civil Society described briefly as follows:

- Non-governmental sector is still disperse; it is not coherent and cooperative compared to that of EU member countries
- NGOs are lacking cooperation, facilities, networks, information channels and especially the expertise and knowledge how to apply for projects, manage and distribute outputs, lobby and make dialogue with the government.
- NGOs still lack professionalism, transparency of their activities and staff policies.
- NGOs lack membership, social accountability and networking.
- NGOs lack strategic planning, managing structures and use of modern technologies.
- Board members are not prepared for their role to play and NGO financing is depending on donors, i.e, it is insufficient for a sustainable development of this sector.[11]

[9] Shinasi Rama, *Përrallat e tranzicionit shqiptar* (Tiranë: Princi, 2012), 167
[10] Shinasi Rama, *Përrallat e tranzicionit shqiptar* (Tiranë: Princi, 2012), 26
[11] Fondacioni Shqiptar i Shoqërisë Civile, *Plan Strategjik Tre-Vjeçar* (September 2005), 3

**2.2. Establishment of the rule of law**

Rule of law is a basic value of democracy. Rule of law implies the system where the state especially the executive and administrative powers are limited within their own judicial norms (constitution and law), the way how basic human rights are guaranteed. Main principles of the rule of law are: principle of constitutionality and legitimacy, equality under the law and non discrimination, freedom and rights of citizens and minorities, division and limitations of powers, depolitization of public services, independent judicial system, Civil Society, etc.

In Albania ... *a lot is lacking, mainly in the rule of law. Fight against corruption and organized crime are important challenges… Albania should continue with the reforms in public administration in order to increase professionalism and depolitization; pursue an inclusive reform in the judicial system;... intensify its efforts against corruption and take further steps against organized crime ... It is essential that the reform process is followed by a constructive and sustainable political dialogue between the government and the opposition .... The Government should ensure that the opposition is able to fully perform its functions of democratic control*.[12]

Albania has not established the balance between levels of powers yet. In this aspect, the European Commission as continuously attracted attention. In the progress report of 2010, it was stated that the High Council of Justice had no competences on the Supreme Court, which was politically appointed and had an extraordinary position within the judicial system. Exclusion of higher level courthouse from applicable rules for lower level courts weakened the independence of judicial power as a whole. The fact that the Parliament voted to appoint judges for the Supreme and Constitutional courts brought with it the risk of politization and as a result affect the democracy and independence of institutions. Prosecution system was too centralized and hierarchic. The autonomy of prosecutors was guaranteed in the trial stage, but it was limited in investigation stage which affected the efficiency of investigations. Independence and accountability of prosecution system was especially weakened from the fact that appointing of General Prosecutor was made by simple majority vote in the Parliament.[13]

Independence and striking power of judicial system had been poor as result of the lack of good evaluation systems for judges and lack of appointing and transfers by merits, "*there is a lack of transparency in appointing, promotion, transfer and evaluation of judges and there are considerable weaknesses in inspecting system of judicial system*".[14] Problems are increased from the fact that too often trials were too long, courts decisions are not applied, enforcement of decisions was poor mostly when the accused party was a public institution. "*Cases when decisions of the Constitutional Court were not applied from the government in the course of the last years and politization of voting for appointing the heads of the Constitutional Court and Supreme Court are disturbing because they challenge the basic principles such as judicial independence and application of the rule of law*."[15] The judicial system has suffered the issues of transparency, accountability, responsibility and efficiency. Human and financial resources were insufficient, infrastructure was inappropriate. Moreover, what made the situation worse is that in the judicial system and all its links was corruption. As a result, indicators of public perception have marked a very low level of confidence in judicial system.

Unfortunately, corruption was not the only problem in the judicial system; it is an endemic issue in all structures of the country. Progress report of 2010 stated that although the legal and institutional framework had improved, corruption was still in high levels in many sectors and institutions, especially in judicial system, health sector and properties issues, public procurement and financing of political parties … immunity given to a large group of public officials (parliamentarians, ministers and judges) has shown that it is a serious obstacle in investigating corruption. It only increases the risks of this phenomenon…Institutional structure has gaps related to the fight against corruption. Capacities in such fight remain limited.[16]

"*Corruption is not a separate entity nor an independent substance; it is the consequence of state dysfunction*"- claims Arben Xhaferi in one of his interviews. "*If the state works automatically on law bases, corruption is eliminated*".[17] The Albanian politics has not shown proper willingness to change the situation. If we refer to indicators in the course of years published by Transparency International, Albania is considered a high corruption risk country in international reports. Data from this institution show that the Albanian Government, politics and administration have not done enough in the fight against corruption. Albania was ranked as one of the most corrupted countries in Europe in Corruption Perception Index performing worse than the average of other countries of the Balkan Region (table 1).

It is a constant concern the issue of trafficking the human beings, narcotic substances, weapons, stolen vehicles and money laundering during the transition

[12] European Commission, Staff Working Paper, *Albania 2014 Progress Report* (Brussels: 8. 10. 2014), COM (2014) 700 final

[13] European Commission, Staff Working Paper, *Albania 2010 Progress Report* (Bruksel: 9 nëntor 2010), COM (2010) 680 final, 19 - 23

[14] European Commission, *Commission Opinion on Albania's application for membership of the European Union* (Brussels, 9.11. 2010), COM (2010) 680 final, 6

[15] Po aty

[16] European Commission, Staff Working Paper, *Albania 2010 Progress Report* (Bruksel: 9 nëntor 2010), COM (2010) 680 final, 24

[17] Rudina Xhunga, *12 porositë e Arbën Xhaferit* (Tiranë: Dudaj, 2012), 189

period. … Albania is still one of the main destinations of trafficking narcotic substances in the Balkans.[18]

Table 1. Corruption Perception Index – Albania

| Year | Ranking* | Index* |
|---|---|---|
| 2002 | 81 | 2.5 |
| 2003 | 92 | 2.5 |
| 2004 | 108 | 2.5 |
| 2005 | 126 | 2.4 |
| 2006 | 111 | 2.6 |
| 2007 | 105 | 2.9 |
| 2008 | 85 | 3.4 |
| 2009 | 95 | 3.2 |
| 2010 | 87 | 3.3 |
| 2011 | 95 | 3.1 |
| 2012 | 115 | 3.3 |
| 2013 | 116 | 3.1 |
| 2014 | 110 | 3.3 |
| 2015 | 88 | 3.6 |
| 2016 | 83 | 3.9 |
| 2017 | 94 | 3.8 |

***Source:*** Transparency International, 2002 – 2012

By considering the issue a constant concern, during his visit in Albania in February 2006, Barroso stated: "*Albania should make serious efforts in fighting the organized crime and corruption. To do this, Albania should combine strong measures for those who break the law with establishment of a powerful and independent judicial system. This is something that requires the integrity of judges for ensuring law for all.*"[19]

Although some steps in improving the efficiency of judicial system have been taken, it has operated poorly because of the lack of independence, transparency and results. Legislation planned for addressing these issues was delayed and has been noticed that political willingness is missing for terminating a real reform in this area.*"Failure in judicial reforms could be attributed to the executive power as well as the judicial itself. The executive power has obstructed the establishment of an independent judicial system so that it may use it for political purposes. Whereas the judicial power has been unable to reform itself because of high corruption levels supported by political immunity given by the executive power."*[20]

Worth mentioning is the fact that Albanian has put the Criminal Code in line with the Council of Europe's Convention on criminal law. Also, a specific legislation has been approved on bribery; national strategies on corruption and organized crime have been approved. Although the Albanian Government has undertaken a more strategic approach, still corruption is prevailing and makes up for a serious risk *"... prevailing corruption, organized crime and insufficient economic development are the main challenges for a sustainable democratic stability and Albania's European integration,"*[21]- stated by Stern and Wohlfeld.

On July 22nd, 2016, the Parliament passed the constitutional amendments that aimed to reform the judicial system, among other dispositions for evaluating judges and prosecutors in Albania. Later on, law on "Re-evaluation of judges and prosecutors in the republic of Albania" passed along more than 20 other necessary laws in applying the judicial reform based on constitutional amendments. Currently, a deep reform in the judicial system is being applied which aims to make it more independent, impartial and efficient.

### 2.3. Lack of legitimacy

Elections present the convertibility process of the political willingness of citizens in political power. In a democratic country, the Government's authority comes from the consent of the governed ones, whereas the main device to transform the consent into state authority is developing free and fair elections. The universal character of elections comes from their own ability for articulation, political pluralism and democracy as an appropriate form of governance. There is no democratic system without free, general, democratic and fair elections. Sovereignty of people in a democratic system is fulfilled by participating in political decision-making, and the right of electing democratic institutions for running the country. Elections are the essence of democracy or the mechanism it operates with.

*"Elections; a lost chance for Albania"*, was the statement of the Head of the Election Observation Mission of OSCE/ODIHR in Tirana, immediately after the conclusion of local elections in 2007 in Albania. When citing this quote, all reports of OSBE / ODIHR occur to mind, which always qualify for "progress" made after each election process, but this "progress" is never enough to be qualified "successful". In other words, elections are considered the "Achilles heel" for the Albanian democracy.

In order to have free and democratic elections based on European standards, efforts have been made to ensure complete and democratic legal basis. The Election Code was one of the most debated and revised laws in Albania. The code was amended several times in order to ensure free popular willpower and this willpower could be read the right way possible.

[18] European Commission, Staff Working Paper, *Albania 2010 Progress Report* (Bruksel: November 9 2010), COM (2010) 680 final, 116
* Ranking inculdes 178 countries, 1 – less corrupted country, to 178 – most corrupted country
* Index is made up of a scale from 1 – 10, 10 less corrupted country, 0.1 – 1 very corrupted country
[19] Barroso's addressing word in the Parliament of Albania (February 2006) [online] available in:http://www.parlament.al, retrieve on 15. 08. 2010
[20] Najada Tafili, *Consolidation of Democracy: Albania*, [online] available in: http://www.jpinyu.com/wp-ontent/uploads/2015/01/consolidation-of-democracy-albania...najada-tafili1.pdf, retrieve on 11. 03. 2018
[21] Ulrike Stern, Sarah Wohlfeld, "Albania's Long Road into the European Union,"*DGAPanalyse 11*, (Shtator 2012), 13

On May 8th, 2000, Parliament of Albania passed the Election Code. Based on the Election Code, the Central Election Commission (CEC) was a constitutional institution. It was the highest institution for organizing, managing and supervising the election processes in Albania. CEC established and supervised the local administration bodies of election. The chairman was proposed by the largest party in power, whereas vice chairman was proposed by the largest opposition party. CEC decisions were considered valid when they were signed by both chairman and vice chairman. The composition of CEC has always been the reason for political debate among political parties. According to the Code, Albania would vote based on a mixed election system, majority - proportional. 100 parliamentarians for 140 Parliament seats would be elected by majority voting from the single member areas, whereas 40 seats would be complemented by national multi-member lists of political parties so that to achieve a proportional approach among votes on national level and parliamentarians representing a political party in the Parliament. In order to win a proportional seat, political parties should pass the election threshold of 2.5%, whereas coalitions 4%.[22]

Based on OSBE-ODIHR recommendations and problems or legal shortcomings that were noticed in the parliamentary elections of 2001, it was agreed to revise the Election Code. Its revision was conducted by a parliamentary commission *ad hoc* by multi-party representation and assisted legally by OSCE and Venice Commission during June 2002 - April 2003. Based on this agreement: the candidate running in the single member list was a winner by simple majority of votes unlike before when absolute majority was required; number of parties that would have representatives in all election administration levels would be 4; voting in these commissions would be made by majority, 5 votes from 7 members and all decisions having legal value should be signed by the chairman and vice chairman who were appointed by the Socialist Party (SP) and the Democratic Party (DP).

After the local elections of 2004, OSBE/ODIHR called for attention to improve some aspects in the Election Code such as: the dominating roles of SP and DP in election commissions; appointment of CEC members from SP and DP, as opposed to the law; uncertainties related to four parties that were proposing members to CEC; update of voters' lists; deadlines set during the complaint process; transparency in financing the political parties during the election campaign; rules on validity or invalidity of the ballot paper; procedures in counting the votes.[23] In improving these problems, the Code was revised again for the period January – April 2005, by a bipartisan commission, SP and DP. As a result of this agreement, a law on determining new boundaries of election areas passed in March 2005. Other changes consisted on the counting process; election management; division of election areas; complaint and appeal process. The agreement defined again the dominating roles of SP and DP in managing the election process. Small parties were limited in their rights to give their election announcements (their timing on TV was limited, half a time set for the two large parties). Also, small parties that were not represented in election administration commissions had no rights to get copies of official tables of the election results from election regional commissions.

By OSCE initiative, an agreement was signed on January 2007. This agreement consisted on some amendments on the Election Code. Based on the agreement, the mandate of local government authorities was extended from 3 to 4 years. The election would be held by a single voting round based on "who ranks first" principle, whereas mandates for local councils would be made by proportional system. The next amendment occurred in CEC, where the number of members increased from 7 to 9.

In December 2008, by consensus of two largest parties, new Election Code was approved. Based on this new code, the majority proportional system transformed into regional proportional system. Parliamentarians were elected by closed lists in election areas coinciding with the administrative division of the country: the region. In order to win seats in the Parliament, parties should pass the threshold of 3% of the votes, coalitions 5% of the cotes on regional level, whereas independent candidates should pass the natural threshold (the number of valid votes divided by the number of mandates). Regional proportional system was contradicted forcefully by small parties because it favored two large parties. The new code made improvements on voters' records, vote counting and complaint process. Although there were improvements, the code was maintaining the dominance of two large parties in the election administration; their unlimited right to change the members of election commissions without a reason; criteria on determining a ballot paper invalid were still unclear; there were uncertainties related to the threshold for being represented in local councils, the campaign financing, deadline of final lists, etc. There were issues related to some dispositions, such as:

- The right of party chairmen to run in as many areas they wish, which conflicts the equality principle.
- The right of SP and DP to dismiss elected judges who deal with election appeals. Such article violated the principle of judicial system independence.
- A limited opportunity for repeating the election in a certain area after election devaluation in one of more election areas.[24]

Having made these amendments in the Election Code, the rate of 30% of female representation in

[22] Election Code of the Republic of Albania, Law Nr.8609, dated 08.05.2000, Official Bulletin, May-June, Tiranë, 2000

[23] OSCE-ODIHR, *Local Elections, 12 October 2003 and 25 January 2004* [online] available in: http://www.osce.org.albania.election, retrieve on 11. 04. 2014

[24] OSCE-ODIHR Parliamentary election, 28 June 2009 [online] available in: http://www.osce.org.albania.election, retrieve on 11. 04. 2014

Parliament was ratified. Item 6 of Article 67 of the Election Code provided that "*for each election areas, at least 30% of the multi-member list and one out of three first names of the multi-member list should belong to each gender"*

Amendments on the Election Code were made in July 2012. Improvements were made in the selection process of commission members; compiling voters' lists; process of candidates' registration was simplified; equal access to media and public funds for campaign financing was made available. Last amendments in the Election Code made considerable improvements, but still the parliamentary elections of 2013 revealed that the Code had gaps, ambiguities that left room for misinterpretation. Two large parties were still dominating the administration of election process. The document "*Joint opinion on the Electoral Law and the electoral practice of Albania*" of 2011, OSCE called for attention on "*depolitization of all levels of election administration, in order to avoid polarization in commissions of all levels which often causes lack of collegiality in decision making. It affected the election process. The actual method of establishing election commissions not only polarizes the process of election administration, but it puts parties' interests before the voters' interests.*[25]

The supervision of election processes by political parties is reflected on the CEC's activity too. Although CEC is an independent institution *de juro*, the determining role of political parties in appointing members of this institution and the fact that they affect the functions of these appointees, affects the independence of this institution. On the other hand, members of CEC often act like party members and reflect encounters and political polarization in CEC activity by creating numerous and frequent problems in the institution and election processes in Albania. Because of frequent repetition of these phenomena, OSCE stated in its report on parliamentary elections of June 23rd, 2013 that "*Independence of CEC should be ensured. For this reason, the interested parties should act according to the role they play in CEC activities and election workers should not base their actions and decisions being under the effect of political factors".*

Despite frequent changes on legal framework, in order to ensure free and independent elections according to OSCE/ODIHR reports monitoring the election processes in Albania since 1991, elections in Albania have never been fully democratic based on European standards. Progress has been made from one process to another, but they are not sufficient to be qualified as free and democratic. The most frequent and repeated problems encountered during the election processes according to OSCE/ODIHR are:

Election campaigns are characterized by an extremely political polarization. It is difficult to distinguish state activities from election activities during the campaigns, or party from the state. Reciprocal accusations among rival parties blur political programs.

There are frequently repeated problems during the election process varying from procedure problems to technical, logistic and administrative. They vary from family voting, multiple voting, secrecy, pressure, buy of votes, problems with the voters' lists, presence of police at voting centers, non application of legal terms and time, arbitrary decision making, slow counting, lack of transparency, manipulation of results, political pressure on election administrators causing even fatal incidents near the voting centers.

Manipulation of the election results is a phenomenon which is being sophisticating from one party to another. Reports of OSCE/ODIHR on Albanian elections mention numerous examples of records containing different results for the same voting center, or inconsistencies of the number of voters and ballot papers, use of different criteria often illegal, in determining the validity of voting.

Political pressure on election administration coming especially from two large parties in country is a phenomenon which has remained unsolved and often creates conflicts during the voting and counting processes. This phenomenon comes as result of appointing party activists in commissions.

The process of counting the votes is the most problematic during the whole election process. The election history in Albania has been characterized from narrow victories. The difference of votes between the winning party (or coalition) and the largest opposition party (or coalition) is small. Such phenomenon has been noticed especially in the elections of after 2000s. Being aware of this fact, the political parties are trying to "gather as many votes". For this reason the counting process is delayed in order to find ways to get more votes during the process and reduce the opponent's votes. To achieve this, different methods have been used such as: claiming the ballot boxes are irregular for safety or procedural reasons (denying the right of vote to citizens who have already cast the vote in these ballot boxes), use of different criteria in determining the invalidity of a ballot paper, boycott of the counting process from representatives of a certain political party, disagreements between commission members who count the votes and in many cases do not sign the reports for the election results, proclaiming them invalid, counting and recounting the votes even the way how ballot boxes that are recounted are kept which often is doubtful and easy to manipulate.

After the certification of the election results, the political dialogue becomes even more difficult. The losing party begins a series of accusations to the other party for manipulating the elections, buying the votes, falsify the results, etc.

There are numerous remarks for each election process in the reports from OSBE/ODIHR on elections

[25] OSCE / ODIHR, "*Joint opinion on the Electoral Law and the electoral practice of Albania"* (Strasbourg: 19 December 2011) [online] available in: http://www.aceproject.org/ero-en/regions/europe/AL/albania-joint, retrieve on 11. 04. 2014

in Albania. If we have a quick look at the evaluation reports for each election process, it results that:

- "The conclusions of observation mission are that in many cases the application of Election Law failed. More specifically, in pre-election period and election day 32 out of 79 articles of the law were broken."(Report on parliamentary elections of 1996).
- "The election process was too long, conflicted, uncertain and fragmented" (Report on parliamentary elections of 2001)
- "Local elections were a lost chance for a significant progress towards OSCE commitments and other international standards for democratic elections."(Report on local elections, October 2003)
- "There was competition and voters were given election opportunities among political parties. Although, the process is still too long and often uncertain." (Report on parliamentary elections, July 3, 2005)
- "Elections only met partly OSCE commitments and other international standards for democratic elections ... it is concerning the fact that main political parties in Albania once again put the party short-term interests before the stability and credibility of the election process". (Report of local elections, October 2007).
- "Although most of OSCE commitments were met, these elections did not fully achieve the Albania's potential for fulfilling the highest standards for democratic elections." (Report on parliamentary elections, June 28, 2009)
- "Although elections were transparent and competitive, they were too polarized; with disbelief between the political party in power and the opposition ... two largest parties did not perform responsibly their electoral duties, affecting negatively the election administration." (Report of local elections, 8 May, 2011).
- "Elections were competitive, with an active participation of citizens for the whole campaign duration respecting the basic rights. Although, the disbelief between the two main powers affected the election environment and hindered the whole administration of the election process." (Report on parliamentary elections, June 23, 2013).[26]

These election processes and their irregularities are used as arguments from parties that if they lose the elections, they do not acknowledge the results. No election result in Albania was undisputed from the party / parties that are left in opposition. This is a common practice for political parties in Albania:

- The Socialist Party boycotted the Parliament elected in May 26, 1996 because it claimed elections were manipulated and did not acknowledge the results.
- The Democratic Party did not consider as legitimate the parliament elected in early elections in June 29 1997, because of the conditions they were taking place. As DP called it "Kalashnikov Parliament" was a necessary solution, not popular election.
- DP boycotted the second round of local elections in 2000, because it made accusations for manipulations in their first round.
- After the parliamentary elections in June 2001, the right hand opposition boycotted the Parliament because, according to them, there were irregularities (boycott continued until January 2002).
- DP boycotted the parliament in the end of 2003 as a sign of protest against the Government's attitude and the results of local elections in October 2003.
- Partial parliamentary elections in 2007 were boycotted by the opposition (SP) because of ongoing political debates.
- The socialist opposition boycotted the Parliament after the elections in June 2009, disputing them and not acknowledging the results. Opposition ended the boycott in June 2010.
- After the local elections in 2011 and problems created during the counting process in Tirana, the SP boycotted the Parliament. The boycott continued until September that same year.

Because of not acknowledging the results of elections from all parties, although it is certified by respective institutions, the institutions that are created lack full legitimacy.

### 2.4. Politization of the public administration

Based on the analysis conducted by Fatos Tarifa, and considering Linz and Stepan, "a consolidated democracy is supposed to fulfill 5 conditions, interdependent and collaborative with one another, such as: **Civil Society, political society, rule of law, public bureaucracy** that supports the democratic process and **economic society**."[27] If we analyzed the Albanian public bureaucracy during the transition period, we would face a series of issues: they vary from recruiting the administration clerks on nepotism basis, clientelist policy, arbitrarity of employee transfers and discharges, lack of job practices and necessary logistics to insufficient training, poor job performed by monitoring employee structures in administration, low wages and lack of general motivation for civilians. After every political rotation in Albania, old clerks in the public administration are replaced by new ones. It occurs in high level clerks as well as low level ones.

Nowadays, political studies identify three methods through which political parties in Europe and beyond ensure votes:

- "Vote of belonging" – based on social and class belonging of the individuals and parties' relations with stakeholders.
- "Vote of opinion" – based on preferences of voters about political parties and solutions they offer on economic and social problems, etc.
- "Vote of exchange" – based on different benefits the voters hope to get when parties they voted for come

[26] For more, check OSCE / ODIHR reports on elections in Albania, [online] available in: http://www.osce.org.albania.election
[27] F. Tarifa, K. Krisafi, E. Tarifa, *Paradigma e tranzicionit demokratik*, (Tiranë: Ombra GVG, 2009), 57

to power.[28]

If we analyzed the ways how political parties get their votes and attract the voters in Albania, we would undoubtedly state that support to political parties is ensured through "vote of exchange" method. Votes are given in exchange of material benefits the parties offer such as: jobs, wages, housing, credits, tax facilities, economic or political favors, power positions, etc. Many people dedicate their lives to politics and regard it as a source of incomes. The only interests of politics are function and power. Many Albanians consider an official function simply as a reward for party services. Functions are not given to those who meet professional demands, but those who helped during elections. This practice regards more important the fact of being loyal to the party than the professionalism, qualifications and willingness to perform tasks. This fact is found to be true by several researchers of the transitions period in Albania. U.Stern and S. Wohlfeld, in their study argue: "*Taking over the power is a goal in itself and serves for increasing the personal benefits of those who are in the power. Rarely leaders separate assignments or duties based on objective criteria; they do it by relying on clan and clientelist relations. Those who are involved in a political party, hope to get advantages from possible election winning. During governing changes, the personnel of public authority is subject of many replacements, not only in higher levels*."[29]. Also, K.Gërxhani and A. Schram write that: "*important clerks of the public administration are replaced by the winner's protégés. The winner of elections in Albania practically controls unanimously all public policies*."[30] BTI (Bertelsmann Stiftung's Transformation Index) estimates the transformations towards the democracy, market economy and the quality of political management in 129 countries. In a report of 2014 on Albania it would argue that: "*After taking over the power, each party adopts "the winner takes it all" approach which for the Albanian context means "invasion" of state from the governing elite*".[31] As for the above, recruiting civilians in the public administration has become the most un-democratic and un-European practice which is based on partial, friend or clan preferences.

Disrespecting the legal rules in public administration appointments has brought about some results according to the Civil Service Commission (CSC): *first*, hiring employees without considering the equality principle or abilities to perform tasks; *second*, this has inevitably brought about the loss of faith in free labor power that people are not hired based on preferences or patronage of institutions' directors.[32]

Same issue has been identified in the reports from Public Administration Department. It estimates the decline of public faith on procedure for applying for a job in the public administration: "*Contracted employment and job competition of contracted employees for jobs they already have causes the concerned people to not apply for those vacancies, forejudging the whole job competition procedure*.[33]

Through supervisions CSC has conducted in central and local institutions, has been identified that although job competitions for vacancies have been held in the public administration, it is disturbing the fact that the participation of job candidates in all job applications is as lower as possible. It results that job competitions are generally organized with 4-5 applicants, reducing thus considerably the quality of the candidate to be selected because of the short list of applicants.

Need for reforms in public administration has been demanded continuously by the European Commission, asking for: compilation of a full and democratic legal basis, establishment of a transparent, accountable and efficient public administration; greater focus on civic and businesses needs; adequate management of human resources, better policy planning, coordination and development; sound administrative procedures and improvement of public financial management as essential aspects for operating and implementing necessary reforms towards EU integration.[34] As the EU asks for a professional, responsible, effective, depolitized administration that takes care of the citizens and businesses' needs, which applies laws and state policies, lack of permanency in administration, lack of training, frequent restructuring affect the increase of civil service in higher professional levels. Annual reports of the European Commission reflect a problematic situation in the public administration:

- "There are still needed considerable efforts for reducing the political appointments in higher levels, improvement of salaries, carrier structures and presenation of a performance management in order to increase the efficiency in public administration"[35]
- "... frequent replacements of civil clerks are affecting the independence of civil service and are incrasing corruption among public officials.... Appointments pass through political party lines as opposing to the Law on Civil Service..."[36]

[28] Llambro Filo, *Sistemi politik bashkekohor -Evropa*, (Tirane: Ideart, 2003), 129

[29] U. Stern, S. Wohlfeld, "Albania's long road into the European Union", *DGAPanalyse*, No. 11 (2011), 8

[30] K. Gërxhani, A. Sehram, *Clan-based polarized voting: empirical evidence*, 3, [online] available in: http://www.1.feb.uva.nl, retrieve on 22. 02. 2014

[31] BTI, *Albania Country Report* (2014), 15, [online] available in: http://www.bti-project.org

[32] Komisioni i Shërbimit Civil, *Raporti vjetor* (2011), 39, [online] available in: http://www.kshc.gov.al/siti/sito_website.1089_alb/, retrieve on: 15. 03. 2014

[33] Ibid, f 5

[34] European Commission, *Enlargement Strategy and Main Challenges 2014-15* (Brussels: 8.10.2014), COM(2014) 700 final, 4

[35] European Commission, Staff Working Paper, *Albania 2005 Progress Report* (Bruksel: 9 nëntor 2005), COM (2005) 561 final, 16

[36] European Commission, Staff Working Paper, *Albania 2008 Progress Report*(Brussels: 5.11.2008), COM (2008) 674 final, 17

- Civil service is suffering important shortcomings, mainly those related to the principle of meritocracy during the recruiting process, employment by temporary contracts, rules of promotion, transfers and discharges of clerks. Operation of civil service continues to suffer the politization, especially related to appointments.[37]
- "Further progress is needed for establishing an independent civil and professional service based on merits, free from political influence"[38] demanding repeatedly an improvement of the situation.

This problematic ongoing situation of the Albanian transition affected the fact that state bureaucracy has not always been able to support the democratic processes in country. Because of non-permanency, it often does not possess the experience and skills to respond to democratic demands, integrating processes, needs and rights of the population. By citing Prof. Tarifa, we would admit: "*In a time when certain legislation could be compiled within a relatively short time, creation of an effective bureaucracy and transformation of citizens' attitude and activity of institutions into a routine in accordance to the principles of the rule of law require a relatively long time*."[39]

**2.5. Political parties – Lack of democracy in internal setting**

Democratic processes are comprehensive; the society should be involved in them, although reforms that should be undertaken, policies that should be followed, the way how they should be implemented are competence of policymaking institutions. All researchers agree that political parties as organizations that represent people in the legislative institution through their elected persons, play a key role in democratic processes, their progress and successes. Democratic principles in political parties settings are not related only to the party, but they go beyond "*in describing the standards of party and governing systems, of a functional democracy and constitutional principle of citizens' sovereignty*".[40]

Tens of political parties have been created in Albania since 1990, although the Albanian political setting was dominated by two large parties: Democratic Party and Socialist Party. These two parties have exchanged powers since 1992 to today. Table 2 shows the votes won by these parties in partliamentary elections from 1992 to 2017.

Table 2. Votes won by SP and DP in parliamentary elections in Albania

| Date of parliamentary elections | Democratic Party | | Socialist Party | |
|---|---|---|---|---|
| | % of votes | Parliament seats | % of votes | Parliament seats |
| 22 March 1992 | 62.08 | 92 | 25.70 | 38 |
| 26 May 1996 | 55.50 | 122 | 20.40 | 10 |
| 29 June 1997 | 25.82 | 24 | 52. 71 | 101 |
| 24 June 2001 | - | 31 | - | 74 |
| 3 July 2005 | - | 56 | - | 42 |
| 28 June 2009 | 40.18 | 68 | 40.85 | 65 |
| 23 June 2013 | 30.63 | 50 | 41.36 | 65 |
| 25 June 2017 | 48.34 | 74 | 28.85 | 43 |

Source: CEC, 1992 – 2013

Political parties in Albania were characterized by lack of internal democracy, low level of political culture, mentality of leading with an iron fist, weakness in operating the political structures, ambitions of leading individuals in personalization and identification of themselves with the political party. Political parties are identified by the names of their chairmen, and political leaders do nothing to avoid it. According to Freedom House report in 2002, "*changes within parties, other than program and ideological*

[37] European Commission, Staff Working Paper, *Albania 2011 Progress Report* (Bruksel: 12.10.2011), COM (2011) 666 final, 12
[38] European Commission, Staff Working Paper, *Albania 2012 Progress Report* (Bruksel: 10.10.2012), COM (2012) 600 final, 19
[39] F. Tarifa, K. Krisafi, E. Tarifa, *Paradigma e tranzicionit demokratik* (Tiranë: Ombra GVG, 2009), 66
[40] Afrim Krasniqi, Adrian Hackaj, Albanians and the European social model. Internal democracy in albanian political parties (Tiranë: Friedrich-Ebert-Stiftung, 2015), 23

*changes, have to do with changes in the personality of their leaders.*"[1]

In Albania, as well as in other transition countries, political parties have been transformed from popular traditional parties to media parties. The headship of a party communicates with the members, fans and voters through media, leaving aside the internal traditional structures. Each politician's image and their every word is considered politics, and the most unimportant details and monotonous political activities make the headlines on media and main topics for political debate. These types of political parties increase the power of the chairmen and reduce the control over them. Political parties arranged in an oligarchic manner[2] do not allow alternative thinking, which opposes the majority's opinion. According to Krasniqi and Hackaj, "*expulsions, getaways from election lists and slandering of critical individuals are present in every party. Counter thinking is equal to a hostile political attitude*".[3]

Growth of personal power of a political leader damaging the elected party structures makes the decision making process uncontrollable and deeply personal. Albanian political parties displayed many signs of their control from a narrow group of individuals, often not voted and not elected by the party's structures. *"Because of the way of parties are structured, the political power is concentrated on the hands of group of leaders from the winning party. When a party wins the elections, its leader becomes the president or the prime minister of the country …"*[4] This lack of democratic culture in managing the political parties is reflected in the whole political life of the country and the relations of parties with one another.

The role and control of the leader are major and practiced on the party's representative in the parliament, on their selection and political attitude. According to the old majority system, among others, a major role on the voter's vote played their assessment of the candidates themselves. Party leaders (or its structures – by law) were prone to elect a candidate who was popular and could ensure victory. Changes in Election Code affected the parliamentarian's status too. By the regional proportional election system, parliamentarians in Albania enjoy totally party mandate. They have been elected by the electorate from closed lists of parties. The political party supports them, affords the expenses for the campaign, often they won votes because of the electorate's support to the party although they do not prefer the candidate him/herself. For all these reasons, the elected representative owes the party his/her victory; therefore the parliamentarian is object of party's discipline and acts according to party's instructions. Otherwise, he/she is risking his/her political carrier. Because of this mandate model, during the process of voting and decision making in the Parliament, the parliamentarians of a certain party vote unanimously. Although their personal opinions or interests of their voters might not agree with party's attitude, they should remain loyal to the party. Parlamentarians elected this way, are considered by Servet Pëllumbi, as "s*oldiers*" of the parties, because they are not elected based on their personal qualities or skills; the mandate they receive is called "popular" which in fact is and "is administered" by the parties.[5]

### 2.6. Political polarization

Political life in Albania during the transition period is characterized by an increasing conflict that polarized and irrationalized the politics. Political parties in Albania have developed a harsh political fight by creating a polarized pluralist system. Great political upheavals are followed by a harsh political fight for solving critical issues, whose accumulation leads towards qualitative changes, but, according to Prof. Mezini "*nowhere has political fight been so sharp and fluctuated in such violent forms as in Albania*".[6] According to Janusz Bugajski, Albania suffers six continuous irregularities that have produced numerous problems: "*bipolar politics, limited political competition, non-ideological conflicts, political clientelizm, total lack of political culture, political revenge factor*".[7]

Political situation in Albania has been troublesome with high party polarization. Confronting rhetoric and lack of dialogue and consensus keep on keeping the political pressure high. This picture is mostly noticed in election campaigns periods when the pressure is higher and debate is harsher. Speeches during campaigns are filled with endless accusations against the adversary party instead of displaying their political programs. In his book, "Albania in transition", Elez Biberaj describes the pressure during election periods as follows: "*These two parties considered elections as a race where the winner takes it all and the looser loses it all, often ignoring the democratic norms, manipulating the election procedures, intimidating the justice system and the press and contradicting every unfavorable result"*."[8]

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[1] Freedom House, Report Albania (2002), [online] available in: http://www.freedomhouse.org/report/freedom-world/2002/albania, retrieve on 13. 04. 2014

[2] Najada Tafili, Consolidation of Democracy: Albania, [online] available in: http://www.jpinyu.com/wp-content/uploads/2015/01/consolidation-of-democracy-albania...najada-tafili1.pdf, retrieve on 11. 03. 2018

[3] Afrim Krasniqi, Adrian Hackaj, Albanians and the European social model. Internal democracy in albanian political parties (Tiranë: Friedrich-Ebert-Stiftung, 2015), 44

[4] K. Gërxhani, A. Sehram, *Clan-based polarized voting: empirical evidence*, 3, [online] available in: http://www.1.feb.uva.nl

[5] Servet Pëllumbi, "Në kërkim të zgjedhjeve të lira," në *Filozofia e aktualitetit* (Tiranë: Dudaj, 2010), 74 - 75

[6] Adem Mezini, "Përmbajtja dhe specifikat e tranzicionit posttotalitar në Shqipëri", në *Refleksione për kohët moderne*, II edition (Tiranë: Panteon, 2002), 50

[7] Janusz Bugajski, *Albania challenges* [online] available in: http://www.csis.org, retrieve on 14. 06. 2014

[8] Elez Biberaj, *Shqiperia ne tranzicion* (Tiranë: AIIS, 2011), 521

The political debate lacks understanding, tolerance, and consensus among the parties. Political polarization has obstructed the democratic processes, undertaking of necessary and timely reforms, has prevented the job of legislative bodies and higher state institutions, has slowed down the EU integration process and polarized the society. According to Stern and Wohlfeld, "*Albania has made little progress in developing and consolidating democracy. One of the biggest obstacles is the deep polarization between two large parties, DP and SP and rough personal disputes between their leaders. Such political tension obstructs an effective cooperation among two parties and as result the rapid progress in undertaking the necessary reforms.*"[9] The analyst on Balkan issues, Janus Bugajski, in an interview for the Voice of America states that: -*There is the risk that polarization leads to such a party separation that nothing can be approved in Parliament, that main issues such as fight against corruption and crime are not addressed, that the necessary legislation for achieving them is not applied, that the public debate is too politicized so that it does not allow the legislating system do its job. This is an issue for Albania as well for other countries that could obstruct the progress towards membership to EU.*[10]

Party polarization and lack of consensus among political parties in Albania is repeatedly exposed by international institutions, considering such lack of tolerance and understanding as "rodent" tearing democracy into pieces. Venice Commission report underlined the visit of its chairman Antonio La Pergola in Albania on January 8-10, 1998 as follows: "*The political dialogue failed. It makes it difficult to find a solution for the situation of the country and it is necessary to make the right political decisions and hold legitimate elections in order to get the country out of economic difficulties, social distress and legal insecurity*".[11] European Commission often called for attention the political class in Albania to build constructive dialogue. "*Consolidation of political dialogue among the majority and the opposition is necessary for strengthening further the Parliament's democratic operation… It is important that cooperation between the government and the opposition works well to secure solid basis for further reforms"*.[12] This opinion is supported by Mr. Björn von Sydow, Chairman for Political Issues at the Council of Europe, in his interview for Panorama newspaper on August 10, 2011, as follows: "*The political scene in Albania is dominated by political polarization, which has disappointed the Albanian people in these last two decades. The political situation is presented frozen in its looks for almost 20 years. Both main political parties did now show political willingness to reach consensus on essential issues."*[13]

Extreme political polarization is shown clear almost in every parliamentary session where one cannot help but criticize the harsh language, insulting words, mutual accusations among parties. Too often, the debate becomes so violent so that Parliament halls are transformed into "gladiators' arena" and there are physical conflicts among parliamentarians; or a place for hunger strikes, such as the strike organized by small parliamentary parties which opposed the constitutional amendments in 2008, of the hunger strike in August 1997, in an office of the Parliament's presidency where the democratic parliamentarian Pjetër Arbnori demanded amendments on the Law on Radio-Television; these halls are transformed into crime scenes such as the case of wounding by fire weapon the democratic parliamentarian Azem Hajdari by the socialist Gafur Mazreku, on September 18, 1997. Cause for this situation according to Arbën Xhaferi, is "*the lack of real political offer, lack of real projects for economic and spiritual recovery in Albania."*[14]

These uninterrupted conflicts led the main protagonists to use every means to destroy the political rival (considered adversary). Political disputes were associated with many parliamentary boycotts which caused that "*half of political potential – the opposition – take very little part in co-governance through opposition with alternatives and not roles that belong to the judicial system*".[15] Boycott has been used by both parties as a form of disagreement with the political situation in country, as a contradiction to actions or decisions of the other party, as refusal for supporting the initiatives of the opposite party, or as a need to listen, etc. Therefore:

- During the debates for compiling the Albanian constitution, (a debate that went on for years), the Socialist Party boycotted the parliament. On June 17, 1993 it left the Parliament declaring to go back once the draft constitution was ready.
- The DP boycotted the Parliament in 1998 after the Government decided to prosecute 6 former officials for using deadly gas during the 1997 protests.
- The DP boycotted the parliamentary commission in compiling the Consitution in 1998. According to it, the existing parliament (elected by ealry elections in 1997) did not have the moral authority to approve a long lived constitution. The DP boycotted also the poular referendum for approval of the Constitution on November 22, 1998 and called for its supporters to not participate in it.
- As mentioned above, after each election process the opposition parties have boycotted the Parliament

[9] U. Stern, S. Wohlfeld, "Albania's long road into the European Union", *DGAPanalyse*, No. 11 (2011), 3

[10] Interview with Janush Bugajskin [online] available in: http://www.pressonline.com.mk/default-al, retrieve on 21. 04. 2013

[11] Venice Commission Report on the visit of Prof. La Pergola in Albania, [online] available in: http://www.venice.coe.int/docs/1998/CDL(1998)053-e.asp, retrieve on 20. 2. 2013

[12] European Commission, Staff Working Paper, *Albania 2005 Progress Report*, Bruksel, November 9, 2005, COM (2005) 561 final, 12

[13] Interview with Björn von Sydow, Panorama 7.10 2011, [online] available in: www.panorama.com.al/2011/10/07/

[14] Rudina Xhunga, *12 porositë e Arbën Xhaferit* (Tiranë: Dudaj, 2012), 184

[15] Hekuran Hysa, *Tranzicion i rrezikshëm*, 70

becuase they didn't acknowledge and accept the results of elections.

Boycotts are too common in the Albanian Parliament so that during the first sesion of the Legislation XIX of the Parliament (elected by election of June 23, 2013) Namik Dokle, in the position of leading the session, stated proudly that this legislation was the only one that wasn't boycotted by any political party in Albania.

## Conclusions

Since 1990 to present, Albania has made considerable changes in organizaing the state, its legal basis, social mentality, infrastructire, democratizaton of life. Considering the picture and the analysis described above, we understand that democratic processes in Albania were followed by ongoing issues that have created obstacles in the economic development, political stability, European integration, social reforms. Apart from transition problems encountered in all new democracies, problems are more accentuated and ongoing in Albania such as:

- Politization and abusive movements in the public administration. Political, nepotist, clientelist job appointments caused a lack of permanence in the public administration, its inability for responding to democratic processes, lack of attention to people's demands.
- Contested and manipulated election processes. Elections in Albania are still associated with procedure, technical, logistic and administrative problems, by unacknowledging the results by all parties. On the other hand, this leads to full illegitimacy of established institutions.
- Lack of democracy in internal setting of political parties, which portrays them as authoritary or oligarchic groups, where debate, alternative thinking or fair competition are missing or suppresed. Such lack of internal democracy is reflected in the relations among parties.
- Albanian political parties built their political relations based on ongoing controversies, lack of willingness to cooperate and compromise. The party/ parties in power leave little space to opposition party/parties, which on their part, show little or no willingness to cooperate; in many cases they chose radical forms to make opposition. Such polarization in the Albanian political life has obstructed the decision-making processes, undertaking of important reforms and activities of institutions.
- Corruption, is an endemic issue of society and public insitutions; efforts of the executive and legislative powers to supervise the judicial power; lack of independence, tranparency and efficiency of judicial institutions have prevented the rule of law and its establishment in Albania.

These issues have often been tolerated from public institutions; other times reforms have been undertaken which resulted to be insufficient or have not been applied completely. The above mentioned problems have brought obstacles and delays in the path towards the democtratization of the country.

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# THE TRADITIONAL FAMILY, IN THE ROLE OF THE FUNDAMENTAL MATRIX OF THE FORMATION OF INDIVIDUAL CONSCIOUSNESS – A RADIOGRAPHY AT THE LEVEL OF THE ROMANIAN SOCIETY

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**Abstract**

*The primary group, accepted at all times as the core of society, is subject to a continuous assault. The reason invoked is so-called change, novelty, elements that only open-minded can accept.*

*The main problem that arises in this approach is that the open mind does not mean the mind that accepts any element of novelty, but the mind that analyzes and selects. Between the acceptance of everything and the selection, it is desired to merge these two elements till total confusion.*

*But who wants to create this confusion and why? The answer to this question is actually the quintessence of the present study.*

*First of all, we need to make it clear that the traditional family has an important contribution to clarifying this issue. Of course, in terms of family and open-mind, we must admit that the time has come to make the difference between the modern family and the traditional family.*

*Another determining element which creates this confusion is represented by the mass media. Regardless of the type of communication channel, interest groups have not bypassed the opportunity of communication channel to reach their objectives through manipulation in the public sphere over time.*

*Along with the family and the media, with an influence that does not necessarily occupy the last place after the two social factors, we have to take in consideration the church. Of course, we need to make some clarifications at this point: firstly, the difference between the church as an institution, religion and faith, and second, the difference between the dominant religious beliefs in society. However, it should be noted that the church institution accepts only one way of family existence, namely the traditional one. Along with this, the church emphasizes the conservative elements of social and individual culture, guiding the individual on the analytical and selective sphere, which predominantly leads to the positive segment of social values.*

*Our study aims to highlight the role of the traditional family in the process of building the matrix on which individual consciousness is developed and, in the course of time, in an area comprised of territorial and cultural borders, national consciousness.*

*Interesting is the barrier that emerged between the Romanian traditional consciousness and the diversified novelty wave, the barrier materialized in an increasingly visible resistance both in material and virtual way in accepting the modern type of family to the detriment of the traditional one.*

**Keywords:** *primary group; open mind; confusion; cultural borders; novelty*.

## 1. Introduction

### 1.1. The family, traditional/alternative valoral model

In pursuit of the purpose of any effort made in the field of scientific research, namely *social health*, it is imperative to thoroughly analyze the sources from which *the alternative values* arise, as well as the effects that these values may trigger in the medium or long term in a society fighting for democracy.

It is certainly necessary to review the trajectory followed by social values over time, or only to track the return of some tendencies that are slightly modified or otherwise approached.[1]

Thus, it is worth mentioning that in the traditional societies of the pre-modern period the values embraced a universal pattern imposed on the human individual: social order dictated from the sphere of the church, all knowing and knowing, identical individuals with identical needs, a unique and absolute truth, owned by entities superior to ordinary people.

In the modern age we encounter secularization, the need for science and its explanation, the opening to newness with reason. It is the moment of the emergence of the social norm, which determines the normative model of the individual, the norm being at the same time precursor of social responsibility. However, this normative model maintains identity in terms of human needs and aspirations.

In the 20th century, post industrialism, postmodernism, etc., occult western values and

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[1] Giddens, A., *The consequences of Modernity*, Cambridge, Polity Press, 1990, p. 237.

openness to them. Thus, we become acquainted with the tolerance, which, as we shall see in the present material, carries drastic analyzes and interpretations, some of which give rise to errors in the sphere of logic. However, we cannot overlook the positive contribution of accepting the differences between individuals, the need to know and understand these differences, and the need for genuine tolerance. In addition, it takes place in social consciousness and especially in the individual one, precisely the relativity of truth. Also, as a result of social change, there is a need to permanently define the concepts, social needs, values, attitudes and aspirations that matter to the individual, group and society as a whole.

As a balance for all these valences of change, the idea of risk appears and its assumption, in the context in which the risk, in turn, is in constant change, being a fundamental factor of relativism.

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We are currently witnessing the change of values, with a strong tendency toward post materialism. In Modernization and Post modernization[2], Ronald Inglehart analyzes social values through the hypothesis of rarity and socialization, and then leads to an absolutely obligatory question at least from a sociological point of view: the effect of globalization on values will lead to multiculturalism-the aspect of amalgam of cultures traditional, population-specific, or uniformity - as a common cultural line, universally valid, in which, of course, will prevail the values of politically sustained culture? In this sense, we can speak of a middle path characterized by tolerance and acceptance of value differences, so a certain multiculturalism can become a uniformist vector.

The most important aspect of values is that values are internalized at the individual and then community level, through socialization. As far as socialization is concerned, it is imperative to take into account the relationships that arise between individuals - social interaction, relationship with others. It is clear that changing values undoubtedly drives the social group.

At the same time, changing values or adding value to new groups in the area, as well as creating a new value, are ways to implement what is called alternative values. We are most aware of a conversion of social values, in the sense that old ideas are re-evaluated, reformulated according to the new cultural guidelines. Importantly, these new cultural guidelines are more imposed outside the communities in which traditional cultural elements are governed.

This is primarily about freedom. These are not new social values, but because of the fact that they are re-evaluated, repositioned in the cultural-value system, they acquire new valences and interpretations that lead to derisory morals. Freedom is a fundamental right and also a socio-cultural value conditioned by limits. Without limits and sanctions, the freedom of the individual is at risk of being eliminated, annihilated. Or, the new form of freedom that was born mainly by the removal of traditional moral norms is part of the alternative value baggage that seeks to reconfigure the individual's life and, last but not least, the life of the primary group , the family.

Analyzing *the traditional model of the family*, it presents itself as a group characterized by association, based on private relations. Structurally, the traditional family is made up of a man, a woman - the marital couple - and children from their sexual relationship.

In parallel with the private domain of the family we are dealing with the public sphere, a complex ensemble of social-political relations that accompanies the family in society, a dimension regulated by social contract. In the traditional family model there is a clear division between the private and the public sphere, but also a linear relationship: the laws regulate the family relations with the public sphere, and the man represents the family in the public sphere.

Regarding marriage, it is governed by a law that is based on the sexual division of labor in the household and society. This is where the gender role, identity with gender and gender stereotypes are discussed. The latter govern as templates of social life, according to which the woman and the man have internalized that social learning that led to the finalization and stability of the traditional family model.

In considerable opposition, *the contract model* is centered on the autonomous individual in social relationships with others in the form of agreements. Marriage is seen as a partnership similar to partnership with other types of civil associations. The marriage contract does not involve the state's participation, it only calls for the will of the parties. In this respect, the freedom of the parties in respect of family life is absolute, within the framework of the self-imposed obligations, on the basis of the contractual order. Those who promote this family model also highlight certain advantages deriving from these contracts:[3]

- pluralism and diversity in family life;
- the possibility of exceeding the limits imposed by gender stereotypes;
- Alternative ways in which children adopted or born under contract can gain family membership;
- offers the opportunity to devote parents to both gay and single-parent couples.

*The community model* promotes a specific family ideal, namely to act as the core of human society. The values underpinning the community model of the family are the common values of individuals in a society, influenced by the culture of its origin and subjected to collective judiciary systems. This model

[2] R. Inglehart, Modernization and Post-Modernization. Cultural, Economic and Political Change in 43 Societies, Princeton University Press, 1997, (op.cit.);

[3] Broderick, C., History Currents in Family Forms, în Marriage and the Family, Englewood Cliff, New York, Prentice Hall, 1988, p. 86.

presents as a specific limit the appreciation of the social role of the family to the detriment of the private one.

*The family-based model* of rights predominantly addresses the normative dimension at the family level, which contributes substantially to the promotion of the private character of the family. In this respect, emphasis is placed on the inequalities and dependencies that arise in relations between family members and the rights of family relations are promoted. This model based on rights leads to a conflict between the rights of the individual and the family: on the one hand, the family claims the right to be protected against the interference of the state in its intimacy as a group, and on the other hand the individual claims protection with regard to the possible damage that the state could bring to the family and intimate life - here is the appeal of domestic violence, the right to contraception, etc. The rights-based model fits into a limited theory that in this way family-friendly family issues cannot be adequately managed.

*The model based on relational rights and responsibilities* is grounded in the idea that family group relationships are part of the vast and complex relational system of proximity, education, religion, politics, ethnicity. For this reason, it is necessary to define a relationship between family life and political and economic order in order to establish the responsibilities that derive from this relationship. A theory of relational rights and responsibilities will encompass not only individual freedoms but also the rights to establish and maintain private associations that are compatible with public perceptions of the responsibilities that those associations bring to themselves, including the connections between families and the wider community.[4]

## 2. Content

**Actions to influence of consciousness through the virtual environment**

In the dynamics of the Romanian society, many groups have emerged that militate against or support some debatable interests from the point of view of democracy and balance which hardly manage to maintain a political/cultural balance between tradition and specific elements of globalization. All this invades social consciousness in the on-line environment, where the fight tends to take a magnitude that would have been difficult to imagine in the printing era.

The most extensive public demonstrations are certainly held in the same on-line environment where the number of protesters reaches the widest representation. The communication opportunities offered by the virtual groups support the discovery and permanent formation of the Romanian collective mentality and beyond.

Relationship and networking offered by *virtual platforms* inevitably leads to the learning of a new way of social life where elements of traditional values blend with those of new social needs.

Therefore, particular attention should be paid to the way of a healthy development and consultation of these on-line environments, raising the level of culture of the users in appreciating and taking over the messages, especially those related to radicalization actions, referring to totalitarian or extremist attitudes.

A starting point for all platforms, groups, associations, etc. in the constitution of the group of supporters as well as in the presentation of the directions of action and the proposed goals is represented by the on-line environment, especially the social networks, the ways of relations that are within reach of the masses. Among these groups, by far the most infallible defender of the traditional values of the Romanian family is the NGO - Coalition for Family Association, having as objectives:[5]

1. Defining the family in legislation to be a fundamental institution for society. In this sense, it is necessary for the family to be built on marriage. In turn, marriage necessarily implies free consent between a man and a woman, as well as parent-child legal relationships. This form of family definition must be enshrined in the Romanian Constitution.
2. The population is obliged to be fully informed about the importance of marriage and family based on the moral and legal principles mentioned, both for themselves and for society.
3. Society's respect for and support for the family would be mandatory, as these considerations depend largely on the social peace and future of a nation.
4. The unique character of the marriage requires a reassessment and reconsideration of the status. This status needs protection in order to preserve its uniqueness and strength. Protection directly addresses non-recognition of alternative forms of cohabitation, forms that affect marriage both in terms of importance and uniqueness.
5. With regard to family education, emphasis is placed on the need for stability as a child's development environment. That is why public policies and family legislation must start from the family form in which there are a mother and a father, so we mean clearly the traditional pattern.

The most important actions of this association that triggered vehement disputes in public space began in 2013 when the Coalition for the Family campaigned to redefine the family concept (article 48). The request was aimed at a more precise reformulation that fulfilled a restrictive purpose. In particular, the Coalition opposed the legalization of alternative forms of family

[4] M. Minow, Shanley Lyndon M., Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law, Hypatia, A Journal of Feminist Philosophy, 2001, p. 141;

[5] http://coalitiapentrufamilie.ro/despre-coalitia-pentru-familie/misiune/;

cohabitation, such as civil partnership. This partnership aims at eliminating the notions of spouse / children, replacing it with that of the family group partners, which leads to losing the importance of the family, throwing in the derision and then gradually eliminating one of the oldest traditional Romanian values. At the same time, this form of private union, which, according to the above, is part of the family group's contractual model makes homosexual couples marrying in public consciousness.

To this end, in 2016, the Coalition for the Family collected three million signatures in favor of replacing the expression "spouses" with "a man and a woman" in Article 48 on the family in the Romanian Constitution.[6] In support of the Coalition's initiative came the Romanian Orthodox Church, the Liberty Counsel and the Alliance Defending Freedom NGO. All these organizations have fought the Constitutional Court for a referendum in support of the Coalition's initiative. In 2016, the Constitutional Court has voted positively to revise the Constitution. Adverse reactions were not delayed: the LGBT community came in counterpart with an online petition signed with 11,000 signatures.

LGBT rights organizations such as ACCEPT, MozaiQ, and TRANSform voiced dissatisfaction with the RCC's decision, arguing that it could "lead to an increase in social tensions and hate crimes." Moreover, 24 Romanian NGOs, including Amnesty International, International Commission of Jurists, ILGA-Europe and European Commission on Sexual Orientation Law, have warned that the initiative will limit the right to non-discrimination and to the private and family life of people LGBT.[7]

### 2.1. Preservation/loss of national cultural identity

A Europe in which we can trust and which we continue to honor through our work and culture needs to provide us with a social, cultural, and, last but not least, legislative framework capable of satisfying our moral-Christian aspirations.

The need for harmony between individuals includes the relationship between men and women. This relationship is intimate and underpins the status of parent and its role in childcare and education. The greatest honor of an individual is to bring the descendants to the world. The rise and care of the offspring is the profession of the father. The human society's victory implies the renewal of generations, and therefore the Christian peoples will not only support the social policies that encourage and strengthen marriage, oriented towards the fulfillment of the procreation and education of the offspring.

Europe has built itself as a paradigm on a cultural background dominated by Christianity. This has led to a common European culture in which civisms has developed harmoniously forcing civil society.

In parallel, however, another Europe has emerged, which uses the moral prerogatives of true Europe, but whose action is marked by manipulation and pursues the misappropriation of Christian consciousness towards a set of values that are totally opposed to traditional Christian ones. These are the alternative values, which once put into practice (which is the right of some), create danger as potentially triggering social conflict. On behalf of certain civic forces defending tradition, this Europe has been called false.[8]

Also noteworthy are the tools with which the fight in the street, as a continuation of training from the virtual environment, tries to accomplish the desire to achieve uniformity.

The main tool on the social networks remains the discussion group, which uses pro and against of the *public good*, exactly in the way desired by any well-meaning citizen. On these discussion platforms the habit of planning group meetings was formed, here a certain language is being promoted, consisting of slogans and suggestions that up to a point define groups/citizens. This is the first reason that leads to the numerical growth of the group: goals that defines fundamental human rights.

But as will be seen in the future, it remains important for these goals to direct individual and then collective mentality.

The group in the streets comes to confirm the purpose of online discussions as a crowning achievement of virtual socialization. In fact, there will be many groups in the street that will promote the same values, under the same manipulative form at a given time. Equally important is that these groups occur at the desired moment, and within them are professionally infiltrated conflicting elements of the groups of sports supporters as well as persons who respond to the request to show pro or against anything. Applicants aim to increase the numerical size of the group, the respondents aim to receive money and not only. The interests being satisfied by both sides, we have the painting of a long-running tandem, based on a partnership with immoral tendencies.

We can speak here of a certain type of *cohesion of chaos*, which defines an accentuated state of involvement, which apparently leaves no room for escape. The common slogans of supporter groups of the new family model, and more specifically of the new lifestyle, complement the picture of uniformity, which is based on the idea of equality and the elimination of differences between individuals. The aim pursued in this case is to eliminate the differences with sexual

[6] https://www.digi24.ro/stiri/actualitate/evenimente/3-milioane-de-semnaturi-pentru-schimbarea-definitiei-casatoriei-din-constitutie-reactia-comunitatii-lgbt-521022;

[7] http://adevarul.ro/locale/constanta/coalitia-ong-urilor-versus-coalitia-familie-activistii-critica-initiativa-modificare-definitiei-familiei-constitutia-romaniei;

[8] https://www.geopolintelligence.com/europe-can-believe/, 2017;

connotation between the persons, both in terms of family and marriage.

Another element to be mentioned here is the distribution of action groups at European level and beyond. These groups tend to become part of *the new normality*, demand special rights, benefit from a certain influence in daily life, which gives them advantages and support.

If we look back, we remember the gay parades, which among the Romanian population almost did not find a correspondent. Over time, the Romanian mentality was conquered. There have been Romanians with sexual orientation different from that considered normal throughout the history of the Romanian people. It is not understood that there were no homosexuals in the history of the Romanian people. The novelty and more precisely the shock is the attack on the family.[9] If people with different sexual orientations existed and manifested themselves, the Romanian family of Christian origin has always been made up of man, woman, and children from their sexual union.

Serious is that on the side of these ideas are attracted people who have nothing in common with their sexual orientation towards same-sex persons. But the lack of discernment based on the lack of education in school and in the family leads the crowd to the open mind, where everything new is to be accepted, without analysis, without verification, without additional information. See also the confusion that is made even about the concept of homosexual: not allowed by many specialists in the field, opinion makers, media people, talking about homosexuals and lesbians, as if they were not part of the homosexuals. Early interpretation, lack of attention, conscientiousness, inevitably lead to the chaos mentioned above and, implicitly, to manipulation.

Of course, there has been a *solidarity* of those who promote these values, and above all, the idea is that they are more open to information gathering, more skilled, more prepared for adaptation, so they are superior. Hence a development of a contempt for the citizens going on the traditional road. In some countries in Europe, this experiment has succeeded. Same-sex marriages have been legalized, they can adopt children, etc. It remains to be seen whether in the Romanian national consciousness these alternative values will take the place of the traditional ones in the case of the family.

### 2.2. Multiculturalism – denationalization

Promoting non-discrimination is, in fact, aimed at eliminating the borders of religion, identity, race, political orientation, sexual orientation, nation, etc. In part, these efforts are welcome and even necessary, if we consider, for example, the elimination of gender gaps in the labor market as an equal pay for the same work done by men or women. But it is necessary to observe certain limits, which is not desired. Thus, the idea of equality in everything and everything appears in the equation.

The new European stream has boosted by promoting equality. After the idea of equality has been sufficiently promoted, promoters have easily moved to the next stage - multiculturalism.[10]

A Europe of multiculturalism seemed to be acceptable for the first time, considering that it was initially perceived as a sum of identity cultures, each respecting the others without affecting them in any way. In fact, it turned out to be the tolerance of some cultural values for immigrants, then to go even to the annihilation of the peoples' native culture by promoting the culture of the newcomers. Immediately after promotion, support followed. It is well known that large sums of money are being spent in Romania to build camps for immigrants, social aid and especially the construction of mosques - their traditional worship places. These financial efforts are conflicting factors that lead to a potential state of revolt, with the local population being strongly dissatisfied with the shortcomings in national infrastructure.

Of course, it must not overlook the fact that all fall within globalism, where the dominant culture will be the most common number.

The global community is also feeling its presence in Romania. Partly, collective consciousness is very busy with virtual life, which slowly but surely gains solid ground at the expense of face-to-face socialization.

If we consider that individuals relate virtually even when a real group (see the behavior of individuals when summer terraces are in groups of 5-6 people at the same table, but each is engaged in virtual communication through social networking through personal gadgets, as if they did not know each other). Sometimes hilarious, but apparently true quiet is actually an expression of global communication, to the detriment of traditional.

Apparently, one can say that the enslavement of conscience is an ongoing process and most certainly is hope that soon we will have peace of universal collective mind, because everyone will get along with everyone, we all share the same values and ideals created by the uniformity born of globalism, equality and identity of all with all.

### 2.3. Influence of demographic factors on traditional culture

A mixture of cultures is imminent. Only if we take into account the critical situation in the labor market we will find that the mixture of cultures will lead to the need for an increased degree of tolerance.

Labor emigration leaves a gap in the vacant area in terms of skilled labor. This happens as it is known because of the insufficient or total satisfaction of the needs of individuals, which is why they seek (and find)

[9] Giddens, A., Transformarea intimității. Sexualitatea, dragostea și erotismul în societățile moderne, Ed. Antet, București, 2000.
[10] Broderick, C., History Currents in Family Forms, în Marriage and the Family, Englewood Cliff, New York, Prentice Hall, 1988, p. 112.

what they need in other regions where they are established.

Individuals leaves, but not alone: they take with them the national culture and implement it in the host countries, with or without the acceptance of the local communities. There is still a need for labor in the area left after departure.

In Romania we face, among other things, a huge need for working in agriculture, construction, etc. In this case, the working environment in foreign areas is used by the Romanian and even European culture and civilization. This is how the elements of Asian culture and not only, and then communities, then families appeared in Romanian regions, in which completely different religions, customs, norms and values were interwoven.[11]

Demographic factors determine the change of peoples' culture, first by mixing, then by dominance. The result of the combination of cultures may be closer to one or another, depending on the perception of individuals, their power of adaptation, the degree of annihilation, and any antagonism that might exist between competing values.

### 2.4. The Romanians' absolute need of belonging to the traditional family

A certain form of chaos that gradually builds up in individual consciousness and then forms the collective matrix leads to a lack of motivation both individually and collectively about aspirations, ideals, the future. It is the land that is conducive to the demotivation of establishing a family to procreate.

Many people are skeptical about the hopes of returning to the previous social order. The despair that emerges in collective consciousness is related to the lack of social order in the context in which groups of immigrants with a totally different educational culture and even the opposite of the collectivities in which they have entered benefit from a certain kind of unofficial autonomy that contradicts the law. This situation gives rise to a state of insecurity and especially loneliness. The individual no longer feels like part of the entire collectivity, he no longer feels protected by the authorities, which leads to isolation. This isolation of everyone in the company of all, represents the general framework of globalism.[12]

Others, on the other hand, argue that there is an alternative to this situation. What would that be? Regarding Romania, we could say that the alternative is the fact that although the Romanians are subjected to the attack of virtual nature, at the end of an activity, a day of work or recreation, they come back within the family. Beyond chaos, virtual relationships, social networks, immigrants with most shocking behaviors, violence in different ways, nothing is overtaking the family, made up of mother, father, sister brothers, etc.

Of course, in Romania, as in any other state, there are monoparental families, etc., but most of the families function according to the traditional model and, above all, the Romanian-born Christian, has the matrix of his own consciousness built on the basis of the primary group, the traditional family. The needs and expectations of the Romanian citizen involve the family in all mental constructs governed by moral values. It belongs to the family having an associated gender parent, a father with an associated gender role, the two statuses being inseparable, in a reciprocal relationship, but never interchangeable. He is the family, and his family belongs in the above form, defines it, gives it dignity, and gives affection.

The gradual loss of sovereignty, de-nationalization, loss of national cultural identity, are the cornerstones of globalization. The last bastion, the most difficult to conquer, refers to culture. Why? Because the elements of culture are deeply entrenched in the mind, and individually bear as many physical deprivations, as long as he thinks how he wants, he judges at will and, in particular, is intimidated. The most important cultural value of the human individual is the family. The family is, among other things, its refuge, the fortress where no intruder penetrates, where it is protected and protected.

It is not hard to note that the followers of the change at any price, the traditional values combatants, operate with values that are unanimously appreciated and promoted: equality, non-discrimination, freedom, etc. It remains to be seen how many of us, the Romanians, especially after a period of limitations and constraints (see the Communist era), have the willingness to digest the scheming through the values we are promoting. Freedom and equality describe us as a nation, but it remains important to us who proposes them, in what form and purpose.

## 4. Conclusions

So the notion of family (traditional or modern) and the way it is accepted at the level of the Romanian society has given rise to a series of interpretations and sensitivities. Understanding how it is perceived helps to better adapt communication among individuals and avoid tensions that can often degenerate into conflicts between various social groups.

Introducing this study into the curriculum of the CSDP e-learning process and its extension to the other EU Member States would better help to understand these sensitivities and to calibrate approaches on these themes that will lead to the avoidance of escalating antagonistic positions in the approach and implementation of some projects relevant to the Union.

Last but not least, assessing the understanding of the family concept in third countries where the EU

[11] Chipea, F.,Familia contemporană – tendinţe globale şi configuraţii locale, Ed. Expert, Bucureşti, 2001.

[12] Beck, U., Beck-Gernsheim, E., Individualization: Institutionalized Individualism and its Social and Political Consequences, London, Sage, 2002.

external missions under the auspices of the CSDP would help participants to better understand how the family is perceived in that country, the sensitivities generated by these customs and the avoidance of antagonisms in the implementation of the mandate received.

These studies developed before detaching EU representatives to foreign missions and introducing them into the CSDP e-learning curriculum would be of great help in deepening the understanding of social phenomena in the area of responsibility and facilitating a beneficial interaction with the population of that country.

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- https://www.geopolintelligence.com/europe-can-believe/, A Europe We Can Believe In, 2017

# THE URBANIZATION OF RURAL COMMUNITIES, BETWEEN THE SOCIAL NEED AND THE URBAN CULTURE INVASION

**Mirela Cristiana NILĂ STRATONE***

**Abstract**

*In studying the relationship between urban and rural, it is necessary to address the needs of rural communities through the invasion of technological and informational progress.*

*Urban rural migration and vice versa determined the translation movement of the traditions of rural communities that he moved to the city. From here, to the village, technology, information, urban values, both negative and positive, have begun.*

*The existing differences tend to fade away. This is, on the one hand, a positive outcome in terms of improving the living conditions in the countryside, educational level and entertainment. On the other hand, we can also talk about a negative result, as the blurring of urban-rural boundaries leads, among other things, to the elimination and sometimes to the loss, of elements of tradition and folklore.*

*An extremely important role, of course, is the family, as the nucleus of each community. Of course, it is not to be neglected its particularities, which outline the difference between the village family and the town family.*

*However, even at the level of the family group we can see cultural changes. This group is opening up more and more, so gradually there can be noticed a diminishing of the differences between the rural family group and the urban family group. The constant migration of family members, from city to village and from village to city, leads to the intermingling of cultural values, a certain uniformization of education, a new family matrix in the future, valid for the entire population of the country. However, the differences will coexist with a certain form of uniformity.*

*Alongside the vision of village development, it is also interesting to apply the urban culture at the village, the cultivation of traditional family values, as well as the tendency to eliminate the differences between village and city, both in terms of human lifestyle, comfort , and education.*

**Keywords:** *the spirit of the communities, revalorization of rural lifestyle, a new typology of rural territories, multitude of ruralitys, the new poverty.*

## 1. Introduction

The study of the differences between urban and rural areas emerged as a necessity to the social need existing on both sides.In the rural area appeared the need for comfort, technology, modernism, new culture, as a response of their lack. They were overlooked over time, as the village human „looked over the fence" and wanted to have what his neighbor had from the city. In the urban environment appeared the need for tradition, the continuity of the authentic, in response to "longing," from home. The urban individual did not look ahead, over the fence, he looked behind and longing took possession of his conscience. And if he does not have roots in the village, if he was born in the city, he does not have "miss home, miss of village". He has curiosity. It's a curiosity born of the ancestral need.

In order to be able to analyze and understand such a relationship, it is necessary first to make some clarifications regarding the borders between the two socio-administrative dimensions, as well as between the complex borders of each these dimensions.

The idea of community is in itself a social construct, the result of a sociological construction. Of the two community models, the rural and the urban ones, the rural community is the one that holds the traditional values, it is the oldest, which existed long before the appearance of the rural community.[1]

The community itself, regardless of its rural or urban sphere - presents itself as a set of interactions, patterns of behavior, and social expectations, all along the well defined and at the same time conscious social role of individuals. The materialization of behavioral actions responds to social expectations, the latter based on norms, values, beliefs, language, all forming a common basis for the individuals who make up the community.

It is necessary to specify, because we have mentioned the idea of community value, that the fundamental value transmitted by the romanian village (and not only the romanian one) is represented by the *feeling of the community*.[2]

The borders of communities are not guarantees to preserve their specificity. The borders of communities are blurred. The only stable issue seems to be just the administrative-territorial dimension, although it also suffers changes over time. Beyond that, the interaction between individuals belonging to different communities leads to the blurring of borders, the

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[1] D. Gusti, *Monografia sociologică, Planul de lucru,* în vol. Opere, București, 1968.

[2] Tudor Sălăgean, *http://revistasinteza.ro/cea-mai-importanta-valoare-transmisa-de-satul-romanesc-este-sentimentul-comunitatii/*, 2016.

assimilation of cultural elements, action that includes aculturation, endoculturation, and elements of ethnocentrism, all of which lead to the birth of new cultural values, more or less slightly removed from the original ones. That is why we can safely say that the boundaries of a community are neither precise nor definitive.

Of the two categories of communities, the urban community is the one with the most blurred borders. The cause? The high degree of heterogeneity of population, with regarding to the origin of individuals, language, religion, behavior pattern, etc. If in the rural area the specific community is reduced to the village, in the urban area it can be a neighborhood, in old times a slum, or another urban division. This appears as part of a wider community, such as a city or municipality, which is, as the case may be, a part of a larger administrative-territorial organization, such as megalopolis. When the community is more extensive, the degree of heterogeneity is higher at all levels and borders are more diffuse.

## 2. Content

### 2.1. The social perspective of human settlements

The human settlements are human organizations, with the whole set of social values that make up the social life of the community. Every human community has its own social life, characterized by cultural and moral values, specific social norms and sanctions. From here It results that a human community does not refer only to the sum of houses and not just to a sum of individuals. The human community refers to a socio-cultural system - we speak of one's own way of cultural life, with inter-human relations, attitudes and specific behavioral manifestations - that embraces and transcends the "sum of the lives of its inhabitants"[3].

The cultural lifestyle of a community is learned by humans, because, in addition to the cultural heritage transmitted by tradition, new elements emerge permanently. Is manifest a certain *social animation* in response to the challenges of change. The social change of the community concerns first of all its social organization. The animation contains a so-called *animator,* which is nothing but an agent of change. He trains individuals into the race to learn new social elements that will shape the social life of the community in the future.

The notion of community is a socio-cultural construct. The culture of a community consists of people's beliefs, actions, behaviors, but only those learned, both through the process of enculturation (socialization) and the process of acculturation (social re-learning by adding, changing, in order to maintain the status within the community).

It should be noted that the culture transcends the people: she is superorganic, being made up of the sum of the individual crops of individuals, but it is not limited to the sum. The result of these cultures, their sum, gives rise to a new entity, which is the very culture of the community. But she does not reduce itself to the cultural baggage of each individual, because it will not put to eguality what is happening in the community as a whole, with what happens at the particular level of the members of the community. This is the case in which the quantity changes the quality (see the relationship between individual consciousness and collective consciousness). Although a human community is a whole, it does not mean it is governed by harmony. It breathes on the basis of the social conflicts inside her. The conflictual character ensures its cultural renewal, thus continuity.

**The spirit of the community**

The most powerful liant in a community is represented by its spirit. The spirit of a community lies in the fact that members are aware of their belonging to the community. This awareness includes the idea they all have about themselves, as a collectiv, what it implies a certain fidelity. The community spirit is identified himself with fidelity, and from this connection results the motivation of the members of the community to act for the welfare of the community, as a whole belonging to them and with which, at the same time, they identify themselves.

**The role of urbanization in the rural community**

- the village-city opposition

Exaggerated urban expansion and degradation of the quality of life in urban space underlies the analysis of the village-city opposition.[4]

The opposition between town and village has emerged in the process of the social work division. This has, among other things, led to the division of society into antagonistic classes. The economic base of the city was constituted on the exploitation of the village's resources. In this way it appeared the specific opposition of village-city, which led to the economic, political and cultural remaining ago of the village compared to the city.

The differences betwen urban and rural continue to mark the everyday life of individuals, even though rural communities in developed societies, have largely urbanized themselves their way of life in response to social needs. The difference can be seen even in social representations.

Continuously analyzing the differences between the village and the city, it is easy to see that the countryside is dominated by positive valences: spiritual cleanliness, harmonious coexistence with nature ... "a space that preserves rather than transforms, is rather visited than inhabited, and belongs to the sentimental domain rather than to the domain of labor."[5]

[3] http://cec.vcn.bc.ca/mpfc/modules/com-whru.htm.

[4] A. Toynbee*, Orașele în mișcare*, Ed. Politică, București, 1979.

[5] Abdelmalek A. A., *Ethnographie, ethnologie et anthropologie: du singulier à l'universel*, colloque AFIRSE, Rennes, 2000, p. 20.

Such a concept certainly refers to the contemporary countryside of developed countries, where modern living conditions offer true relaxation times for visitors. It should be pointed out that such spaces are not represented as a general feature even in all developed countries. Less developed countries, including Romania, although offering scenic areas to visit, are exceptions and are not subject to general representation.

- the agriculture

An expression of the social need but also of the technology interference with the countryside is represented by agriculture. From the perspective of tradition, the footprint of the peasant at the ground is illustrated by individual hand-made agricultural work. However, with the development of the global food requirement, throughout history has emerged the need for expansion and development of agriculture. In this regard it is necessary to mention the fact that the peasant has resorted to technology, of course, to the extent that this was allowed.

The transformations from agriculture, the reconfiguration of the agricultural holding, the whole set of changes that formed the basis to the work of the peasant, as well as the relations between the rural family and the agricultural holding, make the object to the social need of urbanization. This expresses the need for agricultural mechanization, to the emergence of coherent agrarian policies, agriculture demanding its right to a special place in national policy - national - also european and global funding. This involves a whole and complex series of processes with major implications for the rural community, on the rural as a whole, which encompasses and exceeds the agrarian.[6]

- the place of peasants (farmers) in society

The concepts of "peasant" and "rural" are the subject of what in the European discourse is expressed in the notion of "peasant society". This type of society or community is considered complex and organized by rules that oppose modernity and, moreover, advanced modernity. From this conflict, the type of traditional peasant society or community disappears, the place of the peasant being taken by the farmer, a social category formed by other rules, respectively the logic of the market relations in the modern societies.[7]

From this perspective, three determinant dimensions have been emphasized in the modern society:

1. evolution of the place and role of the farmer in the national economy;
2. the transformations of layers and social groups from the agricultural population;
3. the changes from the context of production social relations of the agricultural holding.[8]

The disappearance of the traditional peasant society is one of the results of the peasant's need for new, modern machinery, through which he sought and managed to ease his work and at the same time to cope with the increased need for agricultural production. The shift from individual worck in household to collective work on large fields, the administrative and territorial coordination regarding the raport between demand for food and production required, as was normal, a revolution of simple, primitive agricultural tools. Acestea au fost înlocuite cu mașini mai complexe, care au dus la o creștere a producției agricole, care ulterior a dus la crearea unor mașini mai avansate, automate. Thus, the farmer's work has been relieved, which gradually removes him from the labor process: robots are emerging that are increasingly replacing the human factor.

Of course, it is not fair to say that the traditional peasant has disappeared.

It continues to exist through individual work, in its own household, keeping in a certain proportion the custom and the skill to work the land in simple, traditional style. But these examples are singular and on the verge of extinction. This happens because the individual living in the village feels the need for a more comfortable way of life, the ease of physical work, and the gain of a space of time that in the modern society uses for non-existent activities in the past.

### 2.2. The developing of rural society

An answer to the social need for urbanization and, at the same time, urban invasion in the countryside is illustrated with success in the arrangement of rural territory in modern society. The modern constructions arise both whith respect to the family houses and other household annexes. Urban utilities such as the water supply network, electricity, gas network, sewerage network, public transport network, public transportation facilities, medical dispensaries, the construction of places of worship, as well as other administrative-territorial units, bring major changes in the lives of individuals and the rural community as a whole. All this is nothing more than a projections of the urban from the big cities, in response to peasants' demand for a decent life in today's society. In this way it was born a new type of community, the peri-urban or the suburban. It should be mentioned that with the territorial reorganization, in the rural community, some agricultural lands have changed their destination, being transferred in to the land for construction, becoming from outside lands, intravilan lands. Thus, local development has gradually led to the development of much of the rural community through modernization, technology and, last but not least, at the change in people's mentality. The resistance to old, to traditionall, has succumbet to the need of comfort, making room for more and more modern urban elements. Romanian sociologist D. Gusti, the founder of the Sociological

[6] M. Robert, *Sociologie rurale*. „Que sais-je?", nr. 2297, Paris, Presses Universitaires de France, 1986.
[7] I. Petre, *Întoarcerea la rural în socilogia contemporană, Teorii și controverse,* „Revista Română de Sociologie", serie nouă, anul XIX, nr. 5–6, București, 2008, p. 512.
[8] M. Jollivet, *La «vocation actuelle» de la sociologie rurale*, în „Ruralia", 1997, nr. 1, url: http://ruralia.revues.org/document6.html.

School at Bucharest, has analyzed the factors on which the differentiated development of the communities is based:

- • the cosmological or natural framework;
- • the biological framework;
- • the psychological framework;
- • the historical framework.

*The natural (cosmological) framework* refers to the spatial fixation of communities. Terrestrial space is characterized primarily by heterogeneity and lack of uniformity. As defining elements that structure the terrestrial space we have:

− the hydrophoresis (hydrological network) - has as central element the water, essential to life; the hydrological network is the cheapest means of transport and communication that man has used throughout history; most of the social conflicts of the communities, had as their source the mastery of hydrological networks.

− the atmosphere (the succession of the seasons) determines the pace of community existence;

− the lithosphere (forms of relief) are the basis forms of community settlements / habitation and access to subsoil resources; access to mineral resources leads to a higher level of civilization, an advanced way of life for the privileged/exploitative community;

− the biosphere (flora and fauna): a rich flora creates the development of agro-technical activities, and a rich fauna generates the development of zootechnical activities.

The rural communities depend on the natural environment they live and, as needed, they modify, adapt, transform, according him, to ever-changing requirements.

The needs of a community reflect the culture of the community, expressed on the basis of material and spiritual values - traditions, customs, beliefs and, last but not least, education.

**The biological framework**

The most well-known theory regarding this dimension is the organicist theory, on the basis of which human communities can be likened to complex biological organisms. Regarding the biological framework, we have the law of natural selection.

Also, the same organicist theory gave rise to racist ideas, which in turn led to extremist ideologies.

**The psychological framework** is created by psychosociology.

This tries to capture by what methods and how much the community forces its members to impose specific features that can distinguish them from members of other communities.

Each community becomes a matrix of specific behavioral patterns that its members are obliged to assimilate for integration.

**The historical framework** puts the mark of communities from the perspective of their past at all levels. Here comes into play the collective memory that shapes the social consciousness of community members. n this basis the social action will be manifested. The preserving of the past gives rise to a conservative ideology. In addition, the innovation appears to be an absolutely necessary and determining factor for the progress of communities. The innovation will be internalized on an individual basis and put into practice as a social activity.

**Environment**

The demand who come from the countryside to implement urban elements in rural life has led to the perturbation of the ecological balance. The exploitation of the rural environment in the interests of industry, tourism, etc., the consumerism that has escaped from control, has inevitably led to the impaired of the natural environment.[9] This has led to the need for rational management and protection of the environment (water, soil, forests, etc.), all relating to man's relationship with nature. Awareness of this is the first step and also the most important in the effort of conservation and keeping the environment, which leads to the salvation of nature and of course of life.

In today's society, we are witnessing a *revalorization of rural lifestyle*, especially by the urban population subject to stress and pollution.[10] The rural world is considered by the urban individual as a carrying and, at the same time, a belonging of the authentic. For this, the rural life means returning to origin, tradition, and last but not least, at nature. The periurban, dominated by his residential function, which is born under these conditions, is nothing more than the social consequence of the action of increasing revaluation of rurality in public representation.

The urban elements required by the rural community have arrived, but without limits, more than required, so the valences of the rural area are increasingly demanding help regarding of environmental problematic.

On the base of these aspects, we are witnessing the return to rural (retromigration), to specific values. The phenomenon of retromigration makes its presence felt in many areas of the planet. As society is modernized, the peasant and the traditional peasant community disappear, while at the same time subsisting, preserving a different rurality, defined primarily by the spatial or ecological dimension. There is, therefore, a reconsideration of the role of nature, of the environment, in sociological theory.[11]

The rural community is constantly changing. We are witnessing fundamental mutations, including the gradual diminishing of differences between urban life and rural life. In this sense, we are witnessing the emergence of new differentiations. These differentiations can be approached from two major

[9] H.H. Stahl, *Tehnica monografiei sociologice*, Ed. Institutului Social Român, București, 1934.
[10] D. Abraham, *Introducere în sociologia urbană*, Ed. Științifică, București, 1999.
[11] B. Kalaora, *Au-delà de la nature, l'environnement*, Paris, l'Harmattan, 1998, p. 516.

perspectives: one on an inevitable decline, the other on a very interesting revival.

Thus, ***a new typology of rural territories is being built***: agro-industrial, forestry, tourism, peri-urban, residential, etc.[12] This typology of rural areas is the premise of the emergence of a ***multitude of ruralitys***, where we find several rural communities clustered around a nucleus.

### 2.3. The poverty

The social need of the rural community was born, among other things, also because of the consumption poverty, which is characteristic of the urban environment. This side of poverty is acting and there is depending also on consumption that is done in households. It is much more extensive and at the same time deeper in rural than in urban areas. The solutions to blurring this phenomenon have been appears in economic growth, which has inevitably led to an increase in social inequality.

As such, the rural need regarding of the reduce the level of consumption poverty has attracted in special the forced installation of another social phenomenon in the rural community: *the social inequality*. The social inequality is also a new form of poverty, called by sociologists *"the new poverty"*. Against the backdrop of the decline in consumer poverty, which is based on economic growth, on the development of the rural community, the new poverty explodes by accentuating the social inequality, weakening the cohesion of the social group and having a clear trajectory towards the ultimate goal: *the social exclusion*. In this situation, we must point out that the new poverty, is own of the urban, penetrates the countryside, is multidimensional, is extreme and creates vulnerability, the individual's life becoming unpredictable.

Approached as a phenomenon - found between the need of the rural community to develop economically and the penetration from the urban vulnerabilities, lacked of economic security - the differentiation of poverty between urban - rural, highlights four major characteristics[13]:

1. the poverty of consum is in the rural environment, the economic poverty actioning more stronger in urban areas; the action is a violent one, and the causes consist in filling of lack of money with household products, by the peasants, compared to the lack of solutions of the townspeople;
2. the economic and social transformations are more pronounced in the urban environment, which negatively affects the urban population, which has no alternative to the economic crisis to obtain subsistence assets, as in rural areas;
3. the group solidarity differs in intensity from urban - where it is low, to rural - where it is increased; the family group itself does not have the same power of support, understanding, in the event of a crisis in the city compared to the rural family;
4. the sources of risk differ according to the residence environment: in rural areas, the main sources of risk are related to the nature, while in the urban environment they belong of the workplace, and the existence of the salary.

## 3. Conclusions

It can be said that the urbanization of rural communities has been and continues to be an irreversible phenomenon. It has its origin in the social need of the community, expressed in the peasant's desire to have a livelihood, to improve in different specializations in the non-existent education system in rural areas. Once the educational goal is met, the peasant impregnated with urban values returns to the village and brings with it urban culture.

The need to return to tradition does not take into account the fact that life in the country has changed, and the authentic looking dash has acquired new forms. However, it still exists.

The convergent elements described above show that the urbanization of the village is both an expression of the peasants' need to lighten and improve their way of life and the invasion of the city with all its positive and negative aspects, through which gradually the traditional village disappears and the differences urban-rural fades.

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# DEMOCRACY AND ELECTORAL OUTCOMES: COMPARATIVE ANALYSIS OF NIGERIA AND IVORY COAST ELECTIONS

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**Abstract**

*An election is an integral and essential part of democracy, which means that without an election, the concept democracy is impossible and without international accepted democratic process of election, a geopolitical environment cannot be termed democratic system. The quality of such system has to be inclined with the rule of law, freedom of speech and association, free and fair democratic election exercise and some other human necessity that make life livable for every individual residing in such environment. However, most West African states have been confronted with electoral violence and political instability, which has always been caused by electoral malpractices or unjust electoral process. This study will examine the mechanism put in place by International and regional bodies like United Nation, African Union and ECOWAS in relation to the twin concepts, and how it aid lasting solution to the electoral crisis in Nigeria and Ivory Coast, through comparative analysis.*

**Keywords:** *Democracy, Election, Nigeria, Ivory Coast (Cote d'Ivoire), United Nation and Regional Bodies (African Union and ECOWAS)*

## Introduction

An election is a major component of democracy, while it (Democracy) is the bedrock of any social-political society, which makes that society a livable place for the citizen and others. Without a proper election, democracy cannot be identified. And in the absence of democratic rules, the essential livelihood of an individual residing in such geopolitical society will be interrupted or threatened. This has been one of the greatest confrontations most nations in the continent (Africa) have been facing in one way or the other, particularly western part. In other for democracy to be practiced the way it should, ELECTION has to be conducted in an appropriate way and manner (free and fair), which will allow a smooth transition of power and office, that will create amicable passage for the rightful elect to take charge in the corridor of power in such post. Historically, most West African state has been facing differences in democratic settings which have always been created due to the improper or unjust electoral process. From this point of view, scholars and authors in time past have asked salient questions that, on what stand the Africans leaders institute their own democratic system. What attitude are they (Leaders) showing toward this concept? The traditional explanation of African political system shows that most individuals create there political ideology based on their political foundation, which they meet on the ground, or in some cases try to look for a solution to their present societal situation (Mattes and Bratton, 2007).

Furthermore, election and political participation in Africa, according to some analysts, mostly don't put rare fact into consideration, such as an individual may decide to go in line with a particular political tenure or ideology, due to the fact that this individual knows more about their content and possible outcome of such tenure. From the above explanation, it is established that democracy cannot survive without the full participation of the citizen, and by probing this fact, an analytical consideration has to be put in place whereby two political society will be considered, by looking into their electoral system, to establish fact that, is democracy truly in play or a mirage in this societies.

The research will be analytical, the conceptualized approach which will expatiate on why democracy and election in Africa have been experiencing violence and why the democratic process should be giving a prior consideration in the electoral process. In other to achieve this, I will base my argument on previous scholars write up, which negate the fact that democracy can only survive in Africa if colonial interest is at a minimal level. Their influence should not overshadow the real agenda of these states. A typical example is the case of Ivory Coast and some other francophone countries whereby the French has a major say in their democratic process and sometimes decide on the political party to be in power. The same goes to Nigeria and some other Anglophone state too. In some cases, the colonial masters are not directly involved but in one way or the other their opinion count. With the above explanation, the nature of democracy and election process which both countries have been applying and why it has been resulting to electoral crisis, political uphill and democratic

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instability. The analysis will be directed to 2011 and 2015 presidential election in Nigeria and 2010 and 2015 presidential election in Ivory Coast which brings a new face of democratic process to both countries respectively, also at this period, both countries experience election malpractice according to some international electoral observers, but to some extent there is still some element of democratic process which gives room for transition of power in Nigeria while it lead to civil war in Ivory Coast.

## Literature Review

### Democracy

Countless authors, scholars, writer, politician, and other practitioners in the field of politic, government and related fields have to shield more light on the definition of democracy. According to (Hollyer et al, 2011), using the concept of Dahl's describe democracy as a conceptual framework that has to be free in the dissemination of information within a system, and must be coupled with the element of transparency in other to actualized its purpose. From this point of view, the election process has to be giving more priority and maintain democratic process in organizing it, which will create an avenue to manage the political challenges and crisis that may come up before, during and after the election. From another point of view, democracy should have some element of sovereignty. From this perspective, democracy can also be described as the system that comprehends in a way that is governed by some group of individuals who take charge of the political affair, of a sovereignty society. The concept of democracy has been long used, which can be traced back to the days of the classical age. But it gains more attention after the wake of the cold war whereby sovereignty nations and society started calling for free flow information, freedom of speech, freedom of association, democratic election processes and so many more human rights to participate in the modern day government (Coppedge, et al, 2011). Furthermore, in a combination of all these ideas, as it was used co-note supremacy. A geopolitical society, in respectful of the size should attain some amount of self-freedom to decide on what they want and do not. This will amount to achieving the true concept of democracy. Another good example of democracy can be deduce from the definition of (Urbinati, 2010), which state that the conceptual framework cannot be avoided in political discussion, because through it lots of issues truncate into an object which the general society will able to determine the worth of such object and make it the matter of public notice and open societal opinion. To buttress Urbinati explanation, in relation to this research work, the democratic process is the key to good governance and this can only be successful through a process of participation by every individual particularly citizenry. Hence, in defining democracy, and its process in a geopolitical society that has once experience undemocratic system in time past, can best describe the way in which power changes hand during 2015 general election Nigeria and lead to abuse of rule of law during 2010 presidential election in Ivory Coast.

### Election

It is the primary and systematic way which gives a mandate to an individual or group of people who which to contest for a political post that require competitive screening or consensus by the general public. After the process (election) candidate that emerges with the majority vote, automatically attain autonomy to lead, or as a representative of that state or constituency. Furthermore, an election is a methodology, also avenue that usher new regime informs of changes that can happen to a society. It is also an intricate arrangement of exercise which is made out of various factors that demonstrate and relies upon one another. In addition, we can also see an election as a system of formulating actions of aggregate choice that happens in a surge of associated precursor and consequent conduct. In further explanation, election process includes the interest of the general society in the anticipation of how to choose their own head (Leader) and the way they will be part of the administration (Iyayi, 2004). The exercise (Election), is not only based on the activities of that particular date or period, but it makes up of an important aspect of the process, which simply mean that the exercise is a preprocess and post process. To make this exercise more meaningful and official, enactment and writing documents inform of constitutional backup will be require to formulate this exercise, by taking note of political party's names, re-bursting political parties, production of election documents, manpower, machineries and so many other items that will be needed for the success of the exercise.

In continuation of the importance of an election, we can equally say that elections are the process that institute democracy in a geopolitical society, which logically means that, the absence of election is the absence of democracy and other way round. An election is that machinery that makes governmental administration successful. From the qualitative explanation of how the election is important in a geopolitical environment, it simply says that election is a cognizant aspect of a democratic, economic and continuation process of a state or country. So talking about the election process and how it contributes to the success of democracy, the concept should be considered viable to some developing nation and post-crisis society where it will be of great opportunity for such society to truncate into the crisis-free environment if it's properly managed and make the social democratic process barely adequate. To summarize my explanation, an election process did not only stand for the successful implementation of democracy, but it also makes a political post more challenging and competitive for the participants.

## Theoretical Argument

To be honest, it's a fact that can't be thrown away when talking about comparative analysis of democracy and election outcome in Nigeria and Ivory Coast, it may sound not too important, unless it's been stage on the wider perspective of theoretical explanation, in other to give a clear understanding of the main discussion. Furthermore, this will help in a broad way, to give direction in a wider measure on how to indicate the firmness and inadequateness of determining and structuring a democratic electoral process in the near future. This will give us an opportunity to come up with a related decision which can be used in a broader scope. Despite those theories that gives us understanding to circumstances, there is no objection to this fact that theoretical ideal models are most adamant to bend and divide in their definition to translate the electoral crisis tormenting the continent.

Some theories of democracy are without compromise, excessively adamant to explain and plan activities for a democratic election, but are in the standard of putting the preventive measure to the crisis before and after electoral exercise within and beyond a region. Furthermore, in other to analytically explain the electoral outcome of both countries, prior consideration will be giving to rationalist theory. This theory perception is understood that the foundation is seen in social economic of a geopolitical society, with an experimental system in a sociological way. Researchers in time past have attempt to carve a theory to defend the idea that most human acts are basically rational in a natural form, which indicate that human will give absolute consideration of an action outcome, either positive/negative, beneficiary or not before venturing to it.

According to (Downs, 1957, in Geys, 2006), itemize conditions that an individual (voter) should attain before he or she can be considered as a rationalist, which goes thus:

1. Voters may not easily settle on a particular choice when stood with a scope of options (Candidate). They can pick between various options, depending on whom they need to be a leader. The psyche of this group (voters) isn't settled, not realizing what they really need.
2. Virtually every voter will rank all candidate they are faced with in other to select the most needed, superiorly needed and how authentic they are to each other.
3. Voters in some cases decline to a wide range, this is because they estranged to the point were by they think no political party stands for thought or will.
4. Voters will dependably pick among conceivable candidate, which is in the position of their most needed.
5. Voters most times come to a point of no choice than to make their final decision on a particular candidate. This occurs when they are challenged with options of the same idea (Geys, 2006).

To further discuss democracy and election outcome, (Alexander, et al, 2012) from the point of argument emphasis on effective democracy index (EDI), which was based on the fact that EDI is a viable mechanism to demonstrate a link between modernization, social-cultural perspective and democratic system of sovereignty society. A typical example is the rule of law, economic stability, civil society and so many more. In other, for this research analysis to be more analytical the EDIs will be part of variables that will be considered for a detailed explanation. Talking about democracy, the right that makes it an institutional property is one factor that defines it (democracy).Property in this aspect is termed ''concept'', that differentiate qualities, some qualities are with the condition, also this condition may not include in the qualities of a particular conceptual meaning, but in some case, it is useful to elaborate more on the practice of such properties. Furthermore, talking about democratic right, for it to be meaningful, it should contain an element of laws, not just any laws, but the qualitative rule of law. the law in this aspect is not only saying to know the do and don'ts of law enforcement agency alone, but the reason is also simple, knowing this alone is not what define democracy in the modern day system, and cannot be trash when itemizing attribute that makes up democracy. But still, the rule of law is one aspect that makes democratic right quality in modern day politics. In other for this right to be more of effective, the activeness of the rule of law has to come in place by enforcement, to complement the effective democracy index (EDI) in discussing democracy and election outcome in Africa. Models of an election in the region will also be considered as well because of one structural factor that political parties put into consideration before presenting a candidate for a particular post. (Adams et al, 2011) elaborate more on ''Spatial model'' a design that includes valence attribute of a contestant in the structure of aspiring for an electoral post. When talking about contestant valence, it simply means policy component which instigate voter's outcome, i.e. campaign strategies, identification, boldness, ethical principles and a state of commitment to the national interest. The explanation obviously shows that election merit and demerit is linked to contestant valence, which can impact policy standpoint.

Furthermore, the analysis will be structured in line with the extant model, which will differentiate valence attitude, which some citizen mostly admire in a winning candidate. Along the line, criteria's like names known and the way candidate carry out his/her manifesto are sometime germane with strategic valence, but some attribute like boldness, honesty, pragmatism, and commitment to nation building is also in line with character valence. Looking at the dichotomy betwixt strategic and character aspect of valence will establish how important spatial model is. From the expression of this model, it indicated the concept was established to challenge the incumbent.

This was the typical example of 2010 and 2015 election in Ivory Coast and Nigeria respectively that came to limelight due to intrinsic interest in character valence of the eventual winner at those elections. This theoretical explanation shows that elections outcome can be used to challenge the incumbent government results.

The above analysis is a structure on character-based valence, which has an advantage over the incumbent policy, with an upper hand in both district and regional angel. Furthermore, the candidate that did not have the goodwill character against the incumbent will have to go miles far away and has to do with the present priorities. To think that a candidate naturally gives kudus to the attitude of the election successor will sound impossible to many, but from this analysis and previous scholars write up, it is clear that no one will want to go against the notion that, voters priority are mostly on the esteemed character of a candidate that aspire or aspiring a post. In fact, lots of authors and writer in the past argue to support the notion that electors priority are mostly on a candidate attitudinal quality, in which I called ''character valence'', also their priority is not limited to the candidate quality alone as well as the course of actions the candidate will adopt or carry out. For this reason, a candidate can be viewed differently and they relatively differ from the electors, this is not because of their worth, but the right motive that this candidate can manage a post or position giving to him or her. So, relating this to a spatial model of attaining a post, it can be presupposed that a candidate admires to be holding a post always. Why in other models of the above explanation believes in the outcome of their policy, which they hope will serve as a legacy after they descend from the post.

Significantly, the essential aspect that should be observed in the above discussion is that election result in Africa is mostly contested by the opposition parties claiming some irregularity and election malpractice. To recapitulate, election outcome in Africa which mostly lead to the crisis should always be giving prior attention to know the root cause and give time to all parties involved to air their sides of the exercise, in other to establish a structure that will tackle the foundational issue. In the case of Ivory Coast, citizenship identification and ethnicity is the root cause of election crisis. While in the case of Nigeria, both ethnicity and political parties' rotational agenda.

## OVERVIEW OF NIGERIA AND IVORY COAST

### NIGERIA

Nigeria is a country with an unfortunate amalgamation history, due to the formulation system by the then British colonial masters (Halliru, 2012). Presently in population density, it almost 190 million inhabitants and from this details, Nigeria is seen as the most populated country in Africa, and according to (world meter) ranking, Nigeria is occupying 7th position in the world populated country. Nigeria was put together as a colony in the year 1914, which was term amalgamation era. It is also one of the largest Oil producing countries (OECD, 2002). Nigeria was pronounced as an independent state in 1960, from the British colonial masters, ethical crisis plunge the country into coup d'état in 1966, coupled with three years civil war, that erupted from the eastern part (Igbo) for the agitation of BIAFRA Nation. Almost eight coup d'état occurred between 1966- 1993, amounting to 16 years of military invasion in Nigeria democratic rule, until 1999 when the fourth republic started (Owolabi & Folasayo, 2009).

Due to political instability in Nigeria, ethnic and religious crisis has become a day to day activities, from one region to other. Along the line, the issue of terrorism creped in, and until today in Nigeria, the solution has not been met. The oil production that should benefit the general populace of Nigeria, has only been enjoyed by a few people, who are also in charge of the wealth of the country. Nigeria, is a country where rich get richer and the poor get poorer, people living in abject poverty and below 1$ per day (country watch, 2018).

Nigeria democratic process is a conceptualized framework of the governmental system, which took after the United States of America pattern of government. The U.S.A. democratic system is among the developed democracies of the planet, and if I may say number one in the world. But in the case of Nigeria, it's said categorically that among the developing nations of the world, Nigeria democracy is befitting. In Nigeria, elections outcome has always been an issue, which in time past, usually usher in the military to take over the affairs of the government. But as it may be, 1993 general election (June 12) was a year the country first experience free and fair election and Moshood Kashimawo Abiola (MKO), was declared winner for the presidential seat., Gen. Ibrahim Babangida Gbadamosi who was then military head of state annulled the result and install an interim government in the person of Ernest Shonekan, who only stayed in power for one month before another military personnel in the person of Late Gen. Sani Abacha, took over power. During the cause of the annulment and transitions, the country was experiencing civil unrest and military marginalization, which also truncate into the loss of property and lives (Ifukor, 2010).

Between the periods of 1993-1999, the country was governed by the military heads. Until May 29, 1999, when power was hand over back to a democratic system of government. After the first and second regime of the fourth republic, that end in May 2007, usher in another new transition era, but with the same political party. The main point of my discussion will be drawn from the two later elections, which brought a new face of democracy to the country. Elections of this two period in Nigeria was a historical event, 2011 serves as a preparation period and 2015 was the

balancing period (Omodia, 2012). The reason was that power change hand from one political party to another. Looking at Nigeria geopolitical structure as a federal system during 2011 preparation for the general election, which the country comprises of 36 states, aside from the capital, with 774 local council, 8,800 areas for voting registration and 111,119 voting centers, which includes all Senate and state districts across the federation (Jega and Hillier, 2012), indicate the country was fully preparing for a democratic electoral exercise, which also affirms element of democracy.

To sum up 2015 election hyped electoral system in Nigeria and was a progressive step that confronts challenges of time past, which has always been an obstacle to the true democratic process of the election the country and again equally consolidate the foundation that was established in 2011 election exercise. From the look of things, Nigeria electoral body is trying all they could to get to the pinnacle of an advanced system in the electoral process, with time I so much believe Nigeria electoral system will achieve the height of the developed world in all aspect of the democratic process. In other for this to be attained, stakeholders need to be in good relationship with the government and its representative, particularly in the aspect of the electoral process, because election process is a key aspect of a countries developmental plan.

**IVORY COAST (Côte d'Ivoire)**

This country, used to be one of the leading coffee planting nations in Africa, this geopolitical society is also identified as Cote d'Ivoire, was once viewed as an icon of solidarity among Africa nations in the continent. In 2002, Ivory Coast truncated into crisis-ridden territory after revolutionaries group from the northern part of the country agitated to take control by staging a coup d'état. At this period, it's a new face of a challenge for a nation that as once been regarded as an icon of peace and stability. After the unsuccessful 2002 coup attempt, Ivory Coast has engulfed with diversity among the citizenry, some give support to the south and others north. The strategy to do away ammunition from northern rebel and Gbagbo loyal military was unfruitful. The United Nation force and the French army was given the mandate to carry out this strategic duty, given a complain feedback that insufficient equipment was the reason behind their unfruitfulness.

Transition structure was initiated, immediately, Gbagbo five years term laps in 2005, but due to the Ivorite policy Gbagbo contest again and won, which keep him in power till 2010. Peace Accord signed in 2007 was another hope for the rebel side that, there will be a shift of power in the political arena of the country in the near future. Ivory Coast Electoral system is another sensitive aspect, 30 years after their independent, was a battle for veracious democratic practice, in spite of the country being a sovereignty state, the so call electoral democratic process was not democratically practiced, due to election strategy and party participation. At this period there is only two major political party that functions in the country despite the multiparty practice, which is Parti Democratique de la Cote D Ivoire (PDCI) and Rassemblement Democratique Africain (RDA). Late president Felix Houphouet-Boigny was the pioneer of one of the political party PDCI as of this time and the major reason of coming about the party was to kick against the French colonial rule in Ivory Coast then. During his leadership, he contested for president six-time and won all at a stretch between the spaces of 30 years 1960 - 1993 (Roberts et al, 2016). Moreso, the process was not competitive enough to prove how democratic the country is, because, during this period, there was no other political party to challenge him.

Another cognizant aspect was migration, at some appoint, Ivory Coast opens wide their border to some neighboring countries like Burkina Faso and Mali to migrate into their system, and allowed them to claim citizenship. The inflow of migrant as of 1970 has contributed a quarter to Ivorian population (Nugent, 2004:180, in Robert et al 2016).

As the journey of democratic dispensation continues, the democratic authoritarian leader then, late Felix Houphouet-Boigny remains in power till his death in 1993. Immediately after his demise, his vice ''Henri Konan Bédié'' took over power, which he later contested in 1995 and won. He was later sent out of office in 1999. Furthermore, before Bédié was thrown out of office, he implemented a policy that emphasizes on ethnicity, even to the point of working in government offices, which stated that once you are not a bonafide citizen, that indicate your both parent are Ivorian, you are not entitled to hold a government post. The Ivorite policy was so adamant, to a point that affected the present President (Alassane), who was working with the International Monetary Fund then. Alassane want to contest for the president position back in 2000, but because of the Ivorite policy he was disqualified and nailed that he (Alassane) was not full-blooded Ivorian, indicating that one of his parents was from Burkina Faso and the revised constitution done in 2000 stipulated that for any contestant, in respect the level of post his contestant for, such contestant both parent must come from Ivory Coast. This policy of ethnicity spring civil war in the country from 2002 to 2007 (Mbaku & Initiative, 2015).

Dual round of election occurred in 2010, but in the end it was totally disastrous, but the International body gives recognition to the opponent of Gbagbo, in the person of Alassane. Laurent Gbagbo was arrested and charged for war against Humanity in the international world court. Gbagbo prosecution did not end the Ivory Coast crisis. In 2012 seven UN soldier was killed, displeased Ivorian military strike in 2014 and 2017 indicated that the country is prone to political instability in the near future (Country watch, 2018).

## Analysis

Scholastic research and history write up, shows that the political elite that struggles for independent as of this time did it for selfish interest, not for the liberation of their people. A good example is the case of late president Félix Houphouët-Boigny of Ivory Coast, who pioneers their dependency in 1960, and also became the first president and also remain in power till his death in 1993. During his era there was no true multi-party electoral participation, in such a scenario, it's less a democratic dictatorship, which –hides under the pretense of being a democratic leader.

In the case of Nigeria, it was Coup d'état, that crippled the initial concept of democratic participation that was agitated at the early stage of dependency. Three years after the independent, the young and inexperienced country plaque into political instability by a coup. Few years after, the civil war emerge in 1966, research shows that ethnic marginalization in the armed force unit was one major reason for the war out broke. The problem of ethnicity, religion and regional marginalization can be seen in these two countries, also peculiar to most other African countries, if not to the entire continent. The idea of the colonial era in most West African countries, if not all, fairly chose governments representatives via electorate system as most countries do in another part of the globe, this is significant new to the prelude of the political surface in Africa (Kacowicz, 1997: 375 in Pernice, 2013). But the concept of democracy has been sermonized, trusting the fact that its only form of true governmental system that is reliable to human relations, and crisis management. In another way, dictatorship is an idea of a government that engineer crisis in divers of ways (IPA, 2003). Toward the later part of the cold war, the developed world preached the concept of democracy to Africa, equally advice that this concept is the only way forward in the continent (Mitchell, 2011). From this point view, it is understood that, most country that did not allow proper electoral democratic system in their country's i.e. (Ivory Coast) during Gbagbo refusal to accept election result and (Nigeria) during the Abacha era, make the international body to suspend their financial contribution (aid) to this countries until international conduct of electoral process take shape. This gives us the sense of reasoning that, for any crisis-prone society to live to expectation, after the crisis, a rightful mechanism must be put in place (Hanlon, 2005).

## Mechanism

It is understood that mechanism can be an arrangement of the analogical idea that will aid the concept of resolution in any situation. A typical example is this research, which along the line itemize contribution of international and regional bodies like UN, AU, and ECOWAS, which create machinery that will resolute crisis before and after the election. In the part of United Nation (UN), a subunit called United Nation Development Project (UNDP) came about an agenda to promote mutual discussion between all stakeholders, from the electorate (political parties) to electoral, NGOs, civil societies and institutions (government and private), which is targeted to establish peace or avert election crisis and its associated occurrence and for everyone involved to concur with outcome of the election in good faith (Amaka, 2014). Furthermore, codes of conduct introduced by the UNDP informs of enactments that gives room for all stakeholders involved in the exercise (election) to have access to a government source. UNDP activities also truncate to supervision, verification, sequence, and accountability, harmonizing and assisting of external/internal bystander (Von Borzyskowski, 2015).

The regional bodies have a similar structure of mechanism with the international body, but with slight dichotomy. African Union and Economic Community of West Africa State try to lay more emphasis on the political formation or composition of each country, in other to create atmosphere whereby citizens will be free to vote and be voted for in respect of geographical locations, political party or post eyeing for as long it all guided by the rule of law and the spirit of democracy is embedded in the whole process (Hammar, 2009:52 in Mapuva, 2013). The political formations of these countries, institute self-reliance electoral management body (EMB) that will oversee a free and fair exercise. Their part EMBs is very important throughout and beyond the exercise. For these bodies to be more effective and respected by all participant, geopolitical constitution backup is introduced (Makumbe, 2009: 156 in Mapuva, 2013). Furthermore, to summarize the mechanism on a global scale, the interpretation of eight democratic theorems embedded in article 25 of International Covenant on Civil and Political Right (ICCPR) of 1966 is a good standing point of explanation on how to achieve the international accepted process of democratic election exercise (López-Pintor, 2010).

The above analytical expression simple tells us that a democratic system is the only reliable form of government that is able for general participation. It's the acceptable form of government, quoted by International Monetary Fund (IMF) and the World Bank (WB), as part of the obligatory that can aid developmental structure of any geopolitical society (Kaufmann & Kraay, 2008). It further illustrates that any geopolitical environment that is accountable, continuation in an internationally accepted democratic system, run corruption free society and encouraging of personal business enterprise to their citizen under normal rule of law, can be identified has been responsible and up doing nation.

However, from this point, it indicate that Nigeria and Ivorian crisis are basically ethical which has been in existence from the independent period and over the years it has degenerated into political and economic crisis.

Ivory Coast crisis, that later regenerated from 1999 coup d'état caught the citizen and global community unexpected, but political unrest and other crisis rocking the country were not unexpected. Tracking the situation back to the early days of the country independent, until the mid-90s when seen as a nation experiencing turmoil and political instability, contributed wholly by division, violent clashes and overbearing leaderships, which make the country political structure to some irregularities in the hand of Late Felix Houphouet-Boigny, that paddle the whole affairs of the country and remain in the corridor of power for more than three decades. All this later contribute to democracy uphill in Ivory Coast. Aldo the late president (Houphouet-Boigny) did all he could during his leadership, to make the country as one entity in spite of diversity of different ethnical group, he stick with the nation promise before independent to leave as one family and believe in one cause as a nation, which makes other countries identify Ivory Coast as "le miracle ivorien" meaning the miracle Ivory Coast as of that period.

From advent, Nigeria as a country has once experienced political stability, until 1966 when the armed force took over power from civilian and which also went along the civil war. The following emergencies were event combined of political, ethnic and religious estrangement that plunge Nigeria into ungovernable society for a length of years. Also, the impacts of the common war made clash exhaustion in the prompt post-common war time. There was no genuine risk to peace aside from the political turf where the military oligarchs occupied with the power session of upsets d'état and counter overthrow d'état. Furthermore, democracy in Nigeria has been faced with all sort of obstacle which poses the nation to a democratic messed right from the first coup de teat in 1966, up till the fourth republic in 1999 when the country starts experiencing a beat of democratic practices till date. In other to actualize this aspect, the 2015 general election was a landslide in the realm of democracy, where by-election exercise in Nigeria for the first time in history, after about sixteen years (16) of single political party dominance in the center of affairs was voted out.

One major factor that contributed to the downfall of the ruling party (PDP) was the fractionalization that struck the party and this action pave way for party loyalist from local and state level to migrate to another political party (Omotola and Nyuykonge, 2015). It was what major opposition party see as an added advantage for them to an alliance with other smaller political parties to come up with a mega one that could face People's Democratic Party. The final aspect of exit for the leading party (PDP) was the case of insecurity that Nigeria was faced with, which even amount to reason why the independent electoral commission of Nigeria (INEC) reschedule the exercise date from February 14 to March 28, 2015 (suberu, 2007; Ibrahim and Ibeanu, 2009, in Onapajo, 2014). The 2015 election was a remarkable event in Nigeria, after the country return to the democratic process in 1999 and equally mark the fifth of such exercise in Nigeria.

## Conclusion

Finally, looking at the case of Nigeria and the Ivory Coast, it's clearly stated that both countries have a particular issue that has denied them of a proper democratic system. From their historical background, we realized that both countries got independent in the same year, from different colonist, but belong to the same geopolitical region. From an observation, democratic instability in both countries has some element of immaturity at the stage of agitating for self-autonomy. What the research has attempted to bring out is to institute a fact that democracy and election outcome in both countries (Nigeria and Ivory Coast) were not properly manage, in other for proper true democracy to survive in both society. This facts was establish by drawing attention from selected elections in Nigeria i.e. 2003 and 2015 and Ivory Coast 2000 and 2010 general election respectively. Furthermore, the study could briefly explain why then president of Ivory Coast Laurent Gbagbo refused to accept defeat in the 2010 election, but in the case of Goodluck Jonathan in 2015 general election in Nigeria conceded defeat even before the final announcement. From the analytical explanation of the twin concept in this research, indicate the level of democratic advancement of each country in question.

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# A FORM OF POST-WAR COOPERATION – SOVROM

**Florina POPA***

**Abstract**

*The end of the Second World War generated major changes that profoundly marked our country's political, territorial, economic and social evolution. Within the activities aimed at the restoration and development of the post-war economy there are found the partnership forms expressed through Romania`s cooperation relations with other countries, the modalities of achievement being different, over time, in relation to the purpose pursued and the circumstances characteristic of the stages in which they were accomplished.*

*The study focuses on the presentation of the Romanian-Soviet cooperation, in the form of the joint ventures - of SOVROM-type and highlights the ways of establishing the collaboration, the fields and the period in which they functioned, accompanied by concrete examples.*

*The research methodology was the study of the speciality literature and the selection of examples with practical data in the field.*

**Keywords:** *partnership, cooperation, joint ventures, SOVROM, relations.*

**Jel Classification:** *H41; H44; L24; L38*

## 1. Introduction

The changes brought as a result of the end of the Second World War marked profoundly the evolution of our country at political, territorial, economic and social level. *The partnership forms*, from the moment of the end of the war, up to the end of the nine decade of the last century, have practically manifested itself within *the cooperation relations* developed by Romania, differently, externally from internally.

*On external level*, *Romania's cooperation relations* with other countries were subordinated to the political and economic situations developed among the world states, generated by the Second World War and to the events that followed its finalization, the form, the content and the consequences being different, according to the context; *on internal level*, these co-operations integrated and evolved according to the structural changes and the requirements of the Romanian economy, in the efforts of post-war recovery and further development.

On the domestic market, the relations have manifested itself within *the cooperativization* process, representing forms of organizing and development of production, in agriculture, industry and commerce. The stake was to promote the aid among the co-operative societies, principle, by virtue of which, these organizations manifested autonomy towards the state (Popescu G., 2014, p. 89).

The partnership forms on external level, expressed through cooperation relations with other countries, have manifested, differently, over time, in relation to the modalities of achievement.

Below, the Romanian-Soviet cooperation relations, in the form of SOVROM-type joint ventures will be presented.

### 1.1. Romanian-Soviet cooperation - through SOVROM-type joint ventures (1945 – 1956)

A form of presence of the foreign capital in post-war Romania was represented by the societies called SOVROM, a partnership between Romania and U.R.S.S., concretized in the creation of mixed-concern bodies that operated, directly, through concessions or exploitation. They were the expression of a particular character of the forms of property existent in the Romanian economy, through the involvement of a significant volume of resources (raw materials, fuel, energy, human resources) and the presence in a certain share, of the foreign capital in Romania, in the period 1945-1956 (Desmireanu I, in Constantinescu N.N. et al., 2000, p. 140).

After the negotiations conducted on May 8, 1945, the collaboration agreements between the Romanian government and U.R.S.S. related to[1]:

- an economic collaboration agreement between Romania and U.R.S.S.;
- a confidential protocol to the collaboration agreement;
- an agreement on mutual delivery of goods between Romania and the Soviet Union, […];
- an annex protocol concerning pricing;
- a protocol for the liquidation of the old accounts […] remained from the former Romanian-Soviet

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[1] Florian Banu (2004), p. 128, ”Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)”, Editura Nemira, Bucureşti, quotes A.I.C.B fond C.C. al P.C.R., Secţia Economică dosar nr. 18/1945, f. 1-27, fond Casa Regală dosar nr. 38/1945;

agreement of 1941[2].

The co-operation, materialized in the establishment of 16 Romanian-Soviet societies, included important fields of the Romanian economy (metallurgic, extractive, forestry industry, glassware etc.), the constitution principle being the equal contribution with capital, of the parties; in the case of the Soviet participation, this consisted of the German goods in Romania, which, according to the post-war treaties, came to U.R.S.S., afterwards, the Soviet side increasing its share with its own materials and equipment. (Mureşan M., Mureşan D., 1998, p. 366).

Below, examples of some companies that operated between the years 1945-1956, as well as elements of their constitution, based on agreements between the parties, are presented:

- **Maritime transport –** *Sovromtransport*, joint venture established in 1945; the contribution of the parties was as follows:
- Romania contributed with river vessels, tugs, objects of waterside installations and materials of technical provision and renovation of vessel and ports. There were also, leased to **Sovromtransport**, representative vessels of the Romanian fleet: Transilvania motorship 1100 tons of freight and 380 passengers and the Ardeal ship 6500 tons of freight and 140 passengers and important waterside facilities in Constanta, Galati, Brăila and Giurgiu ports (Banu F., 2004, pp. 134, 135);
- The Soviet party participated with four old cargoes requiring repairs (Naşcu I., in Constantinescu N. N. et al., 2000, p. 228-232 ), ten tugs of 5200 HP, four river barge of 370 HP and 740 tm, 47 non-propelled river barges - 47 447 tm, 23 petroleum tanks without propulsion - 19552 tm[3] - the society was disbanded in 1954 (Naşcu I., in Constantinescu N.N. et al., 2000, p. 228-232).

Founders of the company:

- Of the part of Romania: State Administration of Romanian Fluvial Navigation – N.F.R., State Administration of Ports and Communications on Water (P.C.A.) and Anonymous Danube Navigation Society (S.R.D.) [Administraţia de Stat a Navigaţiunii Fluviale Române - N.F.R., Administraţia de Stat a Porturilor şi Comunicaţiilor pe Apă (P.C.A.) and Societatea Anonimă de Navigaţie pe Dunăre (S.R.D.)].
- Of the part of U.R.S.S.: State Navigation Society for Freight and Travelers Transports on the Black Sea, he State Society for Navigation on Danube and the "Sovfrcaht" Union (Societatea de Stat de Navigaţie pentru Transporturi de Marfă şi Călători pe Marea Neagră, Societatea de Stat pentru Navigaţie pe Dunăre şi Uniunea "Sovfrcaht")[4].

The objective of the company was "the administration and exploitation of river and maritime transports, the use of Romanian river and sea ports; the organization of river and maritime communications, the shipbuilding and sheap repair industry, expedition operations and commercial operations in commission, on the territory of Romania and abroad"[5]; the capital - 3 billion lei represented by 600 000 shares, with a face value of 5000 lei (Banu F., 2004, p. 134).

- **Air Transport** The Romanian-Soviet Society of Air Transports *TARS* (*Societatea româno-sovietică de Transporturi Aeriene – TARS)*, established as a result of the 1945 Convention.
- Romania has made available the goods and personnel of the airline transports company LARES - Romanian Air State Operated Lines (Linii Aeriene Române Exploatate de Stat), as well as 12 airports equiped with the related infrastructure; the company was subsidized by the state, and during its operation, the domestic air transport developed (Naşcu I., in Constantinescu N. N. et al., 2000, p. 236-242).
- The U.R.S.S. contributed with the supply of line airplanes, for the most part (Banu F., 2004, p. 135).

The objective of TARS company was "the establishment of the civilian air connections across the entire territory of Romania and in the Black Sea region, on the territory of U.R.S.S., between the civil airoports Ismail, Odessa, Nicolaev, Cherson, Eupatoria, Simferopol"[6]. It had a share capital of 1.8 billion, represented by 36,000 nominative shares (Banu F., 2004, p. 135). A part of the capital would be covered by the right of use of airports, for a period of 30 years. (Banu F., 2004, p. 135).

At the closure of the operation of TARS company, the workers and the goods were sent under the Ministry of Auto Naval and Air Transports (Ministerul Transporturilor Auto Navale şi Aeriene) and TAROM company was established (Naşcu I. in Constantinescu N.N. et al., 2000, p. 236-242 ).

- ***The Petroleum Industry*** *Sovrompetrol*, a company contituied on the basis of the July 1945 convention (Banu F., p. 130, 2004). The confidential protocol in the field of oil meant the establishment of a Romanian-Soviet joint venture whereat the Romanian state and Romanian societies to take part[7]. The participation of the two states consisted of (Banu F., 2004, p.129):
- The Romanian State provided prospects for new, free land, with the common agreement of both

[2] Florian Banu (2004), p. 128, "Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti, quotes A.I.C.B. fond Preşedinţia Consiliului de Miniştri – stenograme (P.C.M.), dosar 5/1945, f. 21;

[3] Florian Banu, 2004, p.. 135, "Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti, quotes Ioan Chiper, Florin Constantiniu, Adrian Pop op. cit. p. 156;

[4] Florian Banu, 2004, p.. 134, "Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti, quotes M.O. nr. 172, 3 august 1945, p. 6, 583;

[5] Florian Banu, 2004, p.. 134, "Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti;

[6] Florian Banu (2004) , p. 135, "Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti,.

[7] Florian Banu, 2004, p. 129, "Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti, quotes A.I.C.B. fond Preşedinţia Consiliului de Miniştri – stenograme (P.C.M.), dosar 5/1945, f. 22;

governments and 50% of the royalties to which it was entitled, percentage, of gross products.

- The Soviet Union contributed with the necessary machine to the functioning of society.

The Sovrompetrol society took over the entire activity of the Romanian oil industry, state-owned, following the act of nationalization in 1948. The society was liquidated in 1956 (Desmireanu I., in Constantinescu N. N. et al., 2000, p. 140)

The nominal value of shares brought at Sovrompetrol is presented in the table 1.

Table 1 Companies whose shares were taken over by the U.R.S.S.

| Current Number | Society name | Shares in millions lei |
|---|---|---|
| 1 | Concordia | 755,8 |
| 2 | Colombia | 325 |
| 3 | Petrol Block | 285,5 |
| 4 | I.R.D.P. | 115,5 |
| 5 | Buna Speranţă | 15 |
| 6 | Explora | 59 |
| 7 | Meotica | 21,3 |
| 8 | Sardep | 43,3 |
| 9 | Sarpetrol | 34,9 |
| 10 | Transpetrol | 4,5 |
| 11 | Continental | 100 |
| | TOTAL | 1759,8 |

Source: Florian Banu (2004)[8], p. 132, "Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti

- **Banking domain - Sovrombanc**. On August 14, 1945, the convention on the conditions for the establishment of the Soviet-Romanian Bank was signed, whereat the constitutive act and the status of the company, as anonymous society, were annexed (Banu F., 2004, p. 134).

The transfer of shares in the U.R.S.S. patrimony was regulated in 1945 (Law No. 573)[9], namely: "the shares of the oil and banking companies (...) that had belonged to physical or legal persons of German nationality and who have passed into the patrimony of the Union of the Soviet Socialist Republics to cover the war damage caused by Germany will be transferred to the shareholders' registers of the respective companies, namely: the shares of the oil companies under the name of "Obedininenie Ucmeft" and the bank shares under the name of the bank of long-term lending of industry and electrification, "Prombank" U.R.S.S."[10].

Participants in the social capital of the Soviet-Romanian Bank:

- Participation of the Soviet side was of 600 million lei in return for 6000 shares of the Soviet-Romanian Bank (Banu F., 2004, p. 133).
- The Romanian side paid 2.67 billion lei and also contributed with shares from different banks (The Romanian Credit Bank, Chrissoveloni Bank, Bank of Discount - Banca de Credit Român, Banca Chrissoveloni, Banca de Scont). The Romanian shareholders acquired shares at the Savrombanc at the value of 350,000 lei/share, higher than the nominal value of a share (100,000 lei). Uzinele de Fier and Domeniile Reşiţa paid 102 million lei in cash and received 292 shares of the Sovrombanc bank, in nominal value, of 29.2 million lei[11] (Banu F., 2004, p. 134).

Article 4 of the Constitutive Act of the Soviet-Romanian Bank S.A., Sovrombanc, stated that the Romanian State was to submit in the bank accounts, the amount of 1.5 billion lei, within 15 days, "amount to be returned to the Romanian state, by The Founding Group, respectively, the Romanian shareholders, through the annual deposit at the State House, of 25% of the dividend distributed to the shares belonging to the Romanian Group"[12]. The main activity of **Sovrombanc** was "financing commercial operations between U.R.S.S. and Romania and of the operations that are to be carried out by the companies constituted in Romania"[13].

- **Wood Industry** The *Sovromlemn* Society was established as anonymous society on the basis of the "Convention for the Exploitation, Industrialization and Valuation of Wood Materials" on March 20th 1946 ("Convenţia pentru exploatarea, industrializarea şi valorificarea materialelor lemnoase" 20 martie 1946)[14]. Founders of the company[15]:
- The Soviet side - Stanislavlesprom and "Exportless" Union (Uniunea "Exportless");
- The Romanian side – C.A.P.S., „The Orthodox Church Fund in Bucovina de Sud", „The common goods Ciuc", „The wealthy community of the 44 Guard village in Năsăud", „The cooperative of forest owners for wood exploitation in Gheorghieni", Forestry

[8] Florian Banu (2004), p. 131, "Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti, quotes Anexa 1 in Legea 573, M.O. nr. 161, 19 iulie 1945, pp. 6158-6159;

[9] Florian Banu, 2004, p. 131, "Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti, quotes Legea 573, M.O. nr. 161, 19 iulie 1945, pp. 6158-6159;

[10] Florian Banu (2004), p. 131,"Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti, quotes art. 1 din Legea nr. 573;

[11] Florian Banu, 2004, p. 134, "Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti, quotes M.O. nr. 245, 26 octombrie 1945, p. 9451;

[12] Florian Banu, 2004, p. 134 "Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti, quotes M.O. nr. 245, 26 octombrie 1945, p. 9451;

[13] Florian Banu (2004), 134,"Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti;

[14] Florian Banu, 2004, p. 140, "Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti, quotes M.O. nr. 101, 1 mai 1946, pp. 4402-4407;

[15] Florian Banu, 2004, p. 140, "Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti;

Company Forema S.A., Autonomous Forest Company „Nădrag", Company „Steaua", The Succession Mihail. D. Sturdza (Fondul Bisericesc Ortodox din Bucovina de Sud, „Bunurile Comune Ciuc", „Comunitatea de avere a celor 44 de comune grănicereşti din Năsăud", Cooperativa proprietarilor de păduri pentru exploatarea de lemn din Gheorghieni", Societatea Forestieră „Forema S.A.", Societatea autonomă Forestieră „Nădrag", Societatea „Steaua", „Succesiunea Mihail. D. Sturdza").

According to the Article 1 of the Convention, the purpose of establishing the Romanian-Soviet Forestry Society - Sovromlemn was "collecting, production and distribution of wood materials"[16].

- **The Gas Industry** - *Sovromgaz*, founded in March 1946, having as object of activity the exploitation of the reserves of methane gas in Podişul Transilvaniei (Banu F., 2004, p. 141).
- **The film industry** - *Sovromfilm*[17], set up in March 1946 for the purpose of introducing Russian culture, for the same purpose, being also the constitution of A.R.L.U.S. Association for Enhance Ties with the Soviet Union (Asociaţia pentru Strângerea Legăturilor cu Uniunea Sovietică), „Cartea Rusă" Publishing House and the Soviet-Romanian Museum (Banu F., 2004, p. 141).
- Three other societies, *Sovromcărbune, Sovrommetal şi Sovromconstrucţii*[18], were founded on the basis of the conventions of July 1949.
- *Sovromcărbune*, established in 1949, by Decree no. 546 (Official Bulletin No. 54 of August 20, 1949) (Decretul nr. 546 -Buletinul Oficial nr. 54 din 20 august 1949), with a share capital of 675 thousand lei, the contribution of each party being equal (by 50%)[19], with the following composition (Banu F., 2004, pp. 142, 143):
- the patrimony of the former „Petroşani" society, to which the Soviet side participated with 61.65% of the capital, coming from actions yielded by Hungary, on the war compensation account, and the rest of 38.5% belonged to the Romanian state, follow-up the nationalization. In the year 1947 the "Petroşani" company was taken over by the Soviet side, due to owning majority of shares;
- mining nature goods - mines that constituted share of the Romanian side, Anina, Dorman, Secu, Armeniş and Sinersig in Banat, whereat the Soviet side had a capital share of about 33%;
- assets of the former "Lonea" company; the Soviet side had a share of 5.6%, the remaining of 94.4% belonged to the Romanian state;
- mining nature assets of the lignite mining group in the Schitu Goleşti basin (Câmpulung) which had belonged to the former Concordia company.

The latest SOVROM societies were set up in 1952.

- *Sovromutilajpetrolier* - the object of activity was the production of oiler equipment; it was consisted of a group of about ten enterprises joined within trust for refineries and oiler equipments building. The newly established trust also supplied Poland, Czechoslovakia and Hungary, giving Romania, the position of the greatest oiler equipment producing country.

At the proposal of the U.R.S.S., the Romanian state accepted that the redemption of 50% of the value of the enterprises belonging entirely to the Romanian state and that were to enter into the new company, to be done by transferring to the Romanian state ownership, of some former German enterprises that U.R.S.S. held in Romania. Thus, the Romanian State and U.R.S.S. were to become equal partners in this SOVROM[20].

− *Sovromnaval* was established as a consequence of the fact that in *Sovromtransport*, the shipyards were not used, prevalently, to their entiere capacity (Banu F., 2004, p.144).

In the new society, the contribution of the Romanian state consisted in the shipyards in Galaţi, Braila, Constanţa and Turnu-Severin, owned by the Romanian state (previously leased to Sovromtransport society); these became a joint Romanian-Soviet property by the redemption by the Soviet Union, of 50% of the value of the above yards, less Turnu-Severin[21].

- *Sovromquartit* established by the signing of the Governmental Convention in December 1951; began to develop its activity in April 1952, with the ore reserves discovered in Băiţa-Bihor[22]. The object of activity was the geological research for discovering the uranium digging in Romania, its extraction and exploitation; also, there have been added construction works, motorways, railways, industrial buildings, dwellings, power lines[23].

The year 1952 was the last stage of establishment of Sovroms and penetration into the Romanian economy, followed-up by a process of decline and liquidation, proving to be disadvantageous.

The presence of SOVROM-type societies on fileds of activity, in the economy of the country, with

[16] Florian Banu, 2004, p. 138, , "Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti quotes Art. 1 from Convention;

[17] Florian Banu, 2004, p. 141, "Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", quotes ***România în anii socialismului 1948 – 1978, Bucureşti, 1980, p. 182;

[18] Florian Banu, 2004, p. 142,"Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)" quotes ***Economia României între anii 1944-1959, Bucureşti, 1959, p. 534;

[19] Florian Banu, 2004, p. 142, "Asalt asupra economiei României. De la Solagra la Solvrom (1936 – 1956)", Editura Nemira, Bucureşti;

[20] Florian Banu, 2004, p. 144 quotes A.I.C.B. fond P.C.M. stenograme, dosar nr. 8/1952, f. 22;

[21] Florian Banu, 2004, p. 144 quotes A.I.C.B. fond P.C.M. stenograme, dosar nr. 8/1952, f. 24

[22] Florian Banu, 2004, p. 144 quotes ***Ochii şi urechile poporului. Convorbiri cu generalul Nicolae-Pleşiţă – dialoguri consemnate de Viorel Patrichi, Bucureşti, 2001, p. 219;

[23] Florian Banu, 2004, p. 145 quotes A.I.C.B. fond C.C. al P.C.R. Cancelarie, dosar 6/1963, vol. II f. 378;

reference to the number of enterprises set up and the staff employed is described in the table below (Table 2).

Table 2 The presence of Sovroms in the Romanian economy

| Industrial branch | Number of business | Number of employees |
|---|---|---|
| Energy | 1 | 195 |
| Extractive | 31 | 7391 |
| Metallurgical | 11 | 12032 |
| Chemical | 8 | 1893 |
| Buildings | 1 | 631 |
| Wood | 29 | 7777 |
| Graphic art | 1 | 2 |
| Textile | 1 | 19 |
| Transports | 59 | 1539 |
| Services | 16 | 131 |
| Trade-credit | 33 | 406 |
| Total | 191 | 32 016 |

Source: Florian Banu, 2004, p. 165 quotes Aurel Negucioiu, „Proprietatea Socialistă în România", Bucureşti, 1987, p. 111

The largest number of enterprises fuctioned in the fields of transport, trade, extractive industry and wood.

The liquidation of the Sovroms began in the year 1953 and meant the passing of several stages, by obtaining the approval from Moscow, concerning the transfer of Soviet-Romanian joint ventures to the Romanian state property, by redemption of the Soviet side, by Romania, namely: 1953 - 9 societies; 1954 - 5 soceities; 1956- 2 societies.

Following-up the decision taken by the Soviet government, the amount scheduled for redemption, for the enterprises transfered in the Romanian state property, was reduced by 4.3 billion lei, whereby 1.5 billion lei, for the former German wealth. The redemption of the value of the Soviet share ownership part was to be in progress at equal annual installments, echeloned on 15 years, the payment being considered a credit granted to Romania, without interest[24].

## 2. Conclusions

The SOVROM-type societies in the respective economic branches had as a model, the Soviet-type socialist enterprises and functioned as levers of control over large economic areas.

Following-up signing of the Moscow Treaty of May 8, 1945, the German industrial properties in Romania were included in Romanian-Soviet joint ventures, which have ensured the exploitation of natural resources, over a long period of time. The former German mixed properties, of great importance, in Romania, were taken over by the Romanian-Soviet joint ventures - 1945-1946, and the rest have been managed by the Romanian state, requiring high costs, until 1948, when the last transfers of property were made to U.R.S.S.[25].

In the relations of alliance with the foreign capital, Romania has, incessantly, maintained its political orientation towards ensuring economic independence, regardless of the political regime.

This form of partnership, according to the opinion of some authors, was not advantageous for our country, and the liquidation was, also, done, to the detriment of the Romanian part, by setting-up a amount of money, for the Soviet side, larger, disproportionate to their actual share (Mureşan M., Mureşan D., 1998, p. 366).

The economic relations between the two countries were at the disadvantage of Romania; a series of decisions concerning the production selling-out, the investments, labor force, were subject to the Soviet part accord; it was incumbent on the Romanian state to provide with a part of the benefits, for the Soviet partner, regardless of whether the enterprise made or not a profit (Constantinescu N. N., 2000).

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[24] Florian Banu, 2004, p. 174 quotes Scânteia, 5 decembrie 1956;
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# THE IMPACT OF PUBLIC PROCUREMENT LAW TO THE SYSTEM OF PUBLIC FINANCE

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**Abstract**

*Public procurement law lays out the processes and procedures that public agencies, authorities, or departments should follow when procuring work or service using public funds. The law stipulates the threshold at which public entities should use public procurement instead of private procurement. Effectively, public agencies spend a considerable amount of government revenue on public services. However, controversy exists on the relationship between government spending and private sector investment. It also remains unclear as to whether public procurement law improves financial management. Thus, the purpose of this study is to determine the relationship between public procurement law and the crowding-out effect, taxes, and finance. The study relies on quantitative research design where data was collected from a sample of 130 participants who comprised of public procurement officials, private investors, and the public. Using a questionnaire, the findings showed that public procurement law increases government spending that in turn crowds out the private sector instead of crowding-in. The need to fund projects often compels government to increase taxes and in turn incur budget deficits due to lack of adequate finances. However, public procurement laws enhance financial planning and control.*

**Keywords:** *Public procurement law, crowding-out effect, financial management, taxation*

## 1. Introduction

Public procurement entails the acquisition of good, works, and services by a public authority or a procuring entity with the aid of public funds. With the need to ensure a level playing field in the procurement process, countries have enacted public procurement laws to regulate the purchase of public services. The authorities are mandated to follow the established procedure in awarding the contract. The law requires the procuring entities to put in place mechanisms for public procurement for services exceeding a specified threshold (European Commission, 2011).

The regulations govern the management and expenditure of public resources and effectively help in ensuring prudent financial management. However, the rise in public spending is considered to affect investment in the private sector in what is popularly known as crowding-out and crowding-in effect (Basar, Polat, & Oltulular, 2011; Devarajan Swaroop & Zou, 1996). Similarly, public procurement plays a critical role in financial management. It requires the concerned entities to follow the best practices and observe the principles of transparency, accountability, and efficiency in the procurement process. However, it remains unclear whether the public procurement regulation has a positive impact on financial management. Thus, this paper aims to address the relation between public procurement and the crowding-out effect, public finance, and taxes. So finally the main objectives of the paper are: to determine the relation between public procurement and the crowding-out effect; to examine the relation between public procurement law and taxes and to investigate the relation between public procurement law and public finance.

## 2. Theoretical Principles of public procurement law

Public procurement is a powerful exercise. It demonstrates policy choices and represents the processes involved in the delivery of public services. It provides economic freedom and depicts trade relations among economic players. Essentially, public procurement is a significant non-tariff barrier and it works as an obstacle to the functioning of a competitive internal market (Koninck & Ronse, 2008). Regulation of the procurement process encourages competitiveness and contributes to significant cost savings in the public sector. The EU law provides a platform for all businesses operating in the region. It sets out the minimum public procurement rules that guide procurement process. These public procurement rules are transposed into member states' laws and apply to tenders whose value exceeds certain threshold amounts (Baldan & Pirvu, 2013). If public tenders do not reach a certain threshold value (or below it), national rules of member states' budgetary laws will apply. Although the EU aims to ensure that its economic policy obeys the principles of an open market

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economy and free competition, public procurement requires authorities to develop a positive regulatory approach. That is why public procurement has now become an essential element of the EU in ensuring a competitive economy. The purpose of this research paper is to examine the EU public procurement law and recommends ways to improve enforcement and the procurement process in the region.

### 2.1. Directives

The primary legislation that regulates public procurements within the EU is in the public procurement directives. They include Directive 2004/17/EC that coordinates procurement procedures in the energy, transport, postage, and water services (McCrudden, 2007). A recent 2014/25/EU supersedes that 2004/17/EC Directive. Directive 2004/18/EC coordinates procedures involved in the award of public works, service, and supply contracts (OJEC, 2017). Similarly, a recent 2014/24/EU one supersedes the 2004/18/EC directive. Directives 2004/18EC and 2004/17 EC are now Old Directives. The New Directives replaced them following a consultative process coupled with a series of legislative proposals. These rules regulate the purchase of goods and services by the member states and their various bodies. The new rules simply contain procedures of public procurement and make them flexible to the advantage of businesses. They pave the way for electronic procurement that is expected to increase the effectiveness of the procurement process. For example, only winning firms submit the papers to show that they qualify. As a result, the new directives will reduce the documentation required (Thai et al., 2016).

Besides, the procurement law includes several specific rules for different sectors. Defense Procurement Directive (Directive 2009/81/EC) focuses on defense and security. Regulation EC1370/2007 focuses on public transport sector by road and rail. Directive 2007/66/EC amended Directive 92/13/89/665/EEC to increase the protection of tenderers against breaches of the law by contracting authorities when they award public contracts (McCrudden, 2007). It sets out the requirements concerning the remedies necessary for the violation of public procurement procedures (OJEC, 2017). European institutions establish directives as the legal instruments to achieve flexibility. The directives provide discretion to the member states regarding the method and form of implementing public procurement rules. They have the ability to harmonize public markets while considering the existing divergences in the legal systems of different states. The directives ensure that legal systems conform to the objectives of the European Community. However, it must be acknowledged that the divergences will remain. Essentially, this attributes to the fact that the EU does not have the power to override existing national legal regimes and impose a different one (Kapteyn & Verloren, 1989).

Although the New Directives address some of the inherent weaknesses in the Old Directives, issues of transparency still arise (Andrecka, 2016). For instance, Directive 2014/24/EU has not yet clarified the uncertainties that involve in the operation of single and multi-supplier frameworks (Andrecka, 2015). Although one can affirm that some level of transparency exists, it is only present at the pre-award stage. Currently, there are inadequate provisions to guarantee transparency, especially during the award stage of the contract. One of the key issues that arise is the lowest price offer that contracting authorities should accept. A transparent or competitive pattern does not guarantee and provides safeguards against underpriced patterns. However, it automatically disqualifies abnormally low offers as in the case of SA Transporoute ET. Travaux v. Minister of Public Works [1982]. Even so, the New Directives allow for the achievement of societal goals, including environmental protection, as well as stimulation of innovation. They improve efficiency in public spending largely by simplifying existing rules as well as introducing flexibility in the procurement process.

### 2.2. Governing Principles

The contracting authorities in the public sector are subject to the EU General Principles even when the procurement itself is outside the scope of the New Directives (Ebrecht & Werner, 2017). These principles encompass equal treatment, non-discrimination, proportionality, mutual recognition, and transparency. Others include free movement of products and freedom to provide services. For public sector procurements that are outside the scope of the New Directives, the overriding principles are competition, transparency, and equal treatment. These principles require potential bidders to access the suitable information regarding the intention to award certain procurement. Therefore, it means that they should advertise to ensure that the contract is available to all parties to allow fair competition. The European courts have reinforced these principles in different case laws. In Commission vs. Ireland, the Court of Justice of the European Union (CJEU) concluded that the modification of the contract award criteria after reviewing the bids violated the principles of transparency and equal treatment.

### 2.3. Importance of Public Procurement

Public procurement in the EU is a matter of immense economic value. According to BDI (2017), awarding public contracts to businesses is critical in meeting the public needs and ensuring a cost-effective use of public resources. It also serves as an important factor that allows companies or organizations from different parts of the world to compete fairly. In the EU, member states award public contracts that exceed 2.2 trillion EUR annually (Ebrecht & Werner, 2017). This figure accounts for approximately 12-19% of the GDP. Indeed, these figures show a macroeconomic value of public procurement. Thus, from an economic

perspective, public procurement legislation aims to bring competitiveness, increase the penetration of imports, enhance trading of different public contracts, and bring about price convergence (Baldan & Pirvu, 2013). From a legal perspective, public procurement law is essential as it supports the free movement of people, goods, and services, and prohibits discrimination based on the nationality of an individual (Bovis, 2002). Thus, its liberalization reflects the desire of European institutions to end discrimination and preferential purchasing patterns in the public sector. It also shows the wish to create seamless interstate trade links involving both the private and public sector. Due to the importance and value of public procurement, European institutions have developed several rules at a national, regional, and international level. The goal is to create a predictable legislative framework that guides public procurement.

Table 1 Public Procurement Tresholds of the years 2016/2017

| PUBLIC | Supply, Services and Design contracts | Works contracts | Social and other specific services |
|---|---|---|---|
| Central Government | 135,000 EUR | 5,225,000 EUR | 750,000 EUR |
| Other contracting authorities | 209,000 EUR | 5,225,000 EUR | 750,000 EUR |
| Small lots | 84,000 EUR | 1,000,000 EUR | n/a |
| | | | |
| UTILITY | Supply, Services and Design contracts | Works contracts | Social and other specific services |
| Utility authorities | 418,000 EUR | 5,225,000 EUR | 1,000,000 EUR |
| | | | |
| DEFENCE AND SECURITY | Supply, Services and Design contracts | Works contracts | Social and other specific services |
| Defence and Security authorities | 418,000 EUR | 5,225,000 EUR | 1,000,000 EUR |

Source: European Commission.

## 3. Literature Review

### 3.1. Public Procurement Law

According to the World Bank Group (2018), most countries have enacted public procurement laws which outline the rules and processes that must be followed in public procurement. Most international financial organizations require countries to establish transparent and competitive bidding process in order to receive funding for infrastructural projects. The procurement law requires governments or the procuring authority to publish tenders publicly when the procurement is of a certain threshold (Europa, 2018). According to the European Union (2018) over 250,000 public entities in the EU spend nearly 14% of the GDP on public services. In efforts to establish a level-playing field, the EU law lays out the harmonized procurement rules that stipulate the way public authorities purchase goods and service. According to Fairgrieve and Lichere (2011), public procurement represents over 15% of the EU GDP.

### 3.2. Public Procurement Law and Crowding-Out Effect and Taxes

Crowding-out arises from expansionary fiscal actions (Sundararajan & Thakur, 1980). Increase in government spending through taxes or debt issuance may curtail investment in the private sector leading to a situation, where the sector feels crowded out (Carlson & Spencer, 1975). Further, Atukeren (2005) indicates that increased government expenditure arising from public procurement laws that requires government to publicly procure goods often leads to excessive borrowing in the capital markets. In turn, the interest rates increase due to the competition for the limited financial resources. As a result, the cost of obtaining capital increases for the private sector, which in turn slows down private investment (Erden & Holcombe, 2005). As Atukeren (2005) indicates, excessive government borrowing to finance public projects often makes the private sector unprofitable. The authors indicate that investment in public infrastructure results to a positive impact on investment in the private sector in the short term. However, some other types of public investment often result in crowding-out (Dash, 2016).

Basar et al. (2011) indicated that the relation between public procurement and private investment is a highly debatable issue. Thus, they investigated the impact of government spending on investments in the private sector within the context of crowding-in and crowding-out hypotheses. Using data from Turkey that had been collected between 1987-2007 combined with Johansen-Juselius cointegration analysis, they observed that total public spending and interest payments by the government resulted in a positive impact on private investments (Basar et al., 2011).

Thus, their findings validated the crowding-in effect hypothesis and rejected the crowding-out effect. Based on their findings, they argued policies that increase public expenditure should be adopted to stimulate investments in the public sector. Similarly, Ahmed and Miller (1999) explored the impact of government expenditure on private investment. The researchers observed that public expenditure on the infrastructural projects increased private sector investment while public sector spending on social security and welfare resulted in a crowding-out effect.

Simcoe and Toffel (2011) examined the connection between public procurement policies and private sector investment in green buildings. The study was guided by the need to determine whether a preference for public procurement stimulates the private sector to develop innovative products. They observed that public procurement policies motivate professionals to invest in their respective sectors and also fuels the demand for green buildings in the private sector. Thus, government procurement policies serve as a means for increasing investment in the public sector. Similarly, both Bazaumana (2004) and Miguel (1994) observed that public investment leads to a crowding – in effect as opposed to crowding-out effect on investment in the private sector. The latter obtained data using Johansen co-integration analysis while the former gathered findings in Mexico. Similarly, Cruz and Teixeira (1999) examined the effect of government spending on private sector in Brazil. Using data from 1947-1990, they observed a crowding-out effect in the short term, but in the long –term a crowding-in effect occurred.

### 3.3. Public Procurement Law and Finances

Public procurement law and financial management are correlated. As Sarfo and Baah-Mintah (2003) indicate, financial management is comprised of all activities involved in obtaining and utilizing finances effectively. These activities include financial planning, financial control, and financial decision making. Public financial management lays emphasis on efficiency, effectiveness, and economy. Public procurement is critical towards achieving sound financial management by ensuring that there is value for money spent on public projects. Maithya (2014) conducted a study to determine the impact of public procurement laws on financial management among Kenyan public hospitals. The authors indicated that due to the high volumes of government expenditure on procurement, efforts had to be made to enact a law that would govern public procurement within the public sector. This aimed at ensuring effective management of public finances. Consequently, the Kenyan government created the public procurement & disposal Act of 2006. The regulations aimed to bring fairness and an a just system for effective financial management. Using a sample of 45 employees drawn from the procurement & the finance unit of the respective public hospitals, coupled with an additional 20 percent of the suppliers, the authors issued them with a questionnaire (Maithya, 2014). The researcher observed that public procurement law had improved financial control and planning. However, the regulations had not enhanced financial debt management. According to Abebe (2013), public procurement regulations demand high standards of accountability, transparency, and efficiency to ensure efficient delivery of public services. The law calls on the respective parties to adopt the best practices in the management of public expenditure based on the three principles. Efficiency is critical as it ensures that the public obtains value for money. Transparency is also critical as it encourages fair competition among the suppliers. Both transparency and accountability help in promoting integrity that, in turn, prevents corruption in the procurement process (Lynch & Kobo, 2013). Thus, these principles contribute towards efficient management of public resources and finances.

### 3.4. Summary and Gaps in the Studies

A close analysis of the literature shows the inconsistencies in the findings. While some studies argue that public procurement and by extension government spending creates the right conditions for private sector investment, other studies affirm the contrary. At the same time, some of the studies argue that public procurement squeezes funds from the public and compels governments to increase taxes in order to meet the costs of public procured services. It is also not clear as whether public procurement laws, improves the overall financial management in terms of planning, controlling, and debt management.

## 4. Methodology

### 4.1. Introduction

This section outlines the research method used to answer the study objectives. It describes the research design, the sample, data collection, and instruments for data collection. The chapter also describes the data analysis, validity and reliability of the methodology, and the ethical considerations made.

### 4.2. Research Design

The paper adopted a quantitative research design. This approach was considered as the most valid one based on the purpose of the study. It would allow the researcher to collect data from a large sample size and make it possible to make generalizations. The quantitative approach was easy to operationalize and analyze the data due to the standardized data collection method (Mugenda & Mugenda, 1999). Over and above, the method was considered as the most appropriate based on the fact that the study aimed to establish relationships between the independent variable of public procurement law and dependent variables of crowding-out effect, taxes, and public finance.

### 4.3. Sampling

The sample population included public procurement officials, economic experts, the public, and investors in the private sector. The diversity of the sample allowed the researcher to obtain more objective data by drawing responses from across the board. The selection of sample size was guided by Mugenda and Mugenda (2003) who indicates that a sample of between 10-30% of the targeted population is adequate for generalization. A total of 150 participants were recruited where some were from the Ministry of Health and others were investors in the private sector. With the need to ensure diversity in the sample, purposive sampling was used to access information from the right people.

### 4.4. Data Collection

The respondents were conducted via e-mail or telephone and informed about the purpose of the study. They were contacted to arrange for the convenient time to conduct the survey. They were then issued with the surveys through their respective email where they were required to fill them out and return completed survey forms via e-mail. The researcher used closed ended questions to standardize the respondent's responses and reduce the time they would take to complete the questionnaires.

### 4.5. Validity and Reliability

Validity entails the degree to which the results reflect the issue or subject under study. It can also be defined as the extent to which a data collection instrument measures what it intends to measure (Ngechu, 2004). In this case, the validity of the findings was guaranteed by the use of the right survey instruments with questions that were tailored to answer the research questions. The reliability describes the degree to which the findings can be replicated by another study at a different point on the same population (Neuman, 2000). Reliability was guaranteed by the choice of a large sample size.

### 4.6. Data Analysis

In analyzing the data, the researcher checked the questionnaire for completeness to make ensure that the data was consistent. Descriptive and inferential statistics were used where the analyzed data was presented in tables.

## 5. Results

### 5.1. Demographic Information

A total of 150 participants were recruited and issued with the questionnaires. Out of this number only 130 of them completed and returned the surveys representing 87% response rate. This percentage implied that the data was significant for data analysis considering that Mugenda and Mugenda (2003) indicate that a 50% response rate and above is valid. Out of the 13 participants, 100 (77%) were men while the rest were women 30 (23%). Nearly 38% of the participants were aged 26-35 followed by 30% above 46 years, 18-25 and 36-45 both at 15% each. A large portion of the respondents were officials in public procurement and finance departments in the Ministry of Health at 46%, followed by those in the private sector at 38%. The remaining were the public at 15.4%. Nearly 70% of the participants had a university education and above with the remaining having a college education and high school certificate in equal percentages. Over and above, 84% of those surveyed were German nationals and the remaining 16% expatriates. Indeed, this demographic information shows the diversity of the participants that collectively helped to improve the accuracy of the findings.

Table 2 Showing Demographic Information

| Variable | | Number | Percent |
|---|---|---|---|
| Gender | Male | 100 | 77 |
| | Female | 30 | 23 |
| Age | 18-25 | 20 | 15 |
| | 26-35 | 50 | 38 |
| | 36-45 | 20 | 15 |
| | 46+ | 40 | 30 |
| Occupation | Public procurement officials | 60 | 46 |
| | Private | 50 | 38 |
| | Public | 20 | 15 |
| Higher education | University | 90 | 69 |
| | College | 20 | 15 |
| | High school | 20 | 15 |
| Nationality | German | 110 | 84 |
| | Expatriate | 20 | 15 |

Source: own processing

### 5.2. Relationship between Public Procurement Law and Crowding-out Effect

Participants' responses to these questions were examined and summarized in tab 3 below.

Table 3 Participant's responses on public procurement law and crowding-out effect

| **Question** | **Responses Yes** | | **Responses No** | |
|---|---|---|---|---|
| PPL help delivery of public services | Number | Percent | Number | Percent |
| | 110 | 84 | 20 | 15 |
| PPL help infrastruct. facilities | 80 | 62 | 50 | 38 |

| | | | | |
|---|---|---|---|---|
| PPL support private investors | 80 | 62 | 50 | 38 |
| PPL reduce private investors | 70 | 54 | 60 | 46 |

Source: own processing

### 5.3. Relationship between Public Procurement Law and Taxes

Table 4 Participant's responses on the connection between public procurement law and taxes

| Question | Responses Yes | | Responses No | |
|---|---|---|---|---|
| PPL increased taxation | Number | Percent | Number | Percent |
| | 100 | 77 | 30 | 23 |
| PPL increased prices of commodity and projects | 80 | 62 | 50 | 38 |

Source: own processing

### 5.4. Relationship between Public Procurement Law and Public Finance

Table 5 Participant's responses on the impact of public procurement law on public finance

| Question | Responses Yes | | Responses No | |
|---|---|---|---|---|
| PPL increased int. rates | Number | Percent | Number | Percent |
| | 80 | 62 | 50 | 38 |
| PPL reduced money in priv. sect. | 100 | 77 | 30 | 23 |
| PPL incr. budget def | 90 | 69 | 40 | 31 |
| PPL impr. fin. plan. | 100 | 77 | 30 | 23 |
| PPL impr. fin. contr. | 90 | 69 | 40 | 31 |

Source: own processing

## 6. Discussion

### 6.1. Public Procurement Law and Taxes

The public procurement law stipulates that government projects above a specified threshold should be awarded to contractors through the laid down processes and procedures. While procurement in the private sector is mainly funded by shareholders and the founders or owners, the funds utilized in public procurement originate from loans and grants as well as taxation (Lynch & Kobo, 2013). When asked whether the amount of taxes on the citizens have increased due to the public procurement law that requires government agencies, departments, and organizations to publicly procure goods and services, an overwhelming 77% of the respondents affirmed with a yes. This confirms that even the public procurement officials were aware of the deleterious impact of increased government spending on projects. In fact, one of the respondents indicated that the government cannot run without taxes from the citizens.

### 6.2. Public Procurement Law and Crowding-out Effect

When asked whether the public procurement law has resulted in crowding-out effect, 62% of the participants indicated that it has reduced the amount of financial resources available to the private sector, while another 54% stated that it has reduced investment in the private sector. The responses confirm the crowding effect that is brought about by increased government spending. The responses correspond with Carlson and Spencer (1975) who found out that increased government spending through taxes or debt issuance, often impedes investment in the private sector by making it feel crowded-out. For instance, massive government spending in the health sector would effectively kick out private investors due to the lack of demand for their service. If the citizens can receive adequate health services at a lower cost, then it would not make any economic sense for a private investor to consider establishing a hospital to provide similar services. Thus, the feeling of being crowded-out arises as the investors perceive the government to have invaded in the sectors that should have been left for private investment. The responses from the participants conflict with those reported by Basar et al. (2011), Simcoe and Toffel (2011), Bazaumana (2004) and Miguel (1994) who observed that government spending increases investment in the private sector through a crowding-in effect.

### 6.3. Public Procurement Law and Public Finance

Regarding the relationship between the public procurement law and public finance, 69% of the respondents indicated that it had an increased budget deficit. The law has made it mandatory for government agencies, departments, entities, and organizations to publicly procure goods. As a result, there is increased demand for money. When the government cannot secure financing from the taxes, it resorts to loans from international financial organizations and foreign countries. This phenomenon is quite evident in developing countries where governments have resorted to massive borrowing to finance public infrastructural projects. As a result, these countries have huge budget deficits. Similarly, when asked whether the public procurement law has reduced the financial resources available for the private sector, 77% of the respondents agreed. The competition for money increases when the government increases spending on infrastructure. As a result, the lenders prefer lending money to the government as opposed to private entities which in turn

means that the private sector has a few resources to fuel investments. Similarly, the cost of capital increases, which is a disincentive to the private sector. When asked about the efficiency that public procurement law brings in the management of finances, an overwhelming majority indicated that it improves financial planning and control. The responses correspond with Maithya (2014) who found out that public procurement law, enhanced financial planning and control in public organizations. However, the present study established that public procurement regulations did not improve financial debt management. The fact that public procurement laws require the respective parties to follow the best practices and embrace the principle of accountability, transparency, fairness, and efficiency explains why the regulations enhance financial planning and control.

## 7. Conclusion

Public procurement law sets a level playing field for procuring public goods and works. The law requires public entities to embrace the best practices by observing the principles of fairness, accountability, and fairness, and efficiency.

It is for this reason that it is considered as the cornerstone of efficient financial management in the public sector. However, it has unanticipated negative impacts on the private sector and taxation. The provision in the law that requires government entities, departments, or organizations to publicly procure services when they are of a certain threshold often leads to a crowding-out effect.

As observed in this paper, massive government spending must be funded by higher taxes or loans which implies that it increases taxation on the citizens and elevates the budget deficits. Similarly, by publicly procuring key services, governments edge out the private sector as they reduce the opportunities for the investor. Although critics argue that government spending provides a foundation through infrastructural projects that in turn increase the incentives for private investment, the present study found contrary results. Public procurement laws increase government spending where government borrow excessively from the capital market that in turn increases the interest rates that, in turn, increase the overall cost of capital for investors, which eventually lowers private invest.

Over and above, public procurement law improves financial planning and control, but it does not enhance financial debt management in public institutions and entities.

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# EUROPEAN UNION REFORM AND THE NEED FOR THE REFORMS OF THE NATIONAL SOCIO-ECONOMIC SYSTEMS

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**Abstract**

*This article seeks to analyze the time-being by means of the possibilities to reform public policies (at national and European level) which concern the economic and social area.*

*The national and European social and economic well-being depends on the sustainability of the economic and social policies and on the determination to reform the system.*

*We are considering the analysis of the evolution of the governmental policies regarding the status and evolution of labor force, the pension system and the assumption of the key structural reforms for economy and public administration. The economic resources required for the reform are affected by the new challenges emerged internationally: a potential new economic crisis, the management of the developments emerged on the energy markets, the management of the withdrawal of the United Kingdom from the European Union, etc.*

**Keywords:** *economic sustainability, structural reform, pension system, social security, public policies.*

## 1. Introduction

This paperwork seeks to find answers regarding the sustainability of the long-term social policy system. Social policies are measures and actions undertaken by the state (strategies, programs, projects, institutions, legislation, etc.) which address the needs of social protection, education, health, habitation etc. In other words, social policies aim at promoting and, as far as possible, supporting social welfare. Social policies aim to change the characteristics of the social life of the community in a direction considered acceptable. The central element is the welfare of the individual, family, collectivity and generally of the society.

We do not have a well-known name of the era we are entering in, but we start to unravel its contours: instability, uncertainty, frustration, deepening of system cleavage vs. anti-system (see the election of Donald Trump at the White House and Brexit), the intensification of contesting movements, especially among young people, increased violence, very rapid changes in the political and economic context, disintegration trends at European and national level, the recrudescence of nationalist currents and racial, ethnic and religious identities, competition which leads to aggressiveness and potential conflict, weakening of the hegemonic power of the United States, the fragmentation of the international system and frequent disagreements within the Western world organization system[1].

Therefore, states and public institutions fail to cope with various and repeated tensions and crisis, which raises the number of problems apparently lacking in political and economic solutions. Economic and social uncertainty, life insecurity, aging of the population and imbalances in pension systems generate confusion and strong economic and social tensions. To all these we can add less visible elements directly in the public space, but with dramatic effects on the individual and society, such as pollution, increased price of access to certain resources and democratic institution discrediting.

Russia "tests" the European Union and NATO by opening conflicts and creating tensions in Eastern Europe (Hungary, Greece, and especially Ukraine and Republic of Moldova), and the West cannot fight back appropriately (politically and militarily). Furthermore, France and Germany and even the European Union, underlines the importance of normalizing the relations of cooperation with Russia. "the new Eastern Europe will remain captive for yet another generation in a gray neutrality area that suits Moscow". "Grey area Europe", namely an Eastern Europe which is more under the influence of Russia than of the European Union, re-draws the political map of the continent and deepens the gap between the West and the East. Therefore, the Eastern Partnership countries and the limits of the West advance towards Russia are now the stake of the re-establishment of the new European order. While the gray area will be reconfirmed for another generation. This is the price of peace with Russia.

It would be interesting to see where a "re-founding speech" would come from nowadays, in the sense of a new European Union argumentative

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[1] Valentin Naumescu - Criza Uniunii Europene și ordinea globală în era Trump, Trei Publishing House, 2017

platform[2]. Here are some variants proposed on the continent, none of them perfect, each with its specific interests and limits:

- Cameron version, namely the speech for staying in the EU based on the stimulation of the fears about increasing costs and economic loss in case of Brexit, but at the same time on the political integration stopping. It will be tested soon after March 29th, 2019.
- Merkel version, based on the reiteration of the political and financial solidarity obligations of the Member States in relation to the compliance with the decisions of the European Union, the most recent example being the acknowledgment of refugee quotas;
- Baltic version, based on the fear of Russia aggression and on maintaining European and Euro-Atlantic unity as a guarantee for limiting Moscow expansionist inclinations;
- Van der Bellen version (after the name of the new president of Austria, Alexander Van der Bellen), based on an intense pro-European federalist speech and on an ecological component, on exploiting fear of extreme-right ascension, but also on the opposition to the TTIP, namely to the USA-EU transatlantic agreement on creating a huge trade and investment free trade area, which, according to the Austrian leader, is against Europe's economic, social and environmental interests;
- Two-speed Europe version (respectively the select club and the periphery), generally supported by the competitive countries in the North-West of the European Union, based on accepting the functioning of groups with different parameters within the European Union and on the maintenance or even consolidation and establishment of these differences between Member States, a vision based essentially on the economic, political, social, cultural and administrative realities on the ground;
- The assistant version, which the poor (southern) Europe believes in, based on the idea that the European Union is a bag of money that should be shared generously from Brussels to indebted, non-performant or corrupt economies such as Greece, Romania, Bulgaria etc.;
- Corporate version or generically, "Volkswagen" version, based exclusively on the commercial interest of large companies, of exports on a unified market (without distinctions and political criteria), on the support of the connections with the United States (including TTIP), but also on the resumption of business with Russia, namely on a minimalist, economic liberal and capitalist vision on Europe.

We believe that in the absence of a political outgrowth of the European Union, accepted by a reasonable majority of citizens and European societies, it is unlikely that the next generation still have enough arguments to explain why the 28 Member States should remain together, to pool resources and to obey a single command center (even if they have a share of representation within the decision-making progress), and the entry into the age of sovereign referendums to end the most beautiful and idealistic project of modern Europe.

## 2. Developments in social assistance

Social assistance services are addressed only to those individuals or groups in difficulty. Social assistance service includes both social services provided by state institutions, and non-governmental organizations. Protecting those naturally disadvantaged categories such as disabled persons, orphans, widows, the elderly, children, poor persons, appears as the central objective of social insurance and social assistance services, by focusing the state's activity at central and local level by specially set up institutions, vested with authority in this direction[3].

The legal framework in the field of social assistance has been developed since 1990, starting with the legislation in the field of child protection. Subsequently, the general framework of the national social assistance system was defined and legislation was drafted for the various disadvantaged social categories: children, individuals with disabilities, low-income individuals and families, victims of violence and human trafficking etc. The elderly people benefit from Law no. 17/2000 which regulates their access to social and medical assistance services. The national social assistance service was initially described by Law no. 705/2001 and redefined according to Law no. 47/2006, which established the organization, operation and financing based on the European principles of granting social assistance in order to promote social inclusion process. Currently, the national social assistance service, regulated by Law no. 292/2011 – Social Assistance Law, is defined as a set of institutions, measures and actions whereby the state, represented by the authorities of the local and central government authorities, as well as civil society interfere in order to prevent, limit or remove temporary or permanent effects of the situations that can generate marginalization or social exclusion of the individual, family, groups or communities[4].

The effects of these evolutions can be summarized as follows:

- the increase of the total number of retirees from 3.58 million in 1990 to 5.223 million in March 2018 (+45.89%)[5] under the decrease of the number of employees from 8.156 million in 1990 to 6.303 million of employees in September 2018 (- 22.71%)[6];
- the total number of contracts registered with the

[2] https://cdn4.libris.ro/userdocspdf/761/Criza Uniunii Europene si ordinea globala in era Trump.pdf
[3] National Council for the Elderly, Study - Asistența socială a persoanelor vârstnice (Social assistance for the elderly), 2018, p.4
[4] CNPV – op.cit., p.6
[5] data of the National Institute of Statistics (INS)
[6] data of the Ministry of Labor

Ministry of Labor, namely the employees, reaches 6,303,522 contracts, of which 5,821,822 are for indefinite term, and 481,700 are for definite term.

- the demographic dependency ratio increased from 50.1 (as of January 1st, 2017) to 50.9 young persons and elderly per 100 adults (January 1st, 2018). The experts expect a deepening of the demographic decline of Romania over the coming decades. Therefore, the population of Romania will reach 14.5 million inhabitants in 2050, according to a report of the United Nations (UN), published in July 2015[7].
- in the second quarter of 2018, the average state social insurance pension was of RON 1073, and the ratio between the average nominal net social security pension for old age with full retirement contribution (free of tax and social health insurance contribution) and the net average earning was of 48.2% (compared to 51.3% in the first quarter of 2018)[8];
- According to the data published by Eurostat, in 2016 Romania ranked fifth among EU countries as regards the rate of replacement of salary with pension (by excluding other social benefits) with a rate of 0.66 – i.e. the pension represents two-thirds of the salary. Obviously, the situation is a little better for retirees if we took into account a series of facilities they benefit from everywhere in Europe. Luxembourg (0,88) was ranked above us, a particular case in that there are very many people from neighboring countries working there; it was followed at a short distance by Italy (0.69), France (0.68) and Hungary (0.67)[9].

The indicator of the pension replacement rate is defined by Eurostat as being the report between median value (most frequent) of pensions of persons between 65 and 74 years old and the median salary earning of those between 50 and 59 years old. The indicator is based on the EU –SILC standard, on European statistics on income, social inclusion and living conditions.

Notwithstanding, we can consider that the real reform of state social insurance starts with law no. 19 of 2000, which enables the access to the social insurance system of all income-producing persons, without being limited only to the holders of labor agreements.

## 3. Labor relations and occupational health

Many of the jobs created in the current global economy[10] are ecologic jobs, the so-called green jobs, as well as jobs of the industries created to mitigate negative impact on the environment, by developing and implementing alternative technologies and practice. While green jobs are welcome because they provide new employment opportunities, it is important that they are set up and monitored, so that the new dangers and risks that may arise are known and removed or mitigated.

Furthermore, education plays an important role in developing knowledge/skills in the field of hygiene and body integrity, for those integrated in the Romanian education system.

The occupational health and safety is perhaps the most important chapter of the EU policy on employment and social business[11]. The main purpose of this chapter is the prevention of potential shortages within the labor system, so that human resource activity can work with maximum efficiency. Human resource is at the forefront, the most important goal being the protection of life, integrity and health, as well as the prevention of accident risks and occupational illnesses.

It is well known that the scope of the "Community strategy 2007-2012 on health and safety at work"[12] was permanent, sustainable and homogeneous decrease of the accidents at work and occupational illnesses. Notwithstanding, within the European Union:

- Every year, over 3 million employees suffer a work accident involving absence of more than 3 days from work and around 4000 employees die in the same type of accidents;
- 24.2% of the employees believe that work can affect their health and safety;
- A quarter of the employees consider that their work affects their health [13];
- Over 3% of the gross domestic product of EU represents the level of direct and indirect costs generated by medical leave;
- Last but not least, social insurance costs that can be related to occupational diseases or work accidents are very high.

By taking into account all these aspects, National strategy on health and safety at work for 2018-2020"[14] is correlated with EU strategic directions and with the "European Pillar of Social Rights"[15], a document that takes into account the dynamics of recent changes at EU level, as well as the changes in the labor market. Therefore, according to the pillar, workers are entitled

[7] data of the National Institute of Statistics (INS) https://www.economica.net/populatia-romaniei-declinul-demografic-s-a-accentuat-in-iulie-din-cauza-cresterii-mortalitatii_158202.html#n

[8] https://a1.ro/news/social/date-actualizate-pensii-2018-cati-bani-primesc-pensionarii-din-romania-id800787.html

[9] http://cursdeguvernare.ro/rata-de-inlocuire-pensiilor-indicatorul-ne-plaseaza-topul-european.html

[10] National strategy in the field of the occupational health and safety for the term between 2017-2020

[11] Policy based on Article 137 of the EC Treaty.

[12] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of February 21st, 2007 called "Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work" [COM(2007) 62final].

[13] European study on labor conditions, 2010

[14] Government Resolution no. 191/4.04.2018 for the approval of the National strategy in the field of occupational health and safety for the term between 2018-2020

[15] European Pillar of Social Rights, EC 2017, chapter 2

to a high level of protection of their health and safety at work.

In this context, general goals of National strategy on health and safety at work for 2018-2020 are:

- a better implementation of the legislation on health and safety at work, especially in microenterprises and SMEs;
- the improvement of the safety and of the protection of workers' health, especially of those from economic activities of risk, in the priority areas of action, with emphasis on the prevention of occupational illnesses;
- the simulation of joint actions with social partners, by the awareness and involvement in the management of health and safety issues at work and the materialization of an efficient social dialogue;
- the appropriate management of the issue of older workers in the context of the general phenomenon of population aging, respectively of active labor force.

The specific goals of the National strategy on health and safety at work for 2018-2020 are:

- the improvement of the legal background of the health and safety at work;
- the support of the microenterprises and of the small and medium sized enterprises in terms of the compliance with the legislation on health and safety at work;
- the improvement of the process of observing the legislation in the field of health and safety at work by actions of the authorities with duties in the field;
- the approaching of the phenomenon of labor force aging and the improvement of occupational disease prevention;
- the improvement of the collection of statistic data
- the consolidation of the coordination with national partners to reduce accidents at work and occupational diseases.

These specific goals shall be achieved according to the National actions plan for the implementation of the national strategy on health and safety at work for 2018-2020 which is an integral part of this document.

## 4. Evolution of the labor force

In the short term, it is expected that the labor force reaches 1.1 mil. employees if the economy increases at the forecasted rate and no measures are taken to increase the employment rate. At the same time, it can be noted that there are large differences between the counties in what concerns the labor supply and demand. Therefore, the counties with high demand and low labor supply are the following: Brașov, Bucharest, Cluj, Constanța, Ilfov, Prahova, Timiș, Arad, Maramureș and Sibiu. While at the opposite pole, the counties with low demand and generous supply of human resources are Harghita, Ialomița, Mehedinți, Sălaj, Teleorman, Vaslui, Vrancea, Bacău, Buzău, Dâmbovița, Galați, Gorj, Mureș, Olt and Suceava.

Therefore, Romania's gross domestic product by business area is as follows:

Table 1: Romania's GDP on business areas

| | BUSINESS AREA | % in GDP |
|---|---|---|
| 1 | Industry (no constructions) | 27 |
| 2 | Constructions | 6 |
| 3 | Wholesale and retail trade, transport, accommodation and food services | 20 |
| 4 | Information and communication | 6 |
| 5 | Financial and insurance activity | 3 |
| 6 | Real estate activities | 8 |
| 7 | Professional, scientific and technical activities, administrative and support activities | 8 |
| 8 | Arts, entertainment, leisure, other service activities | 4 |

Source: PwC, Coalition for the Development of Romania, Labor Force Barometer, 2018

In what concerns labor productivity, our country is at the bottom of the list among European countries, but, however, it has the highest growth rate. According to a study performed by PwC, Coalition for the development of Romania, the following aspects are noted between 2008-2016: If labor productivity in Great Britain fell by 8.4%, in Spain also declined by 1.1% and in Italy by 4.7%, then in Germany there was a growth rate of 0.6%, in Poland increases by 17,7%, in Bulgaria by 15.9%, and in Romania the growth rate is of 23.3%. However, productivity rate adjusted by salary level (the value added divided by the personnel

costs) decreased in Romania in most of the business area due to disproportionate salary increases[1].

It is well known that net salaries increased significantly between 2017-2018, partially due to the increases in the public administration.

Table 2 Evolution of average salary 2015-2018 EUR net / month

| Year | Average salary Euro | Increase % |
|---|---|---|
| 2015 | 476 | - |
| 2016 | 530 | 11.3 |
| 2017 | 585 | 10.5 |
| 2018 | 596 | 1.7 |

Source: INSSE – Online Tempo

In terms of the average salary in 2018, the administrative sector is ranked third after information, communication and finance. Despite all the increases, in 2017, there was the highest number of vacancies according to the economic activity which was carried out.

Table 3: Net salaries on business areas

| No. | Business areas | € net per month |
|---|---|---|
| 1 | Information and communication | 1,195 |
| 2 | Finance | 1,047 |
| 3 | Public administration | 921 |
| 4 | Mining | 797 |
| 5 | Health | 770 |
| 6 | Education | 614 |
| 7 | Trade | 519 |
| 8 | Arts | 502 |
| 9 | Agriculture | 463 |
| 10 | Constructions | 435 |

Source: INSSE – Online Tempo

Table 4: The percentage of vacancies per business areas (2017)

| No. | Business area | Vacancies % |
|---|---|---|
| 1. | Information and communication | 4 |
| 2. | Constructions | 3 |
| 3. | Industry | 31 |
| 4. | Health and social assistance | 18 |
| 5. | Public administration and defense | 17 |
| 6. | Wholesale or retail trade | 10 |
| 7. | Transport and storage | 6 |
| 8. | Education | 5 |

Source: INSSE- Online TEMPO

More than half of private sector employers express an acute need for additional jobs to support business growth. This demand may be solved by importing labor force outside the country because the costs are lower than in case of domestic labor resources.

On the other hand, the domestic labor supply is in a continuous decline due to the decrease of the total population of the country. It is estimated that the total population of Romania is falling at a 10-12% rate in the next 20 years. Therefore, if we currently have 19.8 million citizens, it is estimated that in 2040 we will remain below 17.5 million.

Table 5: Evolution of the Romanian population and forecasts (thousands of inhabitants)

| YEAR | POPULATION (thousands) |
|---|---|
| 2015 | 19,877 |
| 2020 | 19,388 |
| 2025 | 18,927 |
| 2030 | 18,464 |
| 2035 | 17,974 |
| 2040 | 17,463 |

Source: UN - the population forecast based on the prospects of the World Population revised in 2017

It is noted that only in the last 10 years the total population of Romania has decreased by 4.8 %, while labor resources decreased by 9%, representing one of the highest rates within the European Union, according to the data provided by Eurostat.

According to the same data, a population increase is noted, as follows: In Great Britain, Germany and Italy total population, but also labor force (between 15-64 years old) increases, while total population and especially labor force decreases in Poland, Bulgaria and Romania.

The decrease of the population and of the labor force have a common cause, namely migration. In this context, it is estimated that 3.5 million Romanians live abroad. According to the data provided by OECD, 3,547,996 Romanians emigrated to other countries, Spain, Italy and the United Kingdom of Great Britain being among preferences.

The share of public sector employees has grown very much in recent years, so that, in 2016 the average number of employees in the public sector represented 26% of the total number of employees. By regions and

[1] PwC, Coalition for the Development of Romania, Labor Force Barometer, 2018

geographical areas, there are 37% in the South-West of Oltenia and at the opposite pole 24% in the North-West and Center area. In the same context, for 3.5 million employees in private sector, there are 1.5 million employees in public sector.

The inactive population aged 15 and more registered the following evolution in Romania.

Table 6: Inactive population in Romania[1]

| No. | Year | Total |
|---|---|---|
| 1. | 2008 | 7,443,681 |
| 2. | 2012 | 7,672,581 |
| 3. | 2017 | 7,480,138 |

Source: INSSE

Due to this situation, we are ranked third within the European Union as number of persons outside labor work, after Italy with a share of 35.10% and Croatia with a share of 34.40%. In our country, we have a percentage of 34.04% persons outside the labor market. At the opposite pole, we find the Netherlands with 20.3% of the population outside the labor market, Denmark with 20% and Sweden with 17.9% persons not registered in any economic activity (according to Eurostat July 2017).

## 5. Pension system – parallel between Romania and the Nordic countries

The population of Romania is an aging population, thus being outside the European trend. The percentage of retirees of Romania, in the total of the population is of 27%, slightly beyond the margin of the European Union countries. According to the data provided by the European Commission in 2017, if in the United Kingdom, at a population of 65 million inhabitants, there are 15.64 million retirees, in Germany, at a population of 81.2 million inhabitants, there are 23.26 million inhabitants, then in Romania, at a total population of 19.9 million, there are 5.3 million retirees, and in Bulgaria, at a total population of 7.2 million inhabitants, there are 2.18 million retirees. This aspect dramatically influences the rate of dependency to the pension system. According to this trend, it is estimated that the rate of dependency to the pension system in Romania in 2050 will be of 96.9 %.

If in 2016, at a population of 8.4 million employees enrolled in an economic activity, there were 5.15 million retirees, thus resulting a rate of dependency to the pension system of 61.3%. It is estimated that in 2020, for an employed population of 8.2 million, there will be 5.18 million retirees, therefore the rate of dependency to the pension system will increase to 63%, and subsequently, in 2050, the number of employees will be almost equal to the number of retirees, thus, for 5.8 million employees, there will be 5.6 million of retirees, which means that all the people working in an economic activity will support financially the retirees.

Table 7: Romanian private pension system

| ROMANIA | Retirement age: 65 men / 60 women (in 2015) |
|---|---|
| THE ORGANIZATION OF PRIVATE PENSION SYSTEM | Pillar I - Compulsory:<br>PAYG type –the system of pension points;<br>Pillar II – Compulsory/optional (2007):<br>Defined contributions, individual accounts, Contributions of 2.5 % (of 10.5% of gross salary) – 5.1% as of 2015. In December 2017, it was reduced to 3.75%.<br>There is separation between the administrator and the fund.<br>Compulsory for those under 35;<br>Optional for the other employees (35-45 years old).<br>Private pension systems – Pillar II - accumulated, throughout 2007-2017, total funds of RON 38 billion in the accounts of over 7 million participants, thus achieving an average annual yield of 9.1%,<br>Pillar III – Optional:<br>Optional pensions, contributions of no more than 15% of income, individual accounts.<br>In December 2017, the number of participants in Pillar III reached 446 thousand. |
| SYSTEM GUARANTEES | Relative performance guarantee<br>Minimum level of rate of return, calculated on risk levels.<br>Absolute guarantee: The total amount due for private pension cannot be lower than the value of the contributions paid, reduced by transfer penalties and legal fees.<br>Other security elements: Romania has available the widest range of risk control tools: assets separation, actuarial reserves, depository verification, guarantee fund, audit, minimum rate of return. The guarantee fund is intended to cover unpredictable risks and which are not covered by technical provisions. |

[1] INSSE - Tempo online - AMIGO – Inavtive population aged 15 and more, according to the education level per groups of age and residence area

| | |
|---|---|
| DEVELOPMENT OF THE MARKET AT PILLAR II LEVEL | 4.57 mio. participants – Pillar II. 12 administrators. RON 25.94 billion (about EUR 6 billion), representing 3.70% of the GDP in 2015. In December 2017 the number of participants in Pillar II had reached 7.043 mio. participants. Maximum limits for investments: 20% in money market instruments, 70% government bonds, 30% securities issued by local public administrations, 50% shares, 5% corporate bonds, 5% mutual funds. Maximum fees allowed: Max. 2.5% of contributions. Max. 0.05% / month of net assets.<br>Pillar II was seriously affected by GEO 114 of 28.12.2018. This emergency ordinance affects both private pension system and the entire Romanian economy.<br>"The costs determined by the increase to 10% of the share capital for the administrators of Pillar II are very difficult to incur, if we take into account that the new legislative provisions dramatically diminishes the maximum rate of commission within these pension systems of up to 70%1."<br>According to the new demand of the share capital of 10%, the administrators of pension funds should save about EUR 800 million, 11 times more than the current share capital and almost twice more than all the administration fees charged within these pension systems in the past 11 years".<br>At the end of 2018, the total of contributions to Pillar II was of about EUR 8.76 billion. |

**Source**: Adaptation after Dan Zăvoianu – Comparison between pillar II private pension systems and the world markets - Communication Department – CSSPP, Bucharest, July 2010

Compared to Romania, Denmark, together with Finland, Norway and Sweden, belong to the so-called northern social model, the distinctive features of which are related to the promotion of equality and full employment, public responsibilities for welfare and profitable redistribution of income by transfers and progressive taxation. Social services in these countries are provided on an universal basis.

After the deregulation of the labor market in the 1990s, Denmark has one of the freest labor markets in European countries. According to the ranking of the labor markets drawn up by the World Bank, the flexibility of the labor market is at the same level with that of the United States of America. About 80% of the employees belong to trade unions and employment funds are attached to them.

Denmark is a country with a mixed market economy and a highly developed social state, with the highest level of income equality and the lowest level of corruption in the world. Denmark is also one of the few countries in the world that manages to provide its citizens with both a flexible labor market and an old-age pension system fiscally sustainable.

**Table 8: Danish pension system**

| **DENMARK** | retirement age: 67 men/65 women |
|---|---|
| **GENERAL PENSION SYSTEM** | Denmark is one of the first countries adopting a multi-pillar pension system, consisting in both Beveridge elements (unique national pension based on residence criterion) and Bismarckian elements, occupational private pensions based on collective arrangements having the highest share. The universal nature of providing a basic old-age income, coupled with saving under a quasi-mandatory additional pension system is a guarantee that most elderly will not face the risk of social exclusion.<br>The main issue of the occupational pensions is directly connected with their substantiation on collective agreements. Contributions are not paid by individuals who are temporarily out of the labor market or who receive unemployment assistance (child raising, unemployment or illness). This aspect is fined by increased contributions to the fund components of the first pillar, but do not compensate entirely the loss of income. Therefore, there are potential improvements of the system, but, at the same time, we can consider that the shortages of the Danish social protection system are negligible in compared perspective. |
| **Pension pillar I** | Pillar I belongs to the state and is mandatory, has universal coverage and consists of two tiers.<br>The first tier is a national pension based on residence criterion (folkepension) and consists of two different elements: a) the basic amount, which is unique and depends on the term of the residence and b) pension supplement, dependent on the income.<br>The second tier consists of a number of additional funding pension schemes (and a smaller PAYG type one), with different operational structures and scopes. |

[1] Pensions Europe – which the the Association for Private Administration Pensions in Romania (APAPR) is part of http://www.ziare.com/pensii/pilonul-ii-de-pensii/pensions-europe-masurile-impuse-prin-oug-114-vor-fi-devastatoare-pentru-sistemul-romanesc-de-pensii-1547773

| | |
|---|---|
| **Pension pillar II** | This consists in quasi-mandatory funding occupational schemes. The schemes are based on collective agreements provided by social partners. Their coverage increased exponentially in the 1990s, when the private sector was formally included.<br>The collective agreements provide additional pensions to a percentage of 93% of the Danish employees aged between 30-60 (80% of the total. The rest of 20% does not pose a particularly pressing problem for the future social adequacy of the Danish pension system.<br>In case of occupational pensions, contributions are between 9-17% of gross salaries and are largely exempt from taxes. The benefits are calculated by using actuarial principles, based on paid contributions, interest rate, average life expectancy and the risk profile of the individual fund. The main problem of the occupational pensions is that they do not cover other risks of labor market. The unemployment terms do not entitle the payment of any contribution, the compensation being delegated to other schemes of the pension system. |
| **Pension pillar III** | The pillar is represented by additional voluntary pension schemes, administered by banks or insurance companies. The investment is regulated and indexing is not mandatory. The contributions are exempt from taxes and benefits are taxed. The enrollment in this pillar is very high, accounting for about one million persons. |

Source: Adaptation after Valentina VASILE (coord), Ileana TACHE, Cristiana TUDOR, Clara VOLINTIRU – The European Institute of Romania, SPOS 2011 – Study no. 4.

The complex combination of typical Danish flexicurity concept and old-age protection (which characterized the last two decades) led to the so-called Danish employment miracle. From more than 12% at the beginning of the 1990s, the unemployment rate reached only 1.7% in 2008, on the background of a reasonable replacement rate for the vast majority of the population.

With GDP/inhabitant of USD 36130 and a total population of 5.5 million inhabitants, Denmark has a total demographic dependency rate of 52.6% for 2010,40 an economic dependency rate of 28% in 2007, estimated at 40% for 2020,41 as well as an old-age dependency rate of 25.0% in 2010.

Finland has one of the most extended social insurance system of the world, which guarantee decent living conditions for all Finnish and foreign inhabitants who are legally resident. Since 1980, the system has been reduced, but remains one of the largest in the world. Created almost entirely in the first three decades after the Second World War, the social insurance system was a manifestation of the traditional Nordic belief according to which the state is not inherently hostile to the wellbeing of the citizens, but it can interfere in their benefit.

Although the inequality of the income available in Finland remains among the lowest in the EU, it has increased in recent years, despite the substantial decline in the unemployment rates after 1990 recession. As in many countries of the EU, this is a consequence of the increasing globalization and of the modification of the demographic structure.

Table 9: Finnish pension system

| FINLAND | retirement age: variable between 62 and 68 |
|---|---|
| GENERAL PENSION SYSTEM | The pension system of Finland consists of two types of pension plans:<br>a first plan of pensions coming from the performance of an activity (in connection with the earning), the scope of which is the maintenance of a reasonable income level;<br>a second basic national pension plan which aims to guarantee a minimum income for retirees with low salary or very short length of service.<br>These schemes are closely connected because the level of the national pension depends on the size of the earnings-related benefits. The management of the pensions in private sector is delegated to private pension companies, pension trusts and pension funds.<br>The national scheme provides a minimum pension based on the residence term. The retirement age for the national basic pension is 65 years old, but under certain conditions, early retirement is possible at 62 years. The percentage of retirees receiving only national basic pension is in decline. As of January 1st, 2010, national pensions are financed only from general taxes. Before this date, the employer's contributions financed only a part of the costs. |
| Pensions according to salaries | The earnings-related pension scheme includes all the employees (no income threshold), as well as those employed in their own company. The retirement age is flexible (between 62 and 68 years old), accompanied by higher increase rates for the last years of service: 1.9% every year between 53 and 62 years old and 4.5% between 63 and 68 years old instead of the standard growth rate of 1.5%. The pension is calculated based on the salaries received throughout the professional career (as of the beginning of 2005). The benefit formula includes a life expectancy coefficient that reduces the monthly pension value according to longevity increase. The individuals in groups with a higher life expectancy need to work harder to offset the impact of life expectancy coefficient. |
| Pension system financing | The financing of the earnings-related pensions represents a combination of PAYG system[1] and of advance funding scheme system based on pension contributions, both from the employers and from the employees. Approximately three quarters of the earnings-related pensions are financed by PAYG, and the advance funding scheme covers the rest. The market value of the pension fund assets reached 73% of the GDP in 2009. National pensions are indexed with the consumer price index, while earnings-related pensions are indexed by a weighted index which includes 20% of the salaries and 80% of price evolutions. Pensions expenditures represent 10.8% of the GDP in Finland, which places it slightly below the EU 27 average. Due to the relatively recent implementation of the earnings-based system, low basic pension and the low participation of older women in the labor market, the poverty risk of people over 65 years old is higher than the EU average (23% compared to 19%) and of the persons under 65 years old (23% compared to 12%). In 2008, net and gross replacement rates for a worker retired theoretically at 65 years old, after a career of contribution of 40 years, were respectively 69.5% and 61.5%. |

Source: Adaptation after Valentina VASILE (coord), Ileana TACHE, Cristiana TUDOR, Clara VOLINTIRU – The European Institute of Romania, SPOS 2011 – Study no. 4.

The challenge faced by Finland to ensure long-term sustainability of public finances (on the background of the population aging) was assessed by the European Commission as having medium risk. The long-term projected increase of pension expenditures (3.3%) is higher than the EU average (2.4%). The implementation of pension reform has moderated expenditures growth.

Sweden belongs to the Northern social model, the scope of which in terms of welfare policy is to reduce the gaps between different social groups, thus ensuring citizens protection, the opportunity to evolve and an acceptable economic standard. The eradication of social exclusion is an important target of the Swedish government, mainly delegated to the Ministry of Health and Social Affairs. The old Swedish pension systems combined both Beveridge features (as unique basic pensions financed by taxes - folkpension and pensions supplements) and Bismarck (financed by earnings-related contributions and defined benefits) – ATP. This system guaranteed a very comprehensive and generous protection in old age. In 1980s, the system started to face serious difficulties, requiring the draw up of a ten-year reform that has radically affected the OECD pension system. The new system is substantiated on various pillars, the first combining a unique minimum guaranteed pension (garantipension), an earnings-related pension with notional defined contribution

[1] Pay-as-you-go pension systems, based on the solidarity between generations, are facing growing problems in providing decent pensions. This is mostly due to the decrease of the number of taxpayers and of the increase of the number of retirees by population aging, at the same time with decreased birth rates, increased life expectancy, early retirement.

(NDC), income-related pension (inkomstpension) and a private funding pension (premiereservsystem). The occupational quasi-mandatory pensions are above all the aforementioned schemes.

Table 10: Swedish pension system

| SWEDEN | retirement age: flexible – between 61 and 67 |
|---|---|
| GENERAL PENSION SYSTEM | The reform was possible only due to the existence of the National Pension Fund (AP-Fonden), which invested ATP surpluses during the years, thus reaching the coverage capacity of 5 consecutive years of benefits. Three important goals were achieved by means of the reform:<br>a) Stabilization of long-term financial perspectives of public pension system;<br>b) Introduction of salary-related indexation, thus stopping the erosion of ATP benefits threshold;<br>c) The removal of random redistribution of the formula of the best year by means of the calculation of the assessment base over the lifetime of an individual. |
| Pension pillar I | Pillar I (state and mandatory) It includes three tiers.<br>*Tier zero* – guaranteed pension replaced in 2003 the old basic pension and related supplements. It is an universal pension, financed by taxes, unique and indexed at price level. It is designed to ensure an income source, both for individuals who are not qualified for public pension and a supplement for low income retirees.<br>*Tier one* is represented by the income-related pension (ATP) – a very sophisticated NDC system introduced in 1998 for those born after 1954 (a mixed system which applies for those born between 1938 and 1953) and which considers lifetime income.<br>The state covers the contributions for inactive periods – child raising, military service, university studies, illness and unemployment. Retirement age is flexible, a person retires any time after 61, but collective agreements and employers' attitude prevent employment after 67.<br>*Tier two* is represented by the full funding pension premiums, financed by the rest of 2.5% of the total contributions. The contributions are collected by the National Council of Taxes and administered by the Pension Premium Administration (PPM – *Premiepensiinsmyndigheten*). The new members can choose between about 800 funds. The annuities are both fixed with a minimum profit rate of 3% and variable. After the death of the individual, the assets are not inherited, but transferred to the newborns. |
| Pension pillar II | This pillar consists in quasi-mandatory occupational funding schemes which supplements pillar I.<br>They are based on collective agreements and cover 90% of the employees. The level of the contributions usually consists between 2 and 5% of the salaries. The pension plans are based either on defined contributions or defined benefits. They address private sector workers with and without training, central government and local administrations. The schemes of all the four categories were transformed from defined benefits (DB) in defined contributions (DC) for the new entrants. The schemes of the private sector are DC plans in full, but many "white collar" workers of the private sector who are already employed will receive a pension according to a previous DB plan. The occupational pension schemes for the employees of public sector are DC plans up to the income threshold of the social insurance pension system, and for what exceeds the respective threshold – a combination of DB and DC plans. The contributions are exempt from taxes as long as certain conditions are met. |
| Pension pillar III | This consists in voluntary additional pension schemes. They accumulate to old-age pension funds or insurance companies. The development of pillar three is favored by tax incentives. |

Source: Adaptation after Valentina VASILE (coord), Ileana TACHE, Cristiana TUDOR, Clara VOLINTIRU –European Institute of Romania, SPOS 2011 – Study no. 4.

Before launching the new system based on individual accounts, Swedish government launched a three-year information campaign addressed to potential participants. In this respect, mass media means and Internet were extensively used. Initially, the members received the annual situation of the account for the pension scheme – "orange envelope", together with a brochure containing explanations on the new system. Such a campaign was crucial for the increase of the financial culture and individual responsibilities.

The public pension system is under the responsibility of the Ministry of Labor and Social Protection. The National Insurance Council (Försäkringskassan) administers guaranteed pension and income-related pension. Swedish system is often considered as one of the most stable and consolidated systems of the world.

## 6. Conclusions

The best practices emphasizing success examples in programs for activating labor force, consider that there are few key interventions for the increase of the participation on labor market. Here are few of them:

- early interventions for the prevention of long-term unemployment among young people;
- profiling of vacancies and counseling and/or assistance in finding a job;
- requalification of labor force over 50 years old, especially in what concerns digital skills;
- subsidies for employers;
- direct employment schemes;
- flexibility of time and labor conditions, gradual retirement;
- actual correlation of national minimum wage with actual labor productivity;
- "brain import" from abroad;
- partnerships between state authorities, business environment and community, especially at local level.

2018 began with the enforcement of certain legislative amendments[1] which affect most of the population, but also the business environment. The most important amendments are: the transfer of social contributions (pensions, health) from the employer to the employee, but the amounts will still be retained and delivered by the employer; the increase of the national minimum wage from RON 1450 to RON 1900; the decrease of the income tax from 16% to 10% and the decrease of the share of contribution to pension Pillar II from 5.1% to 3.75%. The increase of the national minimum wage, without consulting business environment and studies of impact on the evolution of labor productivity, generates inflation and unemployment. Furthermore, at the end of the year, Government Emergency Ordinance 114 endangered the Romanian business environment, long-term sustainability of domestic and foreign investment of Romanian economy.

Various multinational companies which have activated in Romania until 2018 want to withdraw. In this background, successful private companies of the West side of the country announced their withdrawal and therefore, people working there need to look for a new job[2]. The representatives of the companies blame labor fluctuation, in the first place. However, other serious causes are legislative amendments, but also the costs of utilities and salaries which, according to them, have grown alarmingly. For example, Rieker Swiss company, which owns a shoes factory in Lugoj, is the last on the list of those announcing they are leaving Romania. Almost 700 people were employed there, most of them of the neighboring villages. The representatives of the company motivated the leaving from Lugoj by means of the lack of labor force, but also by means of high cost of the transport of the employees from neighboring localities. Furthermore, in the last three months, they recorded an increase by 35% of the utility costs. The representatives of the factory said that the fluctuation of the labor force and salary costs caused a rebound of the business. Unfortunately, the company of Lugoj is not single. All alarming information (and maybe substantiated) on the impact on the business environment are not isolated, the entire business environment (from banking system to energy system companies and to the millions of private individual investors who contribute to pension pillar II) showed dissatisfaction on the frequent legislative changes regarding both the economic and tax environment and the defining elements of the rule of law.

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# ECONOMIC, SOCIAL AND POLITICAL REALITIES AND PERSPECTIVES IN THE UNSTABLE EUROPEAN CONTEXT

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**Abstract**

*After a complex year, with deep trends of geopolitical changes, the new year 2019 promises to be full of events in what concerns the social, economic, political and even geostrategic area. The key events of last year (the uncertain course of the Brexit, the profound lack of reforms at EU level, the year-end social events of France, the hostile manifestations of the Russian Federation towards the West, the oscillating evolution of certain European states in what concerns the values of the rule of law, the economic war between China – the United States, the Presidency of Romania to the EU Council etc.) shall greatly influence the evolution of the economy at the European and global level. This paperwork aims to analyze the main consequences of recent events on short term evolutions from the economic, social and political perspective.*

*We also aim to analyze the realities and main potential evolutions in what concerns the economic, social and political status of this year of turning for the European Union.*

**Keywords:** *public policies, Brexit, geopolitical changes, economic sustainability, economic crisis*

## 1. Introduction

The past few months, respectively the term between the end of 2017 and the beginning of 2019, represented a period of great transformations and evolutions from the economic, social, politic and military perspective. The economic war between the United States and China, the horizons of a new cold war between the Russian Federation and the United States, on the one hand, between Russia and NATO on the other hand, as well as the uncertain evolutions within the EU, all of them point out a period of instability from a geopolitical perspective with major influences in the economic area and traditional alliances. Economic unions, governments and military alliances, that seemed unshakable, are nowadays on the moving sands making any prediction not only uncertain, but risky. The ever-growing ascension of populism and illiberal ideas increasingly removes populations and their actors from the principles of good governance.

In a long-term perspective, the basis of good governance is represented by several defining elements, such as[1]: The participation of citizens and their increased involvement in the decision-making system; Equity and fairness in law enforcement; Decency, responsibility and transparency, aiming at making the taken and implemented decisions available to the citizens. Efficiency and effectiveness, by referring to the care employed in the use of human and financial resources.

The functional categories the consequences of which are reflected in a good governance are the following: civil society, political society, government, bureaucracy, economic society and judiciary system. James Madison said (Federalist Paper no.51) "If men were angels, no government would be necessary". Once we agree that people are far from the behavior of angels, we also agree that we need something or someone to lead us or at least to coordinate our activity. "For the first time in our history, in a multipolar world, too many factors become anti-European, or, at best, Eurosceptic", Donald Tusk wrote in the letter addressed to the 27 leaders of the countries that will remain members of the EU after Great Britain will have left the European Union. The President of the European Council also proposed the topic of the "internal threat of increasing anti-EU feeling, nationalist and increasingly xenophobic". "National egoism becomes an attractive alternative to integration", and centrifugal trend and "the decline of the confidence of the pro-European elites in political integration, as well as the doubts on the fundamental values of liberal democracy" are other topics proposed by Donald Tusk.

And yet, why do we use the notions of "good governance or liberal democracy" and "illiberal democracy"? An explanation[2] would be the increasing of the authoritarian accents in many countries of the world, including in countries with old, solid democratic traditions. Authoritarianism may have its roots in:

- for states, the increasing of the challenges related to terrorism, other unconventional threats (climate

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[1] *www.anosr.ro/wp-content/uploads/2012/09/4-Ce-inseamna-buna-guvernare*

[2] Daniel Dăianu - http://cursdeguvernare.ro/daniel-daianu-democratie-liberala-vs-democratie-iliberala-de-ce-cresc-inclinatiile-autoritariste.html

change, immigration, border protection, cyber security, etc.), economic insecurity. All these increase the inclination to use direct means of control in the economy and society, in general, the use of means that can go beyond the democratic institutionalized control.

- economic insecurity, which is linked to the underestimation of the less good effects of globalization. In this context, it is worth mentioning the economic ascension of new powers (China, India), which changes the balance of power in the world. Robert Kaplan talks in this respect of "The Return of the Marco Polo World"[3]; it is about the proliferating trade conflicts.
- there is a fear of unknown (of all kinds) and there is the need of people of "comfort" in the environment in which they live in a stable way, which cannot be dissociated from habits, feeling of belonging to communities having identities shared by their members. (see Jochen Bittner, a well-known columnist at the *Die Zeit*, who talks about the need for "*Heimat*", which would give consistency to the notion of *patriotism*.
- social /societal fragmentation and anxiety produced by globalization, new technologies (i.e.: *big data*, which greatly emphasize the power of some companies) strengthen the inclination to demand protection from the state, which can accentuate interventionist policies.
- there are institutional/political structures characterized by a sole governing party.
- there is a de-connection between economic evolutions and social and political ethos characterized by anger, protest against elites, political establishment, in many countries[4];
- the impact of fake news, by challenging the "truth" (scientific side of other nature) and, not finally, the rejection of "experts" – whose advice would be behind failed public policies (i.e.: the regulatory and supervisory deficit of the financial markets).
- a genuine desire for power in the political area combined with the consolidation of some structures to maintain the status quo that privileges some interest groups can be added to this series of explanations.

Reaction of rejection of mainstream parties by an important part of the society in liberal democracies can be interpreted by several grids: the impact of the Great Recession (the financial crisis) and unilateral public policies in recent decades, which have increased social cleavages; a certain institutional sclerosis (in the spirit of the analyzes of Douglas North, Mancur Olson Jr), which, as we can note, takes place not only in less evolved societies, in terms of level of economic development[5]; the exceptional nature of our times, with a new industrial revolution which seems to confuse political and intellectual elites.

In such a society we live that, in the spirit of correct political thinking, to appreciate an individual or his/her work is the acknowledgment of the inequality between people. The idea of awarding prizes for certain merits is also condemned because the award granted to some persons would mean others feel "offended" and "inferior"[6].

In the spirit of all the aforementioned, we will take the risk to analyze the events that have already happened, by trying to take a look at the not too distant future, starting from paradigm: we are alone and maybe against all (Great Britain) or we are together within the European Union (France) and we accept. And if we accept, then what is the trend and what we are heading for?

## 2. An evolution under changes and rectifications (2017 – 2018)

The economy of the European Union faced several significant and particularly damaging challenges between 2017-2018: terrorist attacks and geo-political tensions, immigration flows, Brexit, risks associated to banking systems, etc. Compared to the European Commission[7] forecast which considers that the real GDP of the EU is projected to slow its growth rate to 2.3% in 2018 and 2.0% in 2019. In what concerns the Euro zone, the economic growth recorded in 2017 was of 2.3%. Notwithstanding, the European economy recorded a sustained 2.4% growth, largely driven by consumption, while the investment did not have the expected evolution. The 2017 forecasts of the IMF estimated a global economic growth of 3.9% in 2017, both for 2018 and for 2019. According to the IMF, the developed countries were supposed to record an average growth of 2.5% in 2018 and respectively 2.2% in 2019, while the developing countries will have an average advance of 4.9% in 2018 and 5.1% in 2019. The economic growth of China was revised to 6.6% for 2018, with 0.1 pp over the estimation of October 2017, on the background of the expectations on the continuation of the implementation of the economic growth policies. Notwithstanding, the risk of slowing the economic growth of China is still relatively high, provided that the growth is largely based on state incentives, corroborated with crediting expansion and slow progresses in debt reduction across companies. Therefore, for 2019, the growth rate of the Chinese economy is projected to fall to 6.4%.

[3] Robert Kaplan, "The Return of the Marco Polo World, Random House, 2018. See also Kishore Mahbubani, "Has the West Lost It?", London, Allen Lane, 2018

[4] Ruchir Sharma, "Prosperity is no lock on popularity", New York Times, 27 April, 2018

[5] See Steven Levitsky and Daniel Ziblatt, "How Democracies Die", New York, Viking, 2018

[6] Matei Vișinec, O nouă dictatură-gândirea politică corectă

[7] The Government of Romania, The convergence program 2018-2021, April 2018

Table 1: The evolution of the world economic growth (%)

| | Indicator | 2017 | 2018 | 2019 |
|---|---|---|---|---|
| 1 | World real economic growth (%) | 3.8 | 3.9 | 3.9 |
| 2 | Real economic growth – European Union (%) | 2.4 | 2.3 | 2.0 |
| 3 | Economic growth –Euro zone (%) | 2.3 | 2.4 | 2.0 |
| 4 | Inflation rate –European Union (%) | 1.7 | 1.9 | 1.8 |

Source: European Commission and International Monetary Fund

For 2018, IMF estimated a 2.4% economic growth rate within the European Union (actually it dropped by a percentage point), and for 2019 the dynamics of the real GDP was to record a slowdown of 2.0%. In what concerns the world economic growth pace (EU excluded), the European Commission forecast shows an improvement in the economic perspectives, by estimating for 2018 and 2019, the same annual growth rate of real GDP of 4.1%, exceeding by 0.3 pp the 3.8% increase of 2017.

According to the forecasts of the European Commission, the basic inflation rate which excludes the volatility of energy and non-processed prices to remain moderate, given that the matter of the under-utilization of the labor force is slowly moderate, and salary pressures remain within reasonable limits. Global inflation will continue to reflect the significant influence of energy prices, a moderate growth of it being predicted for the next period. In the Euro zone, the inflation reached 1.7% in 2017, and is to grow up to 1.8 % in 2019. Furthermore, the price projection of Brent crude oil was revised upwards, from 52.8$/barrel in 2017 to 58.2 $/barrel for 2019.

Annually, the European Union GDP recorded an advance of 1.9% in the third quarter of 2018, compared to the similar period of 2017, while the GDP of the Euro zone increased by 1.7%. The Member States with the highest annual growth rate were Poland (5.7%), Latvia (5.5%), Hungary (5%), Slovakia (4.5%) and Romania (4.1%). All EU Member States have experienced economic growth in the third quarter of 2018, compared to the similar period of 2017, the lowest "performance" being recorded by Italy (0.8%). For 2020, The EU executive indicates an advance of 3.6%

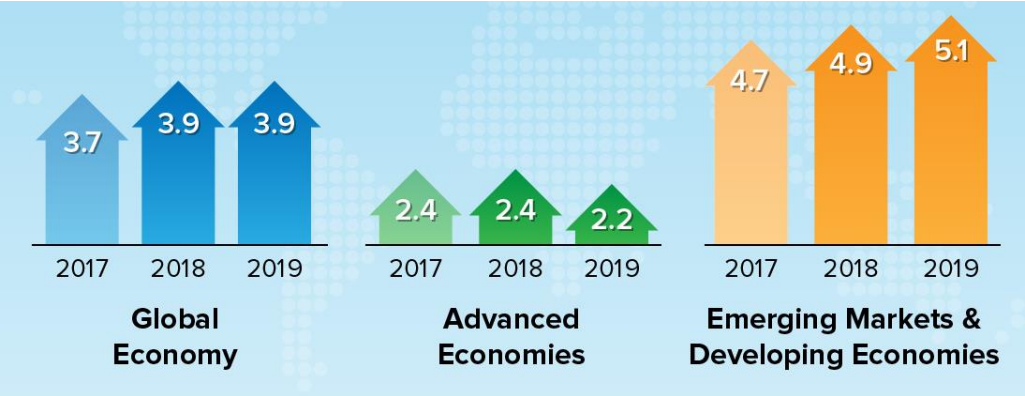
The economic evolution of Germany, the main engine of the European economy, was positive for 2017, the growth rate of 2.2% (even if a 2.3% growth had been predicted) representing an increase of 0.3 percentage points compared to 2016. In the second quarter of 2018, the German GDP grew beyond expectations, by recording a 0.5% advance compared to the first quarter of the same year[8]. This growth was due to the increase of the expenses of the state and households, on the one hand, as well as to the increase of the investment. If the German minister of economy estimated a 1.8% growth in the autumn of 2018, at the end of the same year 2018, he revised the growth forecast for 2019 to 1%, following the effects of the Brexit, commercial disputes and international tax background, AFP communicates.[9]

Furthermore, the maintenance of the dynamics of the GDP in 2018 was predicted for Italy, at the same level with the one of 2017 (respectively 1.5%), followed by a slight deceleration in the rhythm of the growth in 2019 of up to 1.2%. In January 2019, the economic date on the Italian economy were again modified and Italy entered in recession for the second quarter[10]. In what concerns France, after an acceleration of the economic growth in 2017 compared to 2016 (1.8% compared to 1.2%), growth rates of 2.0% were estimated in 2018 and a slight deceleration of it in 2019, up to 1.8%. The data rectified in January 2019 indicate a slowdown of France growth rate. Despite this, it is estimated that France will become the sixth world economy, going beyond Great Britain, with the United Kingdom leaving the European Union[11]. As we have already tried to prove, the data of the International Monetary Fund and of the European Commission were rectified in the last quarter of 2018. In this background, for example, if in April 2017, IMF estimated that, in 2018, Malta and Romania will record the biggest economic growth of Europa, of 5.7% and, respectively, 5.1%, in the report published on October 9th, IMF revised downwards the forecasts on the Romanian economy up to 4% in 2018, by 1.1 percentage points less than the estimation of spring, by predicting that in 2019 Romania is to record an economic growth of 3.4%, by 0.1 percentage points less than the estimation of April.

In the Word Macroeconomic Report, called "Less Even Expansion, Rising Trade Tensions", the experts of the International Monetary Fund draw the attention on the enhancement of the risk factors for global economy, such as the escalation of trade tensions between major economic blocs and geopolitical uncertainties. Therefore, the IMF experts forecast the deceleration of the annual dynamics of international trade from 5.1% in 2017 to 4.5% in 2019. Furthermore, FMI projected an increase in production by 3.9% in 2018 globally, by 2.5% in developed economies and 4.9% in emerging economies.

[8] http://www.bursa.ro/pib-ul-germaniei-a-crescut-peste-asteptari-67161533
[9] http://www.economica.net/germania-prognoza-de-crestere-economica-a-fost-reizuita-in-jos-la-1prc-de-la-1-8prc_164205.html
[10] https://www.gds.ro/Actualitate/2014-08-06/Italia+a+intrat+in+recesiune+in+al+doilea+trimestru+al+acestui+an/
[11] https://www.zf.ro/business-international/economia-frantei-a-doua-ca-marime-din-zona-euro-a-incetinit-in-ultimul-trimestru-al-anului-trecut-15007210

Figure 1. World annual economic growth rate (%)




Source: world-economic-outlook-update-july-2018[1]

## 3. Great Britain and the stages of the Brexit

On June 23rd, British citizens voted in favor of leaving the European Union. On June 23rd, 2016, with 51.9%, for leaving and 48.1% for staying, the result of the referendum on Brexit undoubtedly shocked Europe[1]. David Cameron resigned the day after he lost the referendum and Great Britain received a new prime-minister – Theresa May who declared that she would respect the people's will and that "Brexit is Brexit".

The meeting of the Council of Europe of June 28th, 2016 dealt with the results of the referendum of the United Kingdom.

The informal reunion of the 27 states or government heads of the EU took place on June 29th, 2016.

A new informal reunion took place on December 15th, 2016, where the 27 leaders and presidents of the European Council and European Commission formulated a statement to declare they were ready to start the negotiations with the United Kingdom, as soon as it would deliver the notification under article 50.

March 29th 2017 – the United Kingdom officially calls down article 50 of the Treaty of Lisbon in order to leave the European Union. The Treaty of Lisbon, the constitutional basis for the functioning of the European Union, allows Member States to withdraw from the Community bloc. The five paragraphs of article 50 briefly explains the procedure to be followed for leaving the EU. Article 50 has never been called down so far.

April 29th, 2017 – the special European Council – the first summit since the official launch of Article 50 by the United Kingdom. Guidelines for future talks on Brexit are being adopted.

June 19th, 2017 – the negotiations between the European Union and the United Kingdom are being started, focusing on citizens' rights, financial account, the border of Northern Ireland, etc.

July 20th and August 31st, 2017 – other rounds of negotiations take place, by being focused on citizens' rights.

September 26th, 2017 – the president of the European Council, Donald Trusk meets the British prime minister, Theresa May in London, while the 4th round of negotiations takes place in Brussels.

Other three rounds of negotiations took place on October 12th, November 10th, 2017 and February 9th, 2018, where matters on the transition period, Ireland and finding of solutions for the avoiding of strictly controlled borders and the governance of the withdrawal agreement were discussed.

February 28th, 2018 the European Commission publishes the draft of the withdrawal agreement between the European Union and the United Kingdom.

March 7th, 2018 President Donald Trusk issues a draft of guidelines on the European Union relations with the United Kingdom after the Brexit.

June 19th, 2018 - the Joint Declaration of the European Commission and of the United Kingdom on the progress recorded in March 2018 was made.

November 25th, 2018 – the extraordinary reunion of the European Council where the 27 EU leaders approve the draft agreement for the withdrawal of the United Kingdom and the political statement draft on the future relations between the EU and the United Kingdom.

December 5th, 2018 – the European Council launches the procedure for the signing and conclusion of the agreement on the withdrawal.

January 11th, 2019 – the European Council adopts the decision on the signing of the withdrawal approval.

When all the formalities concluded by the European Council were concluded on February 7th, 2019, President Donald Trusk and prime minister May agreed to continue discussions. The deadline for signing the separation agreement is March 29th, 2019.

[1] www.imf.org/en/Publications/WEO/Issues/2018/07/02/world-economic-outlook-update-july-2018

[1] "EU Referendum Results," *BBC News*, http://www.bbc.com/news/politics/eu_referendum/results, (accessed on January 31st, 2019).

Great Britain joined the European Union on January 1st, 1973 and it is nowadays the second largest economy and the third most populated country of all the Member States.

Which were the causes leading to Brexit? Of course, the answer is particularly complex, by involving various aspects, such as: issues on immigration, economy, nationalism and democracy which have played a decisive role throughout the campaign. In addition to all these, there is another fundamental, worthy of attention, accumulated over time issue: dissatisfaction and disillusion with the political establishment, the way in which traditional liberal politics is practiced, along with antipathy towards political actors.

The British anti – political feeling was undoubtedly stronger than before in 2016, but there was also a populist movement with a strong Eurosceptic agenda to capture the voters' attention. And here we are talking about the UK Independence Party, UKIP, a populist party committed to withdrawing from the European Union and which made use of this state of mind, by playing an essential role both in the initiation of the referendum and in the balancing of the outcome of the vote.

When David Cameron promised, during the general election campaign of 2015, that he would organize a referendum over the EU, very few would have anticipated that his engagement would result in months of intensive campaign during which politicians would turn against each other in the most imaginative ways. It was not even suspected that the exit/staying ratio could become a new significant political cleavage. After gaining a new mandate in May 2015, Cameron proposed a plan of renegotiating the relation between the United Kingdom with the EU, which included: changes in payments in favor of migrant welfare; financial guarantees and easier ways for the UK to block EU regulation. It was already too late.

The pro and anti-European sides brought, during the debate for the referendum and in the two years since its results, a series of arguments for and against staying in the community bloc, all media agencies in the world report.

Table 2: Arguments for and against Brexit regarding the main topics of interest

| No. | Issues approached | Arguments pro Brexit (Anti-EU) | Arguments anti Brexit (Pro-EU) |
|---|---|---|---|
| 1 | Sovereignty of Great Britain | The British Parliament no longer has sovereignty. Provided that the EU militates for an "even closer union" and for a deeper economic integration, especially after the Euro zone crisis, it is better for London to leave before the relations become even stronger. | In a globalized world, every country has to work as closely as possible with the other countries in order to flourish economically. The desire for isolation, which became an English stereotype, will undermine Great Britain. Furthermore, the British Prime Minister has already obtained in Brussels a number of exceptions to EU treaties and directives. |
| 2 | Defense policy | Great Britain could soon be forced to contribute to an EU army. A situation in which it shall be bound to give its consent in this respect, in return for a series of concessions. This must be prevented because it could undermine the independent military force of Great Britain. | The European countries face together terrorist threats from the Islamic State and an increasingly aggressive Russia and economic threats of China. By working together, they can fight against these challenges – an effort which would be undermined if Great Britain turned its back on the EU. |
| 3 | European legislation vs. British legislation | Too many British laws are conceived abroad, by means of decrees from Brussels and decisions made by the European Court of Justice; the British courts have to become sovereign again. | The supporters of the Brexit exaggerated the number of the laws established by the European Commission. It is better for London to take part in the law-making process at the European level than to withdraw. |
| 4 | The status of power of the United Kingdom and its influence in the world | The most common phrase is "Great Britain does not need EU to thrive internationally". By strengthening the relations with the countries of the Commonwealth (former British colonies), Great Britain can have as much influence as it has within the EU. | According to liberal leader Nick Clegg, Britain "would be turned into a little England, drifting friendlessly somewhere in the mid-Atlantic", if it leaves the EU. In a world where globalization is becoming stronger, the interests of Great Britain are best protected by remaining in the Community bloc, and the American |

| | | | |
|---|---|---|---|
| | | | and Chinese leader have already said that. |
| 5 | Finance and capital market | The discussions about a leak of financial capital outside the country have no basis. London will remain an important financial center outside the EU and banks will still want to have headquarters in the UK, due to low taxes. | Banks will withdraw from Great Britain, and City, the financial center of London will collapse, if Britain leaves the EU. Currently, the commercial advantages generated by the fact that Great Britain is part of the Community bloc increase the profit of banks. |
| 6 | Trade and international relations | The connections of Great Britain with the EU undermine its relations with emerging markets – there is no important commercial agreement with India or China, for example. The withdrawal from the European Union would allow Great Britain to diversify its international relations. | About 44% of Great Britain exports reach other EU countries and, at the same time, many countries will limit their exports to the Kingdom. The lifting of barriers to the main commercial partners of the countries would be counterproductive. |
| 7 | Labor market and employment policies | The threat for Great Britain jobs represented by the withdrawal from the EU was exaggerated. By stimulating investment with corporate tax cuts and other measures, Britain can flourish, like Scandinavian countries outside the EU. | About three million jobs are linked to the European Union and they risk to disappear after Brexit because companies will be more reluctant to invest, if the country is outside the community bloc. |
| 8 | Immigration policies | Great Britain will never be able to control immigration, if it does not leave the European Union, because the freedom of movement gives the other EU citizens the automatic right to leave in the United Kingdom. | Leaving the bloc will not solve the immigration crisis, but it will bring it to the door of the United Kingdom, because border controls from the continent will move from Calais (France) to Dover (Great Britain). |
| 9 | Justice and crime | The European arrest warrant allows British citizens to be sent abroad in order to be prosecuted by the foreign courts, most often for minor offenses. The withdrawal from the EU would end this phenomenon. | Those who commit serious offenses in Great Britain can be transferred to the United Kingdom in order to be held liable for their deeds only due to European arrest warrant. The withdrawal from the EU would prevent the functioning of the justice. |

Source: Daily Telegraph

This is why the effects of the Brexit can be immeasurable for many economies, especially for the European ones. A number of European Union agencies based in the United Kingdom will be moved to other countries. And we refer here to the European Medicines Agency (EMA) which will move to Amsterdam (the Netherlands) and the European Banking Authority (EBA) which will be transferred to Paris (France). A group of Portuguese companies and French banks take a series of protection measures after the signing of the EU withdrawal agreement. France began a massive procedure of recruiting customs workers in 2018, by employing 700 persons. At the same time, France increases the budget for customs by 10% per year. 30000 French societies export products to the United Kingdom and 3000 are based there, therefore, employers' organizations call on all members in similar situations to examine the exit consequences for their activity in legal, fiscal, customs, data transfer, certification terms which have not existed so far. Since last year, Germany has already decreased exports for United Kingdom by 3.6% compared to 2017 and increased them for China. Not to mention the effects of the Brexit on Eastern European countries (Romania included) which suddenly see that their European funds are lower, their access on the labor market is restricted and exports are reduced by a great number of products to the UK. Once created the precedent, it is possible, and this is why the EU is most afraid, that other states want to leave the community bloc. Let's not forget that the Grexit was brought into discussions two years ago, when the Greeks, dissatisfied with the restrictions imposed by the EU and Monetary Fund, have chosen to be rather extremist than rational and tactful. This year, nationalist feeling is once again amplified, political, populist, racist and xenophobic political movements are triggered. They were started by the French in November 2018 when the movement called the protest of yellow vests initiated by the members of civil society degenerated into massive street violence and shall be

continued this year by groups of Scotland, North Ireland and even Great Britain.

From a rational perspective, an unstable, fragmented and weak European Union is in the advantage of countries such as Russian Federation or China. If we were to think only to the two states, the gain would come from the commercial and financial area put into practice by the conclusion of bilateral agreements. Furthermore, the Russian Federation, strongly dissatisfied with the sanctions imposed to it by Great Britain after the military intervention of Ukraine, will constantly and relentlessly campaign for the destabilization of the North Atlantic Alliance.

## 3. Business environment and foreign direct investment in Eastern Europe

More than 100,000 Romanian citizens decided to leave to the United Kingdom[1]. Construction companies occupy the first place in the field of activities preferred by Romanian entrepreneurs in London. According to a study conducted by Enterprise and Innovation of Makwana Consulting Ltd of 2014, 15% of the 10-11000 Romanian companies in the UK carry out their activity in construction and real estate field of business and 10% in manufacturing. The document also shows that the average age of the Romanian entrepreneur is 33, 75% are men and one third of companies are based in London, followed by other major cities, such as Harrow or Milton Keynes. In 2014, London took the lead for the first time in the field of the possibility of doing business or making investment. Why?

The most important factors influencing direct foreign investment are:

- General economic and social environment of the host country allows this – the features of the macroeconomic environment of the host country, political (including political risk) and social stability, but also the level of economic freedom;
- Quality of regulations – embodied in the level of corruption, governmental efficiency, bureaucracy, legislative predictability, economic governance, competition policy or financial institution reform;
- Legislation and tax burden –refers to the clarity and stability of tax regulations, level of taxation, government consumption;
- The economy development level – measured by the level and evolution of GDP per capita, the level of industrialization and outsourcing, intensity of creative economy, degree of innovation, investment in research and development;
- Economic openness – materialized in FDI legislation and commercial openness;
- Level of development of transport and communication infrastructure;
- Market size – measured by means of the number of inhabitants, the ratio of the urban and rural population, but also by the size of the income and the purchasing power of the population;
- Labor market – the variables defining the labor market are the size and the level of education of the employed population, the level of salary, the level of unemployment, the labor/capital ratio, labor productivity;

Romania's low performances in attracting foreign investment after 1990 have a number of causes, such as: the lack of a strategic document referring to the stimulation of investment, the lack of economic levers to attract investment, low efficiency of all Romanian agencies in attracting investors. Not to mention the economic, social and legislative instability of the last two years.

In the background of positive net FDI between 1999-2015, the economies in our immediate region experienced an increase in FDI stocks, but the differences between these economies remain important. The most attractive economy from the perspective of FDI stocks was Poland, with a total volume of FDI stocks of EUR 192 billion at the end of 2015, with a compound annual growth rate of 12.88% between 1999-2015[2]. Czech Republic is the second performer of the region, with a volume of FDI stocks of EUR 101.9 billion at the end of 2015, the annual compound growth rate being of 11.3% between 1999 and 2015. The two countries are followed by Hungary (FDI volume of EUR 83.4 billion in 2015 and a compound growth rate of 8.17%). At the end of 2015, FDI stocks of Romania reached EUR 62.29 billion, and those of Bulgaria only EUR 37.95 billion, although annual growth rate between 1999-2015 was the highest for the two countries – 18.73% for Bulgaria and 15.56% for Romania. In 2015, Romania had the second lowest FDI stock of the region, although it experienced a twelvefold growth between 1999-2015.

[1] www.mediafax.ro/economic/brexit-ce-se-va-intampla-cu-cei-peste-10-000-de-antreprenori-romani-care-si-au-dus-afacerile-la-londra-15507341

[2] Alexandra Horobeț, Oana Popovici, Investițiile străine directe: evoluția și importanța lor în România, 2017 (Foreign direct investment: evolution and importance in Romania).

Table 3 Regional FDI stocks (billion EUR)

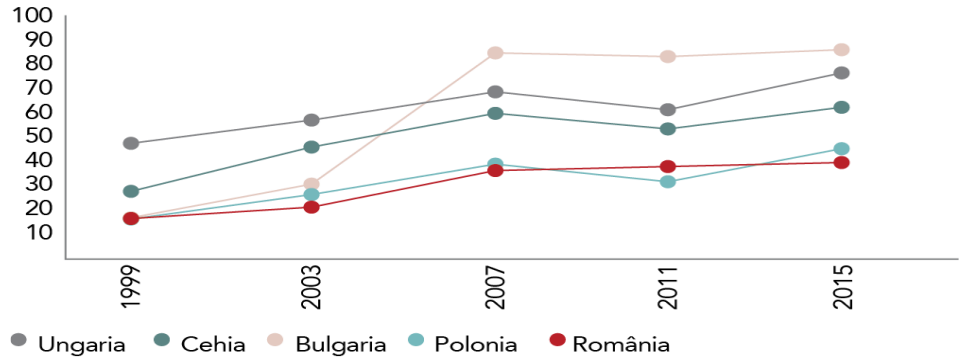
| | Country/year | 1999 | 2015 | CAGR % |
|---|---|---|---|---|
| 1 | Romania | 5323 | 62291 | 15.6 |
| 2 | Bulgaria | 2048 | 37950 | 18.7 |
| 3 | Czech Republic | 16468 | 101899 | 11.3 |
| 4 | Poland | 24465 | 192042 | 12.9 |
| 5 | Hungary | 21842 | 83039 | 8.2 |

Source: UNCTAD

It can be noted that Czech Republic, Poland and Hungary started from FDI stocks significantly higher than Romania and Bulgaria.

In connection with the GDP, Romania has the lowest volume of FDI stocks among all five economies in the region, of only 39% at the end of 2015, compared to 86.0% for Bulgaria, 76.4% for Hungary, 62.6% for Czech Republic and 44.9% for Poland.

Figure 2. FDI stocks in connection with the GDP, 1999-2015 (1999=1)




Source: A. Horobeț, O. Popovici, Investițiile străine directe: evoluția și importanța lor în România, 2017, p. 32(Foreign direct investment: evolution and importance in Romania)

It should be noted that, in case of Romania, the share of FDI stocks in GDP increased from 15.7% in 1999, and the best years in terms of this indicator were 2012 (the share of FDI in GDP was of 44.5%) and 2013 (43.2%). Of course, the increase is significant, but not enough, if we take into account the evolution of the other countries in the region, especially of Bulgaria, the share of FDI in GDP of which increased from 16.2% in 1999 (value close to that of Romania) to 86% in 2015.

This evolution was generated by the low FDI flows in Romania, especially after 2008, given that Romanian GDP had a downward trend between 2009-2012 (in 2008, GDP amounted to EUR 141.54 billion, and in 2013 to EUR 133.61 billion), followed by a GDP growth up to the value of EUR 160.39 billion in 2015[1].

## 4. Conclusions

At the end of 2015, the most important economies investing in Romania were, based on the data provided by UNCTAD relating to the FDI stock, the following: the Netherlands, with a share of FDI in the stock of FDI of 24.99%, followed by Austria, with a share of 14.17%, and Germany, with a share of 12.40%.

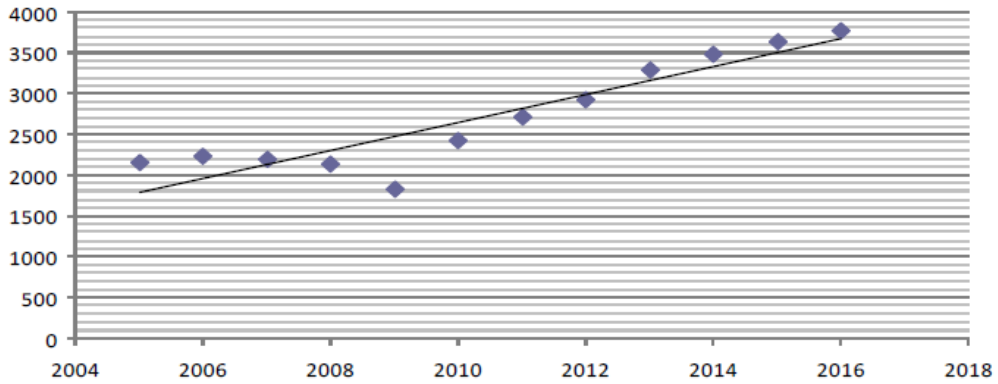
Unfortunately, Romania is losing attractiveness for foreign investors after 2009, on the background of national economic and political agitation, which are beginning to be felt in the region. FDI flows fall sharply and are almost three times lower in 2009 than a year ago, similar to the situation in Hungary and Bulgaria. By far, however, the weakest year for FDI after 2008 for Romania was 2011, where the FDI flows were more than 5 times lower than in 2008. In case of Romania, we are concerned about the low level of FDI flows in the period up to 2015, in 2015 the FDI flows reaching only the value of EUR 3.05 billion, but on the background of a slightly upward trend after 2011.

**Trade between Romania and the United Kingdom** The trade between Romania and Great Britain recorded an upward trend, especially as of 2005, following the conclusion of the negotiations of accession to the European Union which took place in December 2004. They reached in 2015 the amount of EUR 3.94 billion, with a commercial surplus of EUR 814 mil. in favor of Romania. In the first 11 months of 2016, the trade reached the value of EUR 3.76 billion, with a commercial surplus of EUR 898 mil. in favor of Romania.

[1] The data are available in the database of the World Bank: http://databank.worldbank.org and were converted in EUR based on the annual average exchange rates USD/EUR calculated by the European Central Bank.

The United Kingdom of Great Britain and Northern Ireland ranks first in the hierarchy of trade-friendly states favoring Romania (EUR +898 million) (The results of the international trade of Romania between 01.01. 30.11.2016.

Chart 3 Evolution of the trade performed between Romania – Great Britain[1]




Source: Chamber of Commerce and Industry of Romania (CCIR)- The effects of Brexit on the Romanian economy. challenges and opportunities at the European level

The imports of Romania from Great Britain represent about 1% of the GDP, and the Romanian exports to the United Kingdom represent about 1.5% of the Romanian GDP.

**British investment in Romania** In 2015, British investment in Romania amounted to EUR 1,346 billion (position 13 in the ranking of the foreign investors), representing 2.1% of the total foreign investment in Romania.

We should take into account that, given that the regime of foreign investment in Romania is regulated by the European Union, the negotiations on the relation EU – United Kingdom in the post-Brexit period will also address issues on the investment relation between the two countries (the National Bank of Romania).

Table 4 The structure of Romanian exports in the United Kingdom

| No. | Romanian exports | Percentage of total % |
|---|---|---|
| 1 | Machines and appliances, electrical equipment and parts | 31 |
| 2 | Textile products and materials | 23 |
| 3 | Vehicles, aircraft, vessels and transport equipment | 19 |
| 4 | Furniture | 7 |
| 5 | Food and agricultural products | 6 |
| 6 | Plastic materials | 6 |
| 7 | Chemical products | 4 |
| 8 | Common metals | 4 |

Source: Department of Foreign Trade – Ministry for Business Environment, Commerce and Entrepreneurship; Ministry of Foreign Affairs

An analysis of the Brexit effect on the Romanian business environment (Coface, 01.07.2016) indicates that, given the size of bilateral exchanges, the direct impact on short term is limited. In 2015, the Romanian exports represented 1.5% of the Romanian GDP, and the British direct investment only 2.1% of the total foreign direct investment in Romania.

Generally speaking, the negative effects will be visible especially at the level of EU budget, as the United Kingdom had a contribution of 13.45 % to the EU budget in 2016, respectively £10.76 billion, being the third largest contributor at European level, after Germany with 19% and France with 16.3%. If the UK leaves the EU, the budget of the Union will be reduced proportionally, which will directly influence the funding of the Cohesion Policy.

An opportunity for the Central and Eastern European countries, including Romania, refers to the relocation process of employees of the UK-based large companies in the financial, legal, research and design services. According to the Association of Business Service Leaders, the demand for jobs in these areas will triple, up to 1 million, between 2015-2025 (Apostoiu, 11.04.2017). Goldman Sachs will be hiring in Poland, reducing London staff by half, Pfizer will be hiring in Czech Republic, JPMorgan Chase could relocate up to 2,500 positions in the region, especially in Poland, and Hewlett Packard Enterprises could relocate in Cluj-Napoca, where it already has offices (Apostoiu, 11.04.2017).

The withdrawal of the Great Britain from the European Union will affect the European Union business

[1] The data for 2016 are available for the term 01.01-30.11.2016

environment which trades or operates in Great Britain, as well as the British one carrying out trade activities in the EU. This is why the negotiations will aim to prevent a legislative vacuum once the Treaties have ceased to apply to the United Kingdom. The goal of the European Union is to minimize the costs for the European Union citizens, for business environment, as well as for Member States (Remarks by President Donald Tusk on the next steps following the UK notification, 31.03.2017).

Romania should use this context and negotiate the transfer of the European Medicines Agency from Great Britain to our country, because it is one of the EU countries on the territory of which no European agency is based (Stolojan, 10.04.2017). Furthermore, Romania should also take into account the less positive scenario caused by the Brexit, which could weaken the European Union, effects which will be felt at national level both economically and socially.

By taking into account the perspective of direct interest of Romania and considering the size of the British market, a comprehensive post-Brexit EU – Great Britain trade agreement will be desirable.

1. The European Economic Area / Customs Union – unlikely scenario: the possibilities of the UK accession to the European Economic Area or of the accession to the Customs Union, similar to the one between the EU and Turkey are not plausible because of their similarity to the current situation (the free movement of persons for the European Economic Area, European legislation and jurisdiction for Customs Union).
2. World Trade Organization – temporary likely scenario: the scenario of the application of WTO fees in the post-Brexit period is likely, given that the European leaders have announced their intention to negotiate a trade agreement with the United Kingdom after it stops to be a EU Member State. Therefore, WTO fees would be applied to bilateral trade between the EU-United Kingdom as of March/April 2019.
3. Preferential models – the desirable scenario for Romania: EU has preferential agreements of various types with various states such as Canada, Switzerland, Balkan states, Kazakhstan, South Korea, India etc. According to the statements made by both British and European leaders, it is expected that the United Kingdom goal is to negotiate and implement a trade agreement such as the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), potentially slightly extended compared to CETA version. Implementing a CETA type trade agreement would reduce or remove tariffs for trade in goods and services between Romania and the United Kingdom. It would be ideal to implement a wider trade and investment agreement between the EU and the UK with a view to harmonizing legislation between the two parties, in order to contribute not only to the removal of tariffs, but also to the removal of non-tariff barriers.

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# NATIONAL SECURITY AS A LEGAL CATEGORY

**Kremena RAYANOVA***

**Abstract**

*This article describes such notions as "security", "national security", types of national security, recent changes in the National security of Bulgarian doctrine. According to the author trust and partnership relations between governments changed to the sanctions and misunderstanding, there are also economical, migration, ecological, social and other types of crises, military collisions and other problems, which effect national security of any country.*

**Keywords:** *security, ecological security, informational security, national security, military security, national interest, threat to national security.*

The development of public ideas to guarantee national security, requires a more precise specification of this concept. Unfortunately, practice and theory do not give an approved definition. National security is a rarely defined concept. Indeed, there is a defining problem that leads either to a narrow orientation of security policy and activities, or to an overly broad and disorienting interpretation.

On the other hand, a natural property of such general and volumetric terms as national security is to have polyvalent meaning. As a consequence, when actions based on broad consensus have to be reached, each of the participants has the opportunity to apply their own point of view and enrich the basis for a common solution. The ambiguity of the concept of national security reflects subjectivism in its perceptions.

However, it is desirable to have a general degree of conceptualization of the notion that guides policy makers and enables public consensus and control of their decisions and actions.

Efforts to draw up conceptual content are not permanent. There are clearly periods of intensification of this aspiration.

The current period of international relations marked by the end of the Cold War is a period of redefinition of this concept for ours and for the countries affected by the change. Obviously, attention to national security is growing in times of crisis in which society clearly notices the inconvenience of existing concepts after failing to deal with emerging threats.[1] Similar examples of the country include periods of caution to economic security in the seventies, and environmental security in the in the seventies and ecological security in the eighties.

It can be concluded that a more general definition implies a sense of greater openness and uncertainty, and consideration of a wider range of potential threats to the country. Again, a narrower interpretation is a consequence of internal imprisonment and the search for guarantees in traditional power means of security.

There is no legislative act in the country covering the determinants of national security. The most important of them, foreign policy, internal politics, defense, the economy have or are undergoing legal normalization but are not systematically subordinated to the common security objectives. Even less are the links of other spheres of public practice with security. Industry, agriculture, commerce, finance, science, education, health care, social protection remain unconnected wirh the issue security. It is inseparable from the security of the subregion, the region and the world because of the open nature of public systems and their interdependence.[2]

Security is an antithesis of uncertainty. Both concepts here refer to the state of the national public system. They reflect the probability of a system transition from a desirable mission-proofing state to an unwanted and non-mission-critical state. Greater certainty means less likelihood of transition and non-fulfillment of the mission.

Security is a measure of the complex ability of the system to perform the mission. More abstractly, this possibility is a function of the ability to achieve the mission in a favorable, ndifferent or unfavorable environment.

The security of the national system consists of internal and external security. It is inseparable from the security of the subregion, the region and the world because of the open nature of public systems and their interdependence.

The issues directly related to the problem are the roles, risks and responsibilities that the country has to take to build its place in the common and indivisible security system. The resulting political, economic and military security, with which the country will build common security, are the result. The classical notion of national security usually comes down to securing national integrity, independence and sovereignty.

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[1] Владикин, Л. Общо учение за държавата. С. , 1992

[2] Балканската сигурност. Политически и военни проблеми. Под ред. На А. Лилов, Изд. Хр. Ботев, 1995

Traditionally, national security means military security of the country and is directly related to its defense and power structure. In this narrow aspect of the concept attention is directed to the characteristic of the potential conflicts from which he attempts to draw the necessary qualities of the power structure.

War as a classic form of conflict is seen in close association with the state and politics. Charles Tilly states that War is doing the state, and the state is making war. Dominating the notion that war is a continuation of politics by military means. J.Loeser writes that politics is a continuation of the war with other means. "[3]

With this approach of over-linking war with politics, a major problem and the most important means of ensuring security is building and maintaining the army and the armed forces. Attention is directed to the adequate principles of military construction and to the preconditions for maintaining and developing the military, defense ability. Primitive questions become the spiritual and material foundations of the military (defense) potential and military power.

It is emphasized that military power determines the character of military policy, but also the pace of social, economic and society development.

It is considered as a function of the possibility of triggering the military (defensive) potential of the country determined by the population, capital, territory, political system, form of government and state structure, the nature of domestic politics.

The adoption of a military concept in the construction of the national security system (integrity, independence and sovereignty) involves different perceptions of the acceptable application of force in international relations.

Looking at the issue of national security, however, shows that the traditional paradigm is increasingly inadequate to this problem.

Military security as a foundation of national security does not disappear, but it lags behind other components such as economic, environmental, information security.

In a period of changes and social destabilization, it is clear that security is based on a complex balance of multiple determinants that change their importance and role depending on the current circumstances. Most of them have a non-military nature, but nevertheless reflects serious security threats.

There are various aspects of insecurity. Their addressing to social development, however, makes it possible to relate to the perceptions of public life and the priorities of policy. The issue of the current interests of society and the means of guaranteeing them comes to the fore. Security is perceived as a state of the public system that guarantees current and potential interests and freedom of decision and action. With every change in the security paradigm, arises a discussion about national interests and priorities of the external policy. Combined with the threats and the main means of their prevention, they build a strategic concept of security. Risk analysis explores the interaction of goals, interests and threats and is a necessary element of political, economic and strategic security planning.

A key point in risk analysis and development of security and defense concepts is the determination of the system of public values and interests.

The theoretical problem that arises in defining the notion of interest can be avoided by accepting the practical concept, that public interest is a sign of the possibility of achieving goals-desires, and the satisfaction of related needs arising under specific circumstances and relationships in the public environment. Interest is an urge for activity and a transition from goals-to-goals.

Objects of interest may be different spiritual and material values. Such can be the institutions and the relationships that society creates to preserve its values. Thus, interest becomes a tool that influences the socio-political behavior of the community-state, nation, class. The foreign-political sphere is dominated by state and national interests, while domestic policy is more influenced by class, professional, group, ethnic, minority or other societal-group interests.

Ensuring or preserving the public material and cultural well-being is a major political task, since it meets a major public interest. Ensuring external security is a means of preserving the political interests of the nation and the state. Internal security must ensure the quality of citizens' lives and ownership. [4]

In its operation, the security system, defense faces many risks, threats and challenges. All of them must be kept under control, identified and evaluated depending on their security impact.

In 1983, Richard Ulman gives an interesting definition of the threat by asserting that "it is an action or consequence of an event that seriously threatens to destroy the quality of life of the country's citizens or threatens to significantly narrow the range of political alternatives, available to the state government or personal non-governmental beings (people, groups, corporations) in the state." The first component of this definition is logical because the quality of life is a value of the highest order for society. The second component, however, emphasizes the liberal nature of the state and its main function - to protect individual rights and the right to choose adequate political decisions.[5]

With the rapid evolutionary development of the term national security, the question is how this concept has influenced, influenced and how it will influence the development of the democratic state.

[3] Иванов, Т., Новата роля на държавата за гарантиране на националната сигурност, Научен алманах на ВСУ, Серия "Общество и личност", 2002, кн. 4, стр. 39-50.

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[5] Romm J. Detining National Security. The Nonmilitary Aspects. CFRP, 1993

In order to find an answer to this question, we must start from the basic and top-level law - the Constitution. Here is the basic concept of security, the constitutional term of national security. Each chapter, article and paragraph of the Constitution of the Republic of Bulgaria seeks to reach the so-called state of national security. The correct definition of the constitutional term national security also reveals the essential meaning of the democratic, legal and social state. It is because of this fact that the political, social and economic meaning of this concept is studied. Covering the legal aspect of state security, the constitutional term lays the foundation for the development of a stable and secure public life. These are the directions of action of the constitutional term national security. The first guideline deals with internal order and internal activities carried out on a purely political, economic and social level, linked to the influence of the term security. That is why the Constitution should consider these actions taking place on the territory of the Bulgarian state. The second guideline is tied to external or more international relations concerning our national security. In its role as a basic law, the Constitution directly influences public relations, which is why the very constitutional term of national security is directly related to the building of a stable and secure country. The authors of the Constitution of the Republic of Bulgaria have pointed the way to opening and clarifying the term national security. Although no modern constitution, in which the term national security is used, there is no precise and clear definition of the content of this term, it can still be understood the direction of political thinking and the frameworks to which the security of the state extends. The constitution itself encompasses every element of national security and defines the basic functions. Any basic and legal wording of the term national security is, and should be, tied to the constitutional view of this concept. At the heart of any modern and democratic state lies the general legal notion of the term national security. The main issues related to Bulgaria's security are mainly considered at the constitutional level and are related to the general principles of democratic governance, which are expressed in the separation of powers and their mutual control. The definition of the Bulgarian state given by the Constitution is that it is a democratic, legal and social state. By formulating these basic values rooted in freedom, equality, peace, justice and tolerance, reveals the direction and purpose of the constitutional term national security. The term national security can be found in five places in the Constitution of the Republic of Bulgaria. Each one reveals in a separate way how the very notion of security is entangled in complex social relations. Although the definition of national security is not present in the preamble of the Bulgarian Constitution, we can still find its essence related to: "the rights of the individual, its dignity and security are supreme value ". The first reading is one of the main elements of national security, which is personal security. As we know, national security encompasses the values, needs, interests and needs of the person. Their protection is a fundamental objective concerning both the constitution and the constitutional term. Every law concerning the domestic or foreign policy of the country is primarily related to the protection of a fundamental value, comprising and encompassing the whole concept of national security[6]. Bearing in mind that the Constitution is a fundamental law in every country, the definition given to it in the security law automatically becomes applicable to it. Considering the essential characteristics of the Constitution, which are the achievement and protection of public rights and obligations, we can say that it is heavily influenced by the definition of national security at the theoretical and legal level. The organization and management of the national security system takes place at two main levels. These levels cover the internal and external subsystem disclosed by the Constitution.

The external subsystem of national security is a fundamental part of the constitution of the Republic of Bulgaria. [7]

Considering Article 2, paragraph 2 of the Constitution stating that the territorial integrity of the Republic of Bulgaria is inviolable, we can come to the conclusion that the basic purpose of the concept of national security, expressed in the security of a state, has given a fundamental form to that vision. Further, the constitution also mentions the means by which these values are stated. Art. 9 places a particularly important place on the Bulgarian armed forces, which are called upon to guarantee and protect the sovereigns, the security, the independence of the country, to defend its territorial integrity and unity. The Constitution of the Republic of Bulgaria creates and defines the duties of every citizen, including those outside the circle of the State Armed Forces. In Art. 59 para. 1 states that the protection of the state is an irrevocable duty and honor for every Bulgarian citizen, and the most serious crimes punishable by the extreme severity of the law are betrayal and treason to the homeland. The Constitution of the Republic of Bulgaria demonstrates the conviction and security of the legislator that the protection of independence, territorial integrity, sovereignty of the state can only take place within a "fair international order". This phrase is used in the part of the constitution where the foreign policy of the country is spoken. The first part of Article 24 proclaims the fundamental role of the foreign policy of the Republic of Bulgaria in which it is carried out in accordance with the principles and norms of international law. In the following, the main goals of

[6] Ivanov, M. Nazism and islam, Сборник научни трудонве, Шумен 2018, Университетско издателство „Епископ Константин Преславски", стр. 199

[7] Христов, П., Класификация на заплахите на националната сигурност като метод за тяхната идентификация и оценка, Научен алманах на ВСУ, Серия "Юридически науки и обществена сигурност", 2001, кн. 1, стр. 20-29.

the Republic of Bulgaria, which are naturally the national security, the independence of the country, the prosperity and the fundamental rights and freedoms of the Bulgarian citizens, as well as the assistance for the establishment of justice and international order are outlined. In the direction of the principle of active participation of Bulgaria in international conditions for peace and cooperation, it should be interpreted and the explicit mention in Art. 4 para 3 that the Republic participates in the construction and development of the European Union. The policy aimed at achieving a fair international order also involves taking care of political refugees. The Constitution of the Republic of Bulgaria provides in Article 27 (2) that the State provides shelter to foreigners persecuted for their beliefs or activities in defense of internationally recognized rights and freedoms.

Particularly special regard to the foreign security of the Republic of Bulgaria has some constitutional provisions on information. According to Art. 41 the right of every citizen to seek, distribute and receive information may be restricted for reasons of national security.

The Constitution of the Republic of Bulgaria lists a whole set of mandatory internal characteristics of the state. These are the sovereignty of the people, its legal nature, the division of powers, political pluralism, parliamentary rule, the ban on the formation of autonomous territorial education, the state guarantee of life, the dignity and the rights of the individual. The Constitution of the Republic of Bulgaria contains some prohibitions concerning direct internal security. Art. 44 para. 2 prohibits organizations whose activities are directed against the sovereignty, territorial integrity of the country and the unity of the nation, to the raging of racial, national, ethnic or religious enmity, to violation of citizens' rights and freedoms, as well as organizations that create secret or militarized structures or strive to achieve their goals through violence.

According to some Bulgarian authors, some of these provisions contradict the international right to freedom of association and established legal standards in developed democracies. International standards in this regard are summarized by the so-called Venice Commission to the Council of Europe in a report that explicitly states that it is permissible to prohibit political parties only in cases where they propagate violence or use of violence as a political means of rejecting the democratic constitutional order. In practice, there are parliamentary parties in Europe working for territorial separation. Examples are the United Kingdom and Spain. The Belgian constitution, for its part, allows the ethnic German population to have its own government, and in Denmark the Danish minority is actively represented in local government bodies.

In today's world, it is becoming increasingly important to define the term national security. In order to convey the form of a major part of the state, it must necessarily be present in its constitutional form. The constitutional term national security defines the boundaries within which the security concept stands. This understanding encompasses the external and internal aspects of the state. Any economic, political or social earthquake directly affects national security. Similarly, the external influence of other countries as well as the international situation of the Bulgarian state can be considered.[8] The foundations on which the constitutional term national security is based lie precisely in the constitution itself. There is no constitution that directly describes the whole structure of national security, but each constitution considers the impact of this term on internal and external processes concerning state related to government. Each constitutional provision sets out some of the most important goals, and these are the building of a stable and functioning state whose function is to protect the rights and freedoms of the individual. It should not be forgotten that the main element of national security is personal security. Secondly, it is public, and as a higher level is state security. Building a stable and above all safe country would be impossible in the face of an unstable economic situation. From a legal point of view, security in one country occurs only when the internal and external situation of the country is in balance with the basic dogmas of national security. In order to build the new kind of public relations related to national security it is necessary for it to find its constitutional expression.

This is naturally achieved through a long process of evolution of the concept of national security. It forms a completely new form of governmental and political governance.

Thanks to the constitutional term national security, it is possible to shape and construct a new concept of domestic and foreign policy of a state influenced entirely by the legal sense of security.

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# THE ECONOMIC COMPETITION BETWEEN UNITED STATES, EUROPEAN UNION AND CHINA

**Ștefan Cătălin TOPLICEANU**[*]

**Abstract**

*The economic and political developments at the end of the 20th century, but especially those at the beginning of the 21st century, have led to numerous debates, analyze and forecasts on international power structures. Various debated events, such as economic, social and political crises of multiple magnitudes, military-ideological conflicts in different areas of the world, migration flows and socio-cultural transformations, have announced new phenomena regarding power centers of the world economy. Under the impact of these international events, there is often discuss about the decline of American supremacy, European economic reformation and the rise of emerging economies, especially China. Related to these developments, different models of power structures are emerging, in which countries and groups (especially the United States, the European Union and China) rotate among themselves in the hope of designing a system of world power. Among all the nuances of power, the most important component remains economic power, being the decisive element of the development of other types. For this reason, in the world power relations, a clear picture of the existing power structures is needed. This study aims to analyze the economic competition and the power hierarchy between the United States, the European Union and China.*

**Keywords:** *power centers, economic competiton, economic power, American supremacy, the rise of China.*

## 1. Introduction

The power manifestations in the world economy have multiple implications in states and international organizations` lives. Through its various instruments, from different fields as economics, military, sociology, politics, tehnology, culture, international actors exert their power, changing the configuration of world economy. From a historical point of view, there have been several phases of power manifestation in the world economy: ancient empires, colonial powers, bipolarity, unipolarity, multipolarity. Even if multipolarity has been met before; it has never manifested itself at such a high intensity as now, including so many states and actors. Despite the nowadays situation, the most powerful actors remains the United States, the European Union and China, which have developed a great economic competition between them. This competition is worthy to be analyzed since it includes many economic components and it manifests from a long time, causing permanent changes of hierarchy between states. This study aims to offer a clear picture of economic competition between these three great powers, resorting to comparing various economic, trade, investment and social indicators.

## 2. Literature review

Generally, power is associated with concepts such as influence, force, capability, domination, constraint and authority. An attempt to define power is the one through which power is compared with the imposing of your own will within social relations in spite of the existing oppositions. (Pausenberger, 1983, p. 131)

On the other hand, power describes the ability of a nation or a political actor to influence the behavior of other actors using economic or military incentives. (Bucur, 2015, p. 9) Also, power can be seen as the taking decisions` capacity and the ability of putting it into effect. (Chirovici, 2009, p. 21) These processes are initiated by two instruments: the negative one, which involves coercion, the positive one, which appeals to open acceptance. (Bal *et al*, 1999, p. 37)

Despite all these attempts, the definition of power can be sum up as the capacity to influence the world economy, manifesting by an economic or political actor, a multinational company or an international organization. The influences of these actors are structured on five dimensions such as economic, military, physical, political and cultural, the economic component being the most important. (Kebabdjian, 1994, p. 297)

Over time, economic power has manifested itself in various forms of power, especially military one. The military and economic supremacy was held by different ancient, medieval and colonial empires, making them either regional or international power. But, that multipolarity was not as intense as it is today, because the economic power is more active (including commercial, investment, financial and monetary instruments) and the military component has turned into various soft power.

After various configurations since post-war period, in the direction of bipolarity-unipolarity-multipolarity, the world economy is looking for a stable power structure.

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A first option is a structure based on American supremacy and some regional powers such as Germany, China, France, Japan, Russia, Brazil, India, South Africa and Nigeria for solving international problems. (Huntington, 1999, pp. 35-36)

Another option is to restore at bipolarity system between the United States and Russia Federation (Achcar, 2002, p. 14), even if there are some differences between these two economies.

There is, also, the possibility of a trio formula, based on the trade triad between the United States, the European Union and Japan (Hirst *et al*, 2000) or adding India to these. (Mahbubani, 2008)

Considering all of this, we believe that the international structure of economic power is built from three pillars: the United States, the European Union and China. The other states and the entire world economy are influenced by the economic competition between these three great powers.

But, it is considered that even if their decisions can influence the international environment, their actions must be confirmed or blocked by a secondary group of powers, including Japan, Russia and India. (Khanna, 2008, pp. 17-21)

Even if, from different points of view (political, cultural, military, technological, social) there are various models of power structures, demonstrating the multipolar character of world, the economic evolutions after the financial crises of 2007-2008 reveal an economic competition between the United States, the European Union and China.

## 2. Methodology

In order to analyze the economic competition between the United States, the European Union and China and to compare these three major world power, we use 35 indicators of 2017 from World Bank`s statistical database (Annex 1). These indicators reflect different elements of economic power such as Gross Domestic Product (GDP), trade, foreign direct investments (FDIs), Gross National Income (GNI), export costs, inflation, business environment and labor market.

For every indicator used, the United States, the European Union and China are compared each other and every one gets a score between 3 and 1, of which a score of 3 means that an economy has the best position comparing with the other two and a greater disponibility to manifests his economic power. For example, China`s GDP based on purchasing power parity is almost $23.3 trillion, followed by the European Union with about $21 trillion and the United States with around $19.4 trillion. In this case, China will be scored with 3, the European Union with 2 and the United States with 1.

At the end, the scores of every indicator are gathered, suggesting the economic hierarchy between power centers. The maximum final score for an economy can be 105 points, if that state has only scores of 3 at all 35 indicators. On the other side, if an economy has only scores of 1 at all indicators, the final score may not be less than 35 points.

## 3. Analysis and findings

According to Annex 2, the European Union is better positioned at 15 indicators, while the United States at 12 indicators and China at 8.

Starting with the European Union, Table 1 reflects the European economy`s advantages, driven by trade, export costs, foreign direct investments and inflation. Thus, the European Union has the lowest cost to export and the fastest time to export based on documentary compliance.

Table 1

| European advantages | China | US | EU |
|---|---|---|---|
| Cost to export, border compliance | 1 | 2 | 3 |
| Cost to export, documentary compliance | 1 | 2 | 3 |
| Current account balance | 2 | 1 | 3 |
| Exports of goods and services | 2 | 1 | 3 |
| External balance on goods and services | 2 | 1 | 3 |
| Foreign direct investment, net | 1 | 2 | 3 |
| Foreign direct investment, net inflows | 1 | 2 | 3 |
| Foreign direct investment, net outflows | 1 | 2 | 3 |
| Fuel exports | 1 | 2 | 3 |
| High-technology exports | 2 | 1 | 3 |
| ICT service exports | 1 | 2 | 3 |
| Inflation | 2 | 1 | 3 |
| Service exports | 1 | 2 | 3 |
| External balance on services | 1 | 2 | 3 |
| Time to export, documentary compliance | 1 | 2 | 3 |

Practically, according to Annex 1, for European Union, the costs to export reach almost $85 regarding border compliance and about $17 by documentary compliance. European Union is followed by United States with $175 for first type of cost and $60 for second one. Also, the European Union`s time to export regarding documentary compliance is almost 1.4 hours, followed by United States with 1.5 hours and China with 21.2 hours.

Beyond the costs and time to export, the European economy`s benefits are related to exports volume, both goods and services, as well as fuels, information and communication technology (ICT) services and high-technology. Thereby, according to Annex 1, the European Union exports goods and services worth $8 trillion, more than China and the United States combined. Also, the European Union`s fuels exports

($278 billion) are higher than American ($165 billion) and Chinese ones ($35.5 billion). Moreover, the European`s service exports reach almost $2.3 trillion, while the American ones are about $797.7 billion and the Chinese ones a little bit over $200 billion.

From those $2.3 trillion service exports, almost $613 billion are represented by high-technology exports and nearly $277 billion by ICT service exports. However, these exports are superior to those recorded by United States and China. The first exports category reaches almost $504 billion in China and $110 billion in the United States. The second one is higher in the United States than China with $15 billion.

It is seems that the economic power of European Union is mainly driven by trade. Even in the case of external balance on goods and services, European Union has superiority due to its trade surplus of almost $653.8 billion, while the Chinese one is about $210 billion and the United States has trade deficit. But, if we are looking at external balance on services, China is the one which has trade deficit, while the American surplus is almost $255 billion and the European one more than $367 billion.

Despite its trade superiority, the European Union is the largest investor and attracts the most foreign direct investments, followed by United States and China. Practically, according to Annex 1, the European Union invests twice more than the United States and seven times more than China. Also, European economy attracts more foreign direct investments than United States and China together, having a net FDI over $160 billion.

The last two indicators to which the European Union is better positioned than the United States and China are the current account balance and the annual inflation rate at consumer prices. In both cases, the European Union is followed by China. Regarding first indicator, the European current account balance reaches almost $443 billion, while the Chinese one is about $165 billion and the American one is negative. On the other side, the European inflation rate is almost the same as the Chinese one, while the United States records 2.13%.

As we mention before, after European Union, the United States has 12 indicators scored with 3, indicating the best position recorded by American economy. Related to Table 2, United States` benefits are multiple: a favorable arms trade, high levels of GDP and GNI per capita, a positive and high net migration, trade surpluses on arms, fuel and services, a low dependency on fuel imports, a small population ages 65 and above and the fastest time to start a business and to export. To almost all of these indicators, the United States is followed by European Union, excluding external balance on fuel, arms and fuel imports.

So, starting with trade, United States is the biggest arms exporter, with almost $12.4 billion, more than European and Chinese export together, as it can be observed in Annex 1.

Table 2

| American advantages | China | US | EU |
|---|---|---|---|
| Arms exports | 1 | 3 | 2 |
| Arms imports | 2 | 3 | 1 |
| External balance on arms | 1 | 3 | 2 |
| Fuel imports | 2 | 3 | 1 |
| External balance on fuel | 2 | 3 | 1 |
| GDP per capita, PPP | 1 | 3 | 2 |
| GNI per capita, PPP | 1 | 3 | 2 |
| Net migration | 1 | 3 | 2 |
| Population ages 65 and above | 1 | 3 | 2 |
| Time required to start a business | 1 | 3 | 2 |
| Time to export, border compliance | 1 | 3 | 2 |
| Unemployment | 1 | 3 | 2 |

Also, the United States has the lowest volume of arms imports, about half of billion, which is translated to a trade surplus of almost $12 billion, twice than the European Union and China together. But, from this trade surplus, it has to be reduced the deficit regarding fuel trade, counted at nearly $40billion. Even so, this deficit is lower than the Chinese one ($231 billion) or the European one ($309 billion), making the American economy to be in a better position. Moreover, the low level of fuel trade deficit is due to the American economy`s independence on fuel imports. Comparing with the European Union and China, the United States imports fuel of only $204 billion, two times less than European Union and with almost $60 billion less than China. The last, but not least, the time to export, related to border compliance, is 1.5 hours in United States, comparing with almost 8 hours in European Union and about 26 hours in China.

Despite all these, the United States can not rise to the commercial power of European Union, which has more trade advantages than United States. But, American economy is more attractive than the European one. The net migration for United States is about 4.5 million people, compared to 4.32 million people recorded by European Union. As far as China is concerned, its net migration is negative, which means that almost 1.6 million people prefer to leave China than stay there.

The American attractiveness results, also, from its high levels of GDP and GNI per capita, based on purchasing power parity. According to Annex 1, in the United States` GDP and GNI per capita reach almost $60.000, bigger than European Union and China values together. In fact, the American`s GDP and GNI per capita are three times higher than the Chinese ones.

In addition, the United States` business environment is attractive for investitors because the time required to start a business is faster than in the European Union and China. For such a process, it takes 5.6 days in United States, twice as fast as in the European Union and four times faster than in China.

However, the United States remains the world` second investor regarding FDIs and the second destination of FDI inflows after the European Union.

Nevertheless, the United States has superiority to the European Union in the social field. European Union has no score of 3 at any social indicator, its power being based on trade, investments and a low inflation rate. In social field, the United States has the smallest population ages 65 and above and the lowest unemployment compared with European Union and China. Therefore, the American population over the age of 65 counts 50 million people, while the European one is double and China has three times more old people than United States. Moreover, the American unemployment is just over 7 million people, while in the European Union there are about 19 million unemployed, almost half as much as in China. So, from a social point of view, the United States is more advantaged and attractive than European Union, while the European economic power is based, mainly, on trade and investments.

In the middle of these two, there is China, which has 8 indicators scored with 3, according to Annex 2, less than the European Union and the United States. But, China is in the middle of these two because here is a mix of power between trade, business, financial reserves and social facts, its advantages being represented in Table 3.

Table 3

| Chinese advantages | China | US | EU |
|---|---|---|---|
| Imports of goods and services | 3 | 2 | 1 |
| GDP, PPP | 3 | 1 | 2 |
| GNI, PPP | 3 | 1 | 2 |
| Labor force | 3 | 1 | 2 |
| Population ages 0-14 | 3 | 1 | 2 |
| Profit tax | 3 | 1 | 2 |
| Service imports | 3 | 2 | 1 |
| Total reserves (includes gold) | 3 | 1 | 2 |

Practically, China has the highest values of GDP and GNI based on purchasing power parity, the biggest young population, a massive labor force, the largest financial reserves, the lowest profit tax and the most reduced volume of goods and service imports.

Starting with Chinese GDP and GNI based on purchasing power parity, their value exceeds $23 trillion, while the European ones are close to $21 trillion and the American ones over $20 trillion, as it can be observed in Annex 1. Also, China has the lowest volume of imports of goods and services, about $2.2 trillion, by which almost 472 billion are service imports. China is followed by the United States with $2.9 trillion, by which nearly 542.2 billion are service imports, while the European total volume of imports reaches $7.3 trillion and nearly $1.9 trillion are related to services.

Regarding business environment, the profit tax in China is 11% of commercial profits, while the European average is 12.41% and in the United States this tax reaches almost 28%, according to Annex 1.

In social field, it is necessary to mention that China`s young population reaches 245 million people, three times higher than European one and about four times more than in the United States. The difference is almost the same for labor force, being about 787 million people in China.

Finally, the last indicator where China has an advantage compared with the European Union and the United States is the size of reserves, including gold. Practically, the Chinese reserves are estimated at $3.24 trillion, more than double than the European ones. In the same time, the United States reserves are below $500 billion.

Nevertheless, China cannot reach the commercial power of European Union or its investitional potential. Also, the United States remains the greatest military power and the most attractive destination for people because of its high living conditions. In these circumstances, China needs more time to develop itself and to minimize the differences which separate it by the European Union and the United States.

## 4. Conclusions

Power is highly met in all society components, but manifests itself stronger in international relations. It can be defined by an economic, social or political actor (person, state, international organization, multinational company) which influences the other actors` activities through various methods and instruments (economic, political, moral, cultural, military, technological), the economic ones being the most important and decisive. The economic manifestation of power was the most commonly used, even though it was expressed in other forms of power, especially military, over time.

Historic states` evolutions and mutations of economic and social conditions have caused changes in power structures. Over time, many states have had the chance to lead and to hold the power, changing the world hierarchy. Today`s multipolarity has reached a level that has not been reached before, in which economic competition is disputed between the European Union, the United States and China.

Table 4

| Frequency of scores | China | US | EU |
|---|---|---|---|
| Score of 3 | 8 | 12 | 15 |
| Score of 2 | 8 | 12 | 15 |
| Score of 1 | 19 | 11 | 5 |
| Final score | 59 | 71 | 80 |

In Table 4 there is the scoring summary obtained by the European Union, the United States and China. The first one sums up most of the 3 and 2 scores, followed by the United States. Practically, after

comparing these three great powers, the European Union has 15 indicators scored with 3 and the same number of indicators scored with 2. Also, the United States has 12 indicators for each these two score categories, while China has 8 indicators for both. In the same time, the most indicators scored with 1 are met in China`s case, having more than the United States and the European Union together.

However, according to our calculations, the European Union has 80 points, the highest final score. This means that the European economy is better positioned than the American or Chinese one and exerts greater influence in the world economy. The European Union`s economic power is mainly driven by trade, but also by low inflation and an investiment environment, making it the largest investor and the most attractive destination of foreign direct investment.

The second position is taken by the United States with 71 points. Even if the United States cannot reach the commercial and investment power of European Union, the American economy is more attractive than the European one due to higher living conditions and the short time to start a business. Also, the United States` advantages include great military capabilities, high net migration, low dependency on fuel imports and a low population over 65 years.

China is weaker positioned than the European Union and the United States. Its final score is 59 points, but Chinese power is driven by a mix of facts related to trade, business, social issues and financial reserves. With its massive labor force, the youngest population and its large financial reserves, China has the power to recover the gaps which make it inferior to the European Union and United States.

Nevertheless, the economic competition between the European Union, the United States and China remains open. It may be the subject of future research, which could include several indicators or more power`s dimensions.

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Annex 1

| Indicators | China | United States | European Union |
|---|---|---|---|
| Arms exports (billion US$) | 1.13 | 12.39 | 8.08 |
| Arms imports (billion US$) | 1.12 | 0.55 | 2.70 |
| External balance on arms (billion US$) | 0.01 | 11.85 | 5.38 |
| Cost to export, border compliance (US$) | 484.10 | 175.00 | 85.21 |
| Cost to export, documentary compliance (US$) | 84.60 | 60.00 | 16.96 |
| Current account balance (BoP, billion US$) | 164.89 | -449.14 | 442.81 |
| Exports of goods and services (BoP, trillion US$) | 2.42 | 2.35 | 7.95 |
| Imports of goods and services (BoP, trillion US$) | 2.21 | 2.90 | 7.30 |
| External balance on goods and services (billion US$) | 210.73 | -552.27 | 653.79 |
| Foreign direct investment, net (BoP, billion US$) | -66.31 | 24.39 | 164.19 |
| Foreign direct investment, net inflows (BoP, billion US$) | 168.22 | 354.83 | 604.92 |
| Foreign direct investment, net outflows (BoP, billion US$) | 101.91 | 379.22 | 769.11 |

| | | | |
|---|---|---|---|
| Fuel exports (billion US$) | 35.46 | 164.88 | 278.07 |
| Fuel imports (billion US$) | 266.51 | 204.80 | 587.10 |
| External balance on fuel (billion US$) | -231.04 | -39.91 | -309.03 |
| GDP per capita, PPP (current international $) | 16,807 | 59,532 | 41,192 |
| GDP, PPP (trillion international $) | 23.30 | 19.39 | 21.11 |
| GNI per capita, PPP (current international $) | 16,760 | 60,200 | 41,074 |
| GNI, PPP (trillion international $) | 23.24 | 19.61 | 21.05 |
| High-technology exports (billion US$) | 504.38 | 110.12 | 613.30 |
| ICT service exports (BoP, billion US$) | 26.98 | 42.22 | 277.45 |
| Inflation, consumer prices (annual %) | 1.59 | 2.13 | 1.58 |
| Labor force, total (million people) | 786.74 | 163.46 | 248.38 |
| Net migration (million people) | -1.62 | 4.50 | 4.32 |
| Population ages 0-14, total (million people) | 245.07 | 61.60 | 78.96 |
| Population ages 65 and above (million people) | 147.53 | 50.20 | 101.31 |
| Profit tax (% of commercial profits) | 11.00 | 27.90 | 12.41 |
| Service exports (BoP, billion US$) | 206.45 | 797.69 | 2,299.74 |
| Service imports (BoP, billion US$) | 471.87 | 542.47 | 1,932.11 |
| External balance on services (billion US$) | -265.42 | 255.22 | 367.63 |
| Time required to start a business (days) | 22.90 | 5.60 | 11.66 |
| Time to export, border compliance (hours) | 25.90 | 1.50 | 8.11 |
| Time to export, documentary compliance (hours) | 21.20 | 1.50 | 1.39 |
| Total reserves (includes gold, trillion US$) | 3.24 | 0.45 | 1.40 |
| Unemployment, total (million people) | 36.78 | 7.13 | 18.91 |

Source: own representation based on "World Development Indicators", The World Bank, last modified January 30, 2019.

Annex 2

| Indicators | China | United States | European Union |
|---|---|---|---|
| Arms exports (billion US$) | 1 | 3 | 2 |
| Arms imports (billion US$) | 2 | 3 | 1 |
| External balance on arms (billion US$) | 1 | 3 | 2 |
| Cost to export, border compliance (US$) | 1 | 2 | 3 |
| Cost to export, documentary compliance (US$) | 1 | 2 | 3 |
| Current account balance (BoP, billion US$) | 2 | 1 | 3 |
| Exports of goods and services (BoP, trillion US$) | 2 | 1 | 3 |
| Imports of goods and services (BoP, trillion US$) | 3 | 2 | 1 |
| External balance on goods and services (billion US$) | 2 | 1 | 3 |
| Foreign direct investment, net (BoP, billion US$) | 1 | 2 | 3 |
| Foreign direct investment, net inflows (BoP, billion US$) | 1 | 2 | 3 |
| Foreign direct investment, net outflows (BoP, billion US$) | 1 | 2 | 3 |
| Fuel exports (billion US$) | 1 | 2 | 3 |
| Fuel imports (billion US$) | 2 | 3 | 1 |
| External balance on fuel (billion US$) | 2 | 3 | 1 |
| GDP per capita, PPP (current international $) | 1 | 3 | 2 |
| GDP, PPP (trillion international $) | 3 | 1 | 2 |
| GNI per capita, PPP (current international $) | 1 | 3 | 2 |
| GNI, PPP (trillion international $) | 3 | 1 | 2 |
| High-technology exports (billion US$) | 2 | 1 | 3 |
| ICT service exports (BoP, billion US$) | 1 | 2 | 3 |
| Inflation, consumer prices (annual %) | 2 | 1 | 3 |
| Labor force, total (million people) | 3 | 1 | 2 |
| Net migration (million people) | 1 | 3 | 2 |
| Population ages 0-14, total (million people) | 3 | 1 | 2 |
| Population ages 65 and above (million people) | 1 | 3 | 2 |
| Profit tax (% of commercial profits) | 3 | 1 | 2 |
| Service exports (BoP, billion US$) | 1 | 2 | 3 |
| Service imports (BoP, billion US$) | 3 | 2 | 1 |
| External balance on services (billion US$) | 1 | 2 | 3 |
| Time required to start a business (days) | 1 | 3 | 2 |
| Time to export, border compliance (hours) | 1 | 3 | 2 |
| Time to export, documentary compliance (hours) | 1 | 2 | 3 |
| Total reserves (includes gold, trillion US$) | 3 | 1 | 2 |
| Unemployment, total (million people) | 1 | 3 | 2 |
| Final score | 59 | 71 | 80 |

Source: own calculation.

# GIVING REASONS FOR ADMINISTRATIVE ACTS – WARRANTY OF A GOOD ADMINISTRATION

**Ionela-Alina ZORZOANĂ***

**Abstract**

*This article proposes to analyze the giving reasons for administrative acts, an essential condition of good administration. Starting from art. 41 Charter of Fundamental Rights of the EU providing as the condition of a good administration "the obligation of the administration to give reasons for its decisions", we went on to the domestic legislation that does not define the principle of good administration. In regard to the obligation of public authorities to give reasons for acts they issue, the domestic legislation comprises provisions only on normative acts, Law. 24/2000 on the legal technical norms for the issuance of regulations being applicable. Many problems arise in the case of administrative acts of an individual nature where there is no regulated obligation to motivate them.*

*Thus, the purpose of this article is to draw attention on the necessity of a legal regulation also in regard to the obligation to give reasons for individual administrative acts. This is necessary, considering that this type of administrative acts often provide obligations on the citizen, who is entitled to be informed about the actual reasons.*

*Otherwise, we believe that giving reasons for individual administrative acts also results in a relief of the contentious-administrative courts, which are ever more often vested with applications for the annulment of such acts, the main reason being such of the lack of giving reasons.*

*We also hope that both the Administrative Code, but especially the Administrative Procedure Code solves the issue of giving reasons for individual administrative acts, so as to ensure a balanced and transparent relation between the public authorities and citizens.*

**Keywords:** *the principle of good administration, the regulation at European level, transparency, obligation to give reasons to administrative acts, the regulation in domestic legislation, regulating administrative acts, individual administrative act, de facto and de jure motivation, administrative-jurisdictional act, contentious administrative court*

## 1. Introduction

This study proposes an analysis of the necessity to observe the obligation of motivating administrative deeds, as a warranty of good administration. The study starts from an analysis of the regulations at European level, where the principle of good administration is regulated in detail and the failure to observe shall result in sanctions upon the Member States of the European Union that do not observe such. The principle of good administration at European level includes among its conditions the motivation of the administrative acts.

If the situation of normative administrative acts does not allow discussions, Law no. 24/2000 expressly providing that such acts must be motivated (being accompanied by certain types of motivational tools, as the case may be), issues arise especially in case of acts administrative, where there is no legal obligation set up.

Taking advantage of this legislative vacuum, in most cases, public authorities issue administrative acts that are motivated only de jure, relying on the principle that no one can invoke the ignorance of the law. However, we cannot accept that it is sufficient to insert only the legal grounds in the preamble of an individual administrative act and thus fulfil the obligation to motivate such. Contrary to the European institutions, in Romania, although the practice of the courts is established, i.e. it obliges national public institutions to motivate the administrative act, they still take small steps in this regard.

Unfortunately in Romania, concurrently with the timid drafting of the two Codes, the Administrative and Administrative Procedure ones, we hope that we shall comply with the European regulations, i.e. there should be an obligation to motivate also individual administrative acts.

However, attention must be drawn to the risks that exist with regard to the express regulation of such an obligation, such of fully motivating all administrative acts. We state this, as it is obvious that in case of individual administrative acts regulating rights granted to a determined person(s) (e.g. study diplomas, various certificates etc.) no vast de facto motivation is necessary. However, issues arise where individual administrative acts impose certain obligations on its recipient(s) and, due to the lack of motivation, they cannot defend themselves before the authority.

## 2. Content

### 2.1. The Principle of Good Administration

#### 2.1.1. The regulation of the good administration at European level

1. Charter of Fundamental Rights of the European Union

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The principle of "*good administration*" was mentioned at European level for the first time in the Charter of Fundamental Rights of the European Union. The Charter is a mandatory legal tool for the European citizen to stand before any European court. In October 1999, when the drafting of the Charter of Fundamental Rights of the European Union was under discussion, the European Ombudsman proposed that in the Charter should be mentioned "*the right of citizens to the quality of the services provided by the administration*", claiming even that the 21st century shall have to be the century of good administration. "*The right to a good administration*" occurs first of all in art. 41 from the Charter of Fundamental Rights of the European Union, adopted at the Summit from Nice in December 2000. The right to a good administration according to art. 41 from the Charter of Fundamental Rights of the European Union provides the following: "*(1) Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. (2) This right includes: (a) the right of every person to be heard, before any individual measure, which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c)* ***the obligation of the administration to give reasons for its decisions.*** *(3) Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. (4) Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language."* Therefore, at European level, citizens or residents of EU Member States enjoy the right to good administration in relations with the institutions and bodies of the European Union, according to art. 41 of the Charter of Fundamental Rights of the European Union. The Charter also provides for the right of every citizen to complain to the European Ombudsman in the event of maladministration in the work of Community institutions or bodies. Under the Treaty of Lisbon signed on 13 December 2007, amending the Treaty on European Union and the Treaty establishing the European Community, the Charter of Fundamental Rights of the European Union has acquired primary legal force, having the same legal value as the Treaties.

2. The European Ombudsman

In close connection to the right to good administration, the Charter of Fundamental Rights of the European Union provides in Art. 43 the right of every EU citizen or of any natural or legal person residing or having its registered office in the territory of any Member State of the European Union to notify the European Ombudsman in case of maladministration in the activities of the Community institutions or bodies, except the Court of Justice of the European Union and the European Court of First Instance in regard to their jurisdictional attributions.

The European Ombudsman is authorized to receive complaints from any citizen of the Union or from any natural or legal person residing or having its registered office in a Member State concerning cases of maladministration in the work of the Union's institutions, bodies, offices or agencies, except the Court of Justice of the European Union in the exercise of its jurisdictional functions. Where the Ombudsman finds an instance of maladministration, he/she shall refer the matter to the institution, body, office or agency concerned, which has a period of three months to communicate his/her point of view. The Ombudsman then submits a report to the European Parliament and the concerned institution. The complainant is notified about the outcome of the investigations. The European Parliament may also, at the request of a quarter of its constituent members, set up a temporary inquiry commission to examine the alleged breach of the legal regulations or maladministration in the application of Union law, unless the alleged facts are examined by a court and as long as the judicial procedure is not completed. Therefore, preventing and combating maladministration and implicitly promoting good governance are concerns of EU bodies and institutions in order to achieve good European governance.

3. The European Code of Good Conduct

In September 2001, the European Parliament endorsed the European Code of Good Administrative Behaviour[1], which laid down the standards to be observed by the EU institutions and bodies and their employees in their relations with citizens of the European Union. The Code details the provisions of the Charter of Fundamental Rights of the European Union, bringing together material and procedural principles that govern actions taken at the level of European institutions and bodies. This document comprises theoretical provisions, such as: legality, non-discrimination, proportionality and impartiality of actions of officials in EU institutions, prohibition of abuse of power, independence, fairness, amiability and objectivity of employees of EU bodies. Procedural rules on receiving, assessing and sending replies to received requests, rules on hearing people whose interests may be affected by decisions of EU institutions and rules on decision-making regarding a request (reasonable time for decision-making, obligation to motivate decisions and indications of appeals). Since the very beginning of the Code it is provided that "*This Code contains the general principles of good administrative behaviour which apply to all relations of the institutions and their administrations with the public, unless they are governed by specific provisions*"[2]. The Code explains

[1] Reviewed in the year 2013;

[2] The European Mediator of that time, Paraskevas Nikiforos Diamandouros, specified in 2005, in the Foreword to the edition of the Code published on the webpage of the institution that the Code is also "*a useful guide and a resource for civil servants, encouraging the highest*

to citizens the practical significance of this right and what they can expect in a concrete way from the European administration. It is important to mention art. 26 of the Code, which states that any failure of a European institution or official to comply with the principles set out in this Code may be the subject of a complaint to the European Ombudsman. Concurrently with the approval of the Code, the European Parliament also adopted a resolution calling on the European Ombudsman to apply the Code when considering whether a case of maladministration has occurred. As a consequence, the Ombudsman duly refers to the Code in his/her investigations, as well as in his/her proactive furtherance of good administration.

In conclusion, as it results from the above, it can be noticed that at European level, the principle of good administration is well regulated, with the European institutions focusing on the interests of citizen.

With regard to the obligation to motivate the acts issued by the European authorities, the Community case-law noted that the statement of reasons must be appropriate to the issued act and must present in a clear and unequivocal manner the algorithm followed by the institution, which adopted the challenged measure, so as to enable the data subjects to establish the motivation of the measures and also to enable the competent Community Courts of Law to perform the review of the act (Case C-367/1995) and, as the European Court of Justice decided, the extent and detail of the statement of reasons depends on the nature of each case, an insufficient or erroneous motivation is deemed equivalent to a lack of motivation of the acts; moreover, insufficient reasoning or lack of motivation entails the nullity or invalidity of Community acts C-41/1969) and a detailed presentation of the reasons is also necessary where the issuing institution enjoys a wide estimation power, since the statement of reasons provides the act with transparency, as it is possible for individuals to ascertain whether the act is well-founded and concurrently it enables the court to exert the judicial control (Case C- 509/1993)[3].

**2.1.2. Regulating the principle of good administration in Romania**

4. Normative acts regulating the principle of good administration

In Romania, the principle of good administration is not provided as such in a normative act.

However, starting from art. Article 41 (2) of the Charter of Fundamental Rights of the European Union, quoted in point I.1.1, good administration is the right of every person to be heard before any individual measure which may affect him or her adversely, the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy, the right of the administration to give reasons for its decisions.

Although the domestic legislation from Romania does not comprise express provisions on good administration, there are normative acts indirectly regulating the elements of the concept of good administration.

One of the normative acts subject to the principle of good administration is Law no. 52/2003 on decisional transparency in public administration. As stated in art. (2), the aim of the normative act is to increase "the degree of responsibility of the public administration towards the citizen as a beneficiary of the administrative decision" and "the active participation of citizens in the process of administrative decision-making and in the process of drafting normative acts". Another normative act in which is reflected the principle of good administration is Law no. 544/2001 on free access to information of public interest [4], providing in art. 1 that " *The free and unrestricted access of the person to any information of public interest, defined by this law, is one of the fundamental principles of the relations between persons and the public authorities".*

A direct reference to the principle of "good administration" is found in Law no. 7/2004 on the Code of Conduct for Civil Servants [5] which, in Art.2, provides that "*The objectives of this Code of Conduct are to ensure the improvement of the quality of the public service, good administration in the accomplishment of the public interest, as well as to contribute to the elimination of bureaucracy and corruption in the public administration*".

From the point of view of the present paper, Law no. 24/2004 is of particular relevance[6] on the norms of legal technique to draft normative acts. The provisions of Government Decision no. 1361/2006 regarding the content of the tool for presentation and motivation of draft normative acts subject to Government approval[7], but also such of Government Decision no. 561/2009 for the approval of the Regulation on the procedures at Government level for the drafting, endorsing and presentation of document drafts of public policies, of normative acts drafts, as well as of other documents in view of adopting/approval are of significance[8].

This latter component of the principle of good administration - the motivation of normative acts (individual acts without express regulation, as will be explained in point II) is part of the subject analyzed in this paper.

5. The Administrative Code and the Administrative Procedure Code

*standards of administration. European citizens deserve nothing less*" and "*The right to good administration by EU institutions and bodies is a fundamental right* "

[3]https://www.avocatura.com/speta/578490/suspendare-executare-act-administrativ-curtea-de-apel-bucuresti.html

[4] Published in the Official Journal of Romania, Part I, no. 663/23 October 2001

[5] Republished in the Official Journal, Part I no. 525 from 02 August 2007;

[6] Republished in the Official Journal of Romania, Part I, no. 260/21 April 2010

[7] Published in the Official Journal of Romania, Part I, no. 843/12 October 2006

[8] Published in the Official Journal of Romania, Part I, no. 319/14 May 2009

The need for administrative codification was evoked in time, due to the large number of current regulations in the field of public administration. In the explanatory memorandum of the law draft on the Administrative Code, it was mentioned that " *the inflation of the normative acts issued and the frequent changes in the regulations that were necessary in the process of their implementation generated parallelisms, overlaps and implicitly difficulties in implementation in practice*." Furthermore, at European level, this legislative solution is not a novelty.[9]

In the law draft on the Administrative Code, although there is no explicit reference to the notion of good administration, the principle of transparency in public administration is nevertheless provided in Art. 8, i.e.: *(1) In the drafting of normative acts, public authorities and institutions have the obligation to inform and submit to the public consultation and debate the draft normative act, and to allow the citizens access to the administrative decision-making process, as well as to data and information of public interest, within the limits of the law. (2) Beneficiaries of public administration activities have the right to obtain information from public administration authorities and institutions and they have a correlative obligation to set available information to the beneficiaries, ex officio or upon request, within the limits of the law".*

It can be noticed that although the draft normative act comprises some principles of good administration, we can nevertheless find no explicit provision of the concept and, obviously, no definition.

In regard to the motivation of administrative acts, the draft normative act refers to normative acts (which is not a novelty), and regarding individual administrative acts, we refer only to the evaluation procedure of civil servants[10]. We shall see what happens to the draft Law on the Administrative Code, considering that on 6 November 2018, by Decision no. 681, the Constitutional Court admitted the objection of unconstitutionality filed by the President of Romania and declared the draft normative act unconstitutional[11].

On the other hand, there is indeed in an early stage also a draft Code of Administrative Procedure[12]. The draft Code of Administrative Procedure "*provides the pre-procedural, simultaneous and subsequent procedural conditions to issue or adopt the administrative acts, partly defining each operation, the succession of its development, the place and importance of the procedure of the act (endorsements, agreements, quorum and necessary majority, motivation, drafting, signing, approval, confirmation, publication or communication), in close correlation with the general methodology of applicable legislative technique and regulatory and administrative matters.*

*Thus, the obligation to state reasons for administrative acts is implemented, consisting of the factual and legal considerations justifying and requiring the adoption of a normative or individual act, ensuring the decisional transparency, strengthening the administrative capacity, simplifying the procedures in the field in regard to the executive citizen report, aiming to eliminate bureaucracy, formalism and corruption in this important segment of public life, concurrently ensuring unrestricted access to information of public interest"*[13].

### 2.2. Motivating administrative acts - a condition for good administration

#### 2.2.1. Motivation - validity condition of the administrative act

The motivation of the administrative act is a condition of its validity, as an external form of manifestation of the authority's will (the written form to which the administrative act being mandatory). On the other hand, as expressly provided by Law no. 24/2000, in case of normative acts is also mandatory the motivation on the merits. As provided in the doctrine, "*the implementation of the mandatory nature of the reasoning of administrative acts, which is already comprised in the theses of the future code of administrative procedure, will reduce the risk that the administration would take arbitrary, abusive decisions and shall ultimately improve the work of the administration."*[14]

The usefulness of the motivation of decisions has a triple interest, namely: informing about the reasons, which means explaining the decision and thus avoiding possible conflicts between the administration and the addressees of the act; the obligation to motivate determines the administration not to make decisions due to reasons that cannot be brought to the attention of public opinion, so that the administration should guide its activity by moral norms; the motivation enables effective hierarchical control over the content of the

[9] The options considered by the European states were the drafting of unique laws in the field (Portugal), field law collections (codices - France) or sectoral codification (France, Germany), but in none of these states there is a law unifying the legislation in several areas of public administration (http://www.cdep.ro/proiecte/2018/300/60/9/em369.pdf)

[10] Article 19 (2) and (3) "(2) *The head of the public authority or institution shall settle the challenge based on the assessment report and the reports prepared by the assessed civil servant, assessor and countersignor, within 10 working days as of the date of expiry of the deadline for filing the appeal. (3) On basis of the documents provided in paragraph (2)* ***with the obligation to state reasons****, the head of the public authority or institution shall reject the reasoned objection or admit it, in which case he/she shall amend the evaluation report accordingly. The result of the challenge shall be communicated to the civil servant within 5 calendar days of its settlement*."

[11] Until the date of this account, the Constitutional Court's decision no. 681 / 06.11.2018 has not been drafted.

[12]The codification process of the normative acts regulating the procedural issues of the public administration was more pronounced during 2008, the actions taken being materialized by the adoption of Government Decision no. 1.360/2008 on the approval of the preliminary theses of the Administrative Procedure Code (Published in the Official Journal of Romania, Part I, No. 734/30 October 2008).

[13]https://drept.ucv.ro/RSJ/images/articole/2006/RSJ2/0219RiciuI.pdf

[14] Verginia Vedinaș, Administrative Law, 10th edition, reviewed and updated, Universul Juridic, Bucharest, 2017, page 341;

decision, as well as rigorous judicial review of the administrative contentious courts[15].

In fact, what is the motivation of the administrative act? Beyond the legal provisions, which are the legal bases on which the administrative act was issued, it is necessary for its addressee/recipients to know the factual reasons which led to the issuance thereof. There have been frequent (unfortunately) practices in the courts, situations where authorities considered "sufficient" the legal motivation, and only the "*conclusion*" should be inserted in the act, without any explanation, the so-called *de facto* motivation of the administrative act. We consider that the *de facto* motivation of the administrative act (and we refer to the individual administrative act) is necessary, so much the more, as it represents a guarantee of the transparency of the issuing authority in relation to the addressee of the act, even if there is no legal obligation for such purpose at this time. However, such conduct of the authority (which is in any case in a superiority relation towards the addressees of its acts), would be proof of good faith and even respect towards the addressees of its acts.

Last but not least, the motivation of all administrative acts would also have a practical purpose, namely to no longer burden contentious- administrative courts with actions in the annulment/suspension of the enforcement of the administrative act, the first invoked reason of which is most of the times "*lack of motivation*." The addressees of the administrative acts are entitled to know the reasons due to which such an act is issued and how the obligation imposed by that act has been reached. There are situations where, in practice, authorities only explain through the procedural documents submitted with the file how and for what reasons such an act was issued, whereas it is obvious that the motivation should be made by the very content of the administrative act and not by acts subsequent to its issuance.

These are probably (besides others) also the reasons due to which in the theses of the future Administrative Procedure Code[16], the motivation of administrative acts is mandatorily provided, regardless of their nature.

Besides, it has been noticed in the practice of courts that " ***In the absence of an explicit motivation of the administrative act, the possibility of challenging in court the concerned act is illusory,*** *since the judge cannot speculate on the reasons which determined the administrative authority to take a certain measure****, and the absence of such reasoning favours the issuance of abusive administrative acts, since the lack of reasoning deprives the judicial control of administrative acts of any effectiveness and therefore the motivation is a general obligation applicable to any administrative act, it is a condition of external legality of the act, which is subject to an in concreto appreciation, by its nature and context and its scope is to clearly and unequivocally present the reasoning of the institution issuing the act and the reasoning of the court, the motivation pursues a dual purpose****; fulfils, first of all, a function of transparency in favour of the beneficiaries of the act, who will thus be able to ascertain whether or not the act is well-founded; also enables the court to exercise its jurisdictional control, so that it ultimately enables the restructuring of the judgment made by the author of the act in order to reach its adoption; of course it should appear in the act itself and be made by its author. Thus the motivation implies the clear informing about the de facto and de jure elements, enabling the understanding and appreciation of its legality, (...) therefore, the motivation should enable the judge to exercise control over the factual and legal elements which have served as basis to exert the assessment power and thus it should be performed in a sufficiently detailed manner, by indicating in the present case the reasons due to which the issuing authority has concluded that it is necessary to ascertain the legal termination of the mayor's mandate, in other words, the motivation was to be effective, complete, precise and circumstantial*."[17]

The High Court also ruled in another decision[18], as to the **necessity for *de facto* and *de jure* motivation**, to a degree sufficient to enable unrestricted exercise of judicial review by the court, that "*the discretionary power rendered to an authority cannot be regarded in a state of law as an absolute and unlimited power, as to exert the assessment right by infringing the fundamental rights and freedoms of citizens provided by the Constitution, or by law, is an* ***excess of power****, in the context in which the Constitution of Romania provides in art. 31 par. 2 the obligation of the public authorities to ensure the correct information of the citizen about public affairs, as well as issues of personal interest. Therefore,* ***any decision likely to have effects on the fundamental rights and freedoms has to be motivated not only in view of the competence to issue that act, but also from the perspective of the individual and society's possibility to assess the legality of the measure and the observation of the boundaries between discretionary power and arbitrariness****. To accept the thesis according to which the authority should not motivate its decisions is equivalent to emptying of content democracy's essence and the rule of law based on the* ***principle of legality"****.*

**2.2.2. Motivating the administrative act from the perspective of its legal (individual or normative)**

[15] Mihai Oroveanu, Administrative Law, 2nd edition, reviewed and supplemented, Cerma Publishing House, Bucharest, 1998, page 134 and the following;

[16] Approved in Government Decision no. 1.360/2008 on the approval of the theses prior to the Administrative Procedure Code (Published in the Official Journal of Romania, Part I, no. 734/30 October 2008);

[17] ARAD Tribunal Civil Judgement no. 6185/ 29 October 2013;

[18] High Court of Cassation and Justice. Decision no. 1580/11.04.2008;

**nature; the particular situation of administrative - judicial acts**

From the perspective of the effects they produce, administrative acts are classified into normative and individual.

A fundamental classification on basis of which the difference between the administrative and the individual acts, to which specialists add the internal administrative acts, is the one according to the extension degree of the legal effects. "*The administrative normative act contains such general and impersonal rules of conduct as are the laws"*[19]. Thus, one of the criteria to distinguish between the two types of administrative acts is that of the determinability of the persons to whom such apply. " *The normative act has a general applicability, on an undetermined number of persons*"[20], whereas the individual has its effects on a limited and determined/determinable number of beneficiaries, a manifestation of will creating, modifying or extinguishing rights and obligations for its benefit or on behalf of its recipients.

A definition of the normative act can be found in art. 3 lit. a) of Law no. 52/2003 on the decisional transparency in the public administration, as follows: "*normative act - the act issued or adopted by a public authority, with general applicability*".

Law no. 24/2000 comprises clear provisions establishing the obligation to motivate the normative acts. Thus, Section 4 is entitled - Motivation of draft normative acts. Article 30 itemizes "*Presentation and Motivation Tools*", providing the obligation that "*Drafts of normative acts have to be accompanied by the following supporting documents: a) explanatory statements - in case of draft laws and legislative proposals b) substantiation notes - in case of ordinances and decisions of the Government; ordinances to be submitted to Parliament for approval under the authorizing law and emergency ordinances shall be submitted to the Parliament accompanied by the explanatory statement to the draft law approving them; c) approval reports - for the other normative acts; d) impact studies - in case of draft laws of special importance and complexity and of draft laws approving ordinances issued by the Government under an authorizing law and subject to the approval of the Parliament*."

In para. (2), it is specified that " *Explanatory statements, substantiation notes, approval reports and impact studies represent tools to present and motivate new proposed regulations" and in paragraph (3)" In the case of draft laws for which the Government assumes responsibility, the motivation documents accompanying such projects shall be the explanatory statement and, as the case may be, the report provided in Art. 29"*

Law no. 24/2000 assigns an entire chapter referring to the Content of the motivation in which, at art. 31 lists the elements that this must have, mentioning in paragraph (1) letter a), expressly: the reason for the issuance of the normative act, which represents "*requirements imposing regulatory intervention, with particular reference to the inadequacies and inconsistencies of the applicable regulations; the basic principles and finality of the proposed regulations by highlighting the new elements; the conclusions of studies, research papers, statistical evaluations; references to public policy documents or to normative act for the implementation of which is drafted the project. For emergency ordinances shall be separately presented the objective elements of the extraordinary situation requiring immediate regulation, whereas it shall not be suffice to use the urgent parliamentary procedure, as well as possible consequences that would occur in the absence of the proposed legislative measures".*

Last but not least, it is important to mention art. 32 according to which, "*(1) The motivation documents are drafted in a clear explanatory style, using the terminology of the draft normative act that it presents. (2) The motivation has to refer to the final form of the draft normative act; if certain changes were made to the project as a result of the proposals and remarks received from the endorsement bodies, the initial motivation should be duly reconsidered".*

As it can be noticed in regard to the normative acts, the law provides for the obligation to motivate such by recitals, substantiation notes and approval papers, explaining in each case what it should comprise.

The situation differs for individual administrative acts, where there is no general obligation to motivate such. Although we do not have (yet) a generally valid provision regarding the obligation to motivate individual administrative acts, there are still legal provisions to that effect. For example, Government Ordinance no. 27/2002 regulating the petitions settlement activity expressly states the obligation to indicate in the reply sent to the petitioner the legal basis of the adopted solution, and Law no. 544/2001 on free access to information of public interest provides that the refusal to communicate the requested information is motivated and communicated to the petitioner.

The late Professor Antonie Iorgovan[21] estimated that " *If, prior to the current Constitution of Romania, the motivation was regarded only as a principle of administrative-judicial acts, de lege ferenda, proposing to extend this principle to all administrative acts, it is*

[19] Dana Apostol Tofan**,** *Administrative Law*, vol. II, 3rd edition, C.H. Beck Publishing House, Bucharest, 2015, page 21;

[20] Ovidiu Podaru, *Administrative Law. Vol. Administrative Act (I) Landmarks for a Different Theory*, Hamangiu Publishing House, Bucharest, 2010, page 61: " *there may be an "individual" act that has several hundreds of recipients: e.g., the list of candidates declared admitted/rejected at the magistracy admission exam*".

[21] In the Administrative Law Treaty, vol.II, 4th edition, All Beck Publishing House, Bucharest 2005, page 62, quoted by Dana Apostol Tofan in Administrative Law, volume II, 4th edition, C.H Beck Publishing House, Bucharest, 2017, page 41;

*now considered that the necessity to motivate any administrative act is implicitly derived from the provisions of the Constitution, at least from the right to information consecrated in art. 31, representing a correlative obligation of the public administration authorities*".

On the other hand, even if in the future Administrative Procedure Code an obligation to motivate all administrative acts (as it results from its previous theses, without having any certainty in regard to the final form of the Code) is established, in the doctrine it was estimated for some types of administrative acts (e.g. diplomas) that "the futility of motivation is obvious".22 Considering that the obligation to motivate administrative acts is a guarantee of good governance, of protecting the recipients of acts against an abuse by the authorities, as well as a guarantee the observance of citizens' right to information, it is unlikely that they will deem illegal a favourable administrative act. As a rule, invoking the lack of motivation or inadequate motivation of an individual administrative act occurs when its content is not favourable to the addressee, e.g. it establishes a payment obligation the amount of which is not defined or creates a refusal of the authority to perform a certain transaction etc.

Although there is no expressly established motivation obligation for individual administrative acts, in many cases " authorities resort to the substantiation of the administrative acts and we support such a procedure, as this is how the legality reasons of an administrative act is substantiated and this is relevant, especially in case of challenging the legality of the administrative act."23

On the other hand, there are often encountered situations when the motivation of the individual administrative act is limited to mentioning the legal grounds, omitting the de facto motivation, which is actually the one of genuine interest for the recipient of that act, a guarantee of the transparency and good faith of the issuing authority. This practice is questionable, as it often leads to the challenging of court acts24.

A category of individual administrative acts that are always motivated by law, are the protocols for the finding and sanctioning of contraventions. Government Ordinance no. 2/2001 on the legal regime of contraventions25 provides in art. 16 para. (1) the elements to be comprised in the contravention protocol " The protocol of finding the contravention shall include: the date and place where it is concluded; the surname, forename, capacity and institution of which the investigating agent is a party; the surname, forename, domicile and personal number of the offender, description of the contravention deed, indicating the date, time and place where it was committed, as well as showing the circumstances that may serve to assess the seriousness of the offense and to evaluate possible damage; indication of the normative act establishing and sanctioning the contravention; indication of the insurance company, if the deed resulted in the occurrence of a traffic accident; the possibility to pay, within 15 days as of the date of handing over or serving the protocol, half of the minimum fine provided by the normative act; the time limit for the appeal and the court to which the complaint is lodged". In art. 17 paragraph (1) is also expressly provided the sanction of absolute nullity for the absence of the following elements: "notes on the surname and forename of the finding agent, the surname and forename of the offender, the personal number for persons who have assigned such a code and, in case of the legal entity, the absence of its name and registered office, the committed deed and the date of its committal or the signature of the assessing agent". Thus, it can be noticed that the law-maker, by establishing the mandatory references to be included in the minutes, aimed at motivating the individual administrative act. In fact, it is the right solution, as long as, through a contravention protocol, a fine is imposed on the offender, including some complementary measures.

Another example is that of the provisions of art. 5 para. (1) from Emergency Ordinance of the Government no. 33 / 2007 on the organization and functioning of the Romanian Energy Regulatory Authority26, according to which the authority issues orders and decisions in the regulatory activity and which mainly refers to: a) granting/modifying/suspending/refusing or withdrawing licenses or authorizations; b) approval of the regulated prices and tariffs and/or their calculation methodologies; c) approval of technical and commercial regulations for the safe and efficient operation of the electric, thermal and natural gas industry; d) approving/endorsing the documents elaborated by the economic operators regulated according to the effective legal provisions. Although the legal nature of the said administrative acts is not only normative, para. (2) of the same article implements the motivation obligation for all these acts "The orders and decisions provided for in para. (1) lit. a)-d), accompanied by the motivation tools, drawn up in compliance with the effective legal provisions".

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[22] Ovidiu Podaru, op.cit., page 149;

[23] Verginia Vedinaș, op.cit., page 341;

[24] Decision no. 4316/30 November 2006, delivered in File no. 21214/2/2005, having as a subject matter the annulment of an individual administrative act, the HCCJ held that both the legal and factual reasons are necessary, regardless of whether the law expresses this obligation or not, being given as an argument, *inter alia*, the existence of the right fundamental to the information provided by Article 31 of the Constitution (see Alexandru-Sorin Ciobanu, Administrative Law, Public Administration Activity, Public Domain, Universul Juridic Publishing House, Bucharest 2015, page 65);

[25] Published in the Official Journal of Romania, Part I, no. 410 from 25 July 2001;

[26] Published in the Official Journal of Romania, Part I, no. 337/18 May 2007, approved with amendments and supplementations by Law no. 160/2012, published in the Official Journal of Romania, Part I, no. 685/ 3 October 2012;

Another example of individual administrative acts for which the law provides for the motivation obligation thereof are the administrative-tax acts. Thus, art. 43 of the Tax Procedure Code provides that " The tax administrative act contains the following elements: a) the name of the issuing tax body; (b) the date on which it was issued and the date as of which it is effective; c) the identification data of the taxpayer or of the person authorized by the taxpayer, as the case may be; d) the object of the tax administrative act; e) the factual reasons; f) the legal basis; g) the name and signature of the authorized persons of the tax body, according to the law; h) the stamp of the issuing tax body; i) the possibility to be challenged, the deadline for filing the appeal and the tax body where the challenge is submitted;

Last but not least should be mentioned the special case of the administrative-judicial act, which is defined by Law no. 554/2004 to art. 2 (1) (d), as " the legal act issued by an administrative authority with jurisdictional powers in the settlement of a conflict, following a procedure based on a contradiction principle and the assurance of the rights of defence". By acting similarly to a court, administrative jurisdictions must motivate the acts they issue. This is the case, for example, of acts issued by the Court of Accounts of Romania, following the resolution of challenges against decisions by which the audit institution ordered measures. Thus, according to item 223 from the Regulation on the organization and carrying out of specific activities of the Court of Accounts, as well as the capitalization of acts resulting from these activities27, " Conclusions issued by boards of appeal, drafted by the secretary of the meeting, have to be mandatorily motivated and the motivation should comprise the following: a) factual reasons, namely: (i) the submission of arguments and reasoning of appeals to fully or partially admit the appeal or to reject such; (ii) the reproduction of each challenged measure and of the evidence/documents on which the measure was based; (iii) the reasons for the appeal made by the head of the verified entity; (iv) the documents submitted by him/her to support the appeal; (v) the reasons due to which the documents submitted by the head of the verified entity were accepted or, on the contrary, were not considered by the board, as such were not relevant; b) the legal reasons - specification of the legal provisions considered by the board of appeal and on which the given solution is based, in the sense of full or partial admission of the appeal or its rejection;(...)".

**2.2.3. Penalties for non-compliance with the motivation obligation**

In regard to normative acts (laws, ordinances), if the motivation obligation is breached, the Constitutional Court may be notified, both before the promulgation of the act or subsequently, by the exceptions of unconstitutionality raised before the courts of law or arbitration courts.

Although the Constitution of Romania does not provide such an obligation - to motivate the normative acts, I do however appreciate that it is circumscribed to the principles of predictability and clarity of the legal norm, principles resulting from the principle of mandatory observance of the laws, consecrated in Article 1 paragraph 5 of the Constitution.

Obviously, in order to enable the observance by its recipients, normative acts have to meet certain requirements of clarity and predictability so that these recipients should be able to properly adapt their conduct. Recipients of normative acts generally have different levels of culture and obviously different capacities to understand the content of the concerned act. No one can invoke the ignorance of the law, as long as it has been made public, as the Constitutional Court has held in its practice, in a "*natural, in a style and with the means appropriate to the recipients*".[28]

Without insisting too much upon the methods of exercising the constitutionality control of laws before promulgation (*a priori* constitutionality control), it is governed by the provisions of the first sentence of Article 146 lit. (a) thesis one from the Constitution and Articles 15-18 from Law no. 47/1992 on the organization and functioning of the Constitutional Court and is an abstract and direct control, exerted only further to the notification of qualified authors (the President of Romania, one of the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the Ombudsman, at least 50 MPs or at least 25 senators).

On the other hand, the *a posteriori* constitutionality control is regulated by Article 146 lit. (d) from the Constitution and by Articles 29-33 from Law no. 47/1992. At this type of control, the Court decides both on exceptions of unconstitutionality regarding laws and ordinances or a provision of an effective law or ordinance, before a court of law or commercial arbitration court and on exceptions of unconstitutionality raised directly by the Ombudsman. The exception of unconstitutionality may be lifted: by the parties to a dispute, *ex officio* by the court of law or commercial arbitration court; by the prosecutor, before the court of law, in the cases in which he/she participates, directly by the Ombudsman.

In regard to the other normative acts issued by the public authorities, they can be challenged at the administrative contentious court, at any time, considering the provisions of art. 11 para. (4) from Law no. 554/2004[29]. In regard to the deadline for challenging administrative acts of a normative nature, an interesting solution was ruled by the Constitutional Court. Being notified for an exception of

[27] Approved by the Decision of the Plenum of the Court of Accounts no. 155 / 2014, published in the Official Journal of Romania Part I, no. July 547/24 2014;

[28] G.C.Mihai, R.I.Motica, Fundaments of Law. Theory and Philosophy of Law, All Publishing House, Bucharest, 1997, p.144;

[29] Orders or provisions of ordinances that are deemed to be unconstitutional, as well as administrative acts that are considered illegal may be subject to appeal at any time;

unconstitutionality of the provisions from Art. 5 para. (7) EOG no. 33/2007 on the organization and functioning of ANRE according to which "*Orders and decisions issued by the president when exerting his/her duties may be challenged in administrative contentious with the Bucharest Court of Appeal, within 30 days as of the date of their publication in the Official Journal of Romania, Part I, i.e. as of the date on which the interested parties were notified*". By Decision no. 136/08 May 2015, the Constitutional Court noted that " *the above text, which is the subject matter of the unconstitutionality objection, does not distinguish between administrative acts of an individual or normative nature, both categories of acts being subject to the same 30-day limitation period in order to be challenged through administrative dispute. The Court finds that if administrative appeals of individual nature issued by the President of the Romanian Energy Regulatory Authority have not been challenged within this time limit, they may be challenged incidentally, without a time limit, through the illegality objection, as provided by the general law on administrative contentious. On the other hand, administrative acts of a normative nature will be spared of the judicial control, since after the expiration of the 30-day term, no direct action may be taken any longer against them, as by virtue of the "specialia generalibus derogant"-principle, the provisions of the general law may not be applied, if there is a special law expressly stipulating a certain term. Also, as has been shown, this type of act cannot be the subject of an illegality exception, as such is a method of specific challenge of individual administrative acts. As a consequence, orders and decisions issued by the President of the Romanian Energy Regulatory Authority, unilateral administrative acts of normative nature would benefit from the absolute presumption of legality after 30 days as of publication, if in that period no economic operator submits with the Bucharest Court of Appeal an administrative dispute in order to verify their legality in the main action for annulment."* In considering this reasoning, the Constitutional Court admitted the exception of unconstitutionality and established that*" the provisions of art. 5 par. (7) of Emergency Ordinance of the Government no. 33/2007 on the organization and functioning of the Romanian Energy Regulatory Authority, which establishes a deadline to challenge in administrative contentious the administrative normative acts issued by the President of the Romanian Energy Regulatory Authority when exerting his/her attributions, are unconstitutional".*

In regard to individual administrative acts, it is obvious that they can be revoked by the issuer in order to avoid a possible action in court, but it is difficult to assume that once an act is issued, which the issuer considers motivated, it would revoke such. Thus, in most cases, the administrative contentious court is the one deciding whether an individual administrative act is motivated or not. If the lack of motivation is so obvious, the court may even order the suspension of the enforcement of the administrative act (if such a measure was requested), pending the outcome of the action on the merits, or until the final settlement of the case[30]. The High Court of Cassation and Justice stated that " *in order to outline the well-grounded case requiring the suspension of an administrative act, the court should not proceed to analyze the illegality criticisms on which the application for annulment of the administrative act itself is based, but must limit its verification only to those de facto and/or de jure circumstances having the capacity to give rise to a serious doubt on the presumption of legality enjoyed by an administrative act. Such de facto and/or de jure circumstances which are likely to give rise to serious doubts in regard to the legality of an administrative act have been noted by the High Court as: the issuance of an administrative act by an incompetent body or by overriding its jurisdiction, the administrative act issued under legal provisions declared unconstitutional, the failure to motivate the administrative act, the important modification of the administrative act in the administrative appeal.*"[31]

In case of actions for annulment, I appreciate that the solution of the contentious court has a strong subjective side. Thus, it is up to the judge to assess the lack of motivation for an administrative act. Here we include those situations where, even if the act is not very detailed, however, by reference to the capacity of the addressee, the judge may estimate that he/she has the necessary capacity to understand the argumentation underpinning the issuance thereof. It is the professionals who carry out the activity in a certain field and who are obliged to know the entire legislation regulating the concerned field. Thus, in one case, the Bucharest Court of Appeal upheld the applicant's action by partially annulling the Order (…) issued by ANRE regarding the approval of distribution tariffs, an individual administrative act, and noted that " *the defendant authority, in the exercise of its attributions provided by law for such purpose, infringed the plaintiff's legitimate rights by exerting such by abuse of power through the approval of those tariffs without showing transparently the reasons determining such conclusion by depriving the beneficiary of the issued administrative act, the guarantees provided by law to request a genuine verification of this order*"[32]. n the appeal of the respondent authority, the HCCC admitted its appeal, holding in essence that "*Contrary to the court of first instance, the High Court considers that the issued order is motivated, and such relies both upon the report for the approval of the tariffs, and the method of recognizing the investments approved for the period*

[30] Under the provisions of Art. 14 and 15 of Law no. 554/2004 of the administrative contentious, published in the Official Journal of Romania, Part I, no. 1154 of 7 December 2004

[31] Decision no. 442 of the High Court of Cassation and Justice from 30 January 2013;

[32] Civil Judgement no. 3108/23 November 2015;

*2014-2018 was presented in the appendix to the approval report*"[33]. The High Court also notes in the same decision that " *The respondent-defendant explained in detail why it cannot recognize these costs by reference to the provisions of Art. 58 of the Methodology (...) stating that ANRE may reject those costs that are not prudent (...). It is true that the motivation of the administrative act is a guarantee against the arbitrariness of the public administration, but the standards regarding the extent and the detail of the motivation depend upon the nature of the act and the circumstances of the case, the purpose of motivation being to avoid abuses of the administration by transparently indicating the mechanism of issuing or adopting the administrative decision, to enable recipients to know and evaluate the grounds and effects of the decision and to enable the effective exercise of the legality control*."

A legal institution that has been increasingly used lately is the illegality exception[34], especially in cases where the person interested in challenging the act exceeded the time limit for submitting an action for annulment. Contrary to the action for annulment, the plea of illegality is only a means of defence and, if the court before which it was invoked assesses that the act is unlawful, it cannot annul such, but only solves the case without having regard thereto. Thus, if the plea of illegality is admitted, this solution produces legal effects only in the case in which it was invoked. Most of the time, however, in motivating the objection of illegality, there is a lack of clarity and predictability of the individual administrative act, which, in reality, equates to a lack of motivation.

## 3. Conclusions

The institution of motivating the administrative acts in aggregate will certainly be subject to many discussions and there will still be pros and cons, some going to the extreme. It is a certain fact that the ordinary citizen is entitled to be informed about the reasons why the public authority has set an obligation in his/her charge or has ordered any measure. It is true that no one can invoke the ignorance of the law, but in a democratic society and a rule of law, the role of the public authorities must be, first of all, to protect citizens, even against their own possible abuses. So much the more so since, due to cultural or educational reasons, the recipients of administrative acts (especially individual ones) do not know that they are entitled to certain legal challenging methods within certain terms that they have to observe.

Concurrently with the implementation of the obligation to motivate also the individual administrative acts, I believe that the relationship between the authorities and the citizens, in their capacity as recipients of administrative acts, could be improved. It is true that, as the doctrine provided (and I mentioned so in the paper), it is preferable not to reach the extreme situation in which any administrative act (including diplomas, certificates, qualification certificates etc.) has to be motivated, but at least those having a negative effect on the citizen. In fact, the solution would also be preferable from the point of view of burdening administrative contentions courts, which would be relieved of the multitude of cases in which the lack of motivation is invoked as the main reason for the nullity of an administrative act.

It remains to be seen whether the future Administrative Code, but especially the Administrative Procedure Code will clarify this concept that is so much debated, but that is also necessary, i.e. the motivation of administrative acts in their aggregate.

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[33] Decision of HCCJ no. 2791/18 June 2018;

[34] Art. 4 from Law no. 554/2004 provides that "*(1) The lawfulness of an administrative act of an individual nature, irrespective of the date of its issue, may be investigated at any time in a lawsuit, by way of exception, ex officio or at the request of the interested party. (2) The court which has the substance of the dispute before relying on the plea of illegality by finding that that the administrative act of individual character depends on the substance of the dispute, it is competent to rule on the exception, either by an interlocutory order or by the judgment it will rule. If the court decides on the plea of illegality by way of interlocutory order, it may be challenged with the merits of the case. (3) If the unlawfulness of the administrative act of an individual nature has been found, the court before which the objection of illegality to settle the case, without taking account of the act whose illegality was found*"

# Table of Contents

**OFFERING BRIBES: A LEGI-PRAGMATIC PERSPECTIVE**
Basim Yahya Jasim AL-GBURI ..... 5

**THE PROCEDURE FOR THE REFERRAL OF THE CRIMINAL INVESTIGATION BODIES**
Denisa BARBU ..... 19

**ROMANIAN COURTS HOLDING JURISDICTION IN THE IMPLEMENTATION OF THE PROBATION MEASURES**
Andrei-Dorin BĂNCILĂ ..... 25

**OVERCROWDING – CURRENT ISSUES IN ROMANIAN DETENTION CENTERS. CAUSES, EFFECTS AND REMEDIES**
Dorian CHIRIȚĂ ..... 33

**THE BENEFITS OF A SPECIAL CRIMINAL PROCEEDINGS *IN ABSENTIA***
Ioan-Paul CHIȘ ..... 38

**THE EUROPEAN ARREST WARRANT. THE ENFORCEMENT OF THE EUROPEAN ARREST WARRANT IN THE UNITED KINGDOM.**
Cosmin Iulian CRETU ..... 43

**THE INFLUENCE OF ARTIFICIAL INTELLIGENCE ON CRIMINAL LIABILITY**
Maxim DOBRINOIU ..... 48

**REFLECTING THE RIGHT TO PRIVACY IN THE DECISIONS OF THE CONSTITUTIONAL COURT OF ROMANIA**
Eliza Ene CORBEANU ..... 53

**STATE RESPONSIBILITY IN THE PREVENTION OF TORTURE AND INHUMAN AND DEGRADING TREATMENT**
Laurenţia Florentina GĂIȘTEANU (ȘTEFAN) ..... 63

**FREEDOM OF THOUGHT, OPINION, AND RELIGIOUS BELIEFS IN THE CASE OF PERSONS DEPRIVED OF THEIR LIBERTY**
Radu Florin GEAMĂNU ..... 71

**ISSUES OF CONTROVERSIAL PRACTICE REFERRING TO THE CRIME OF FALSE TESTIMONY**
Mirela GORUNESCU ..... 84

**SPECIAL FEATURES OF THE CRIMINAL OFFENCES LAID DOWN IN THE COMPANY LAW NO.31/1990**
Mihai Adrian HOTCA ..... 89

**PARTICULARITIES OF CIVIL ACTION IN THE CASE OF FRAUD BY BANK CREDIT CONTRACTS**
Andrei-Viorel IUGAN* ..... 95

**ACTUAL PROBLEMS OF REALIZATION OF THE RIGHT OF PERSONAL PROTECTION OF THE ACCUSED IN THE CONTEXT OF THE REQUIREMENT FOR A TERM FOR PRE-TRIAL INVESTIGATION ACCORDING TO THE BULGARIAN CRIMINAL PROCEDURE CODE.**
Lyuboslav LYUBENOV ..... 101

**ISSUES REGARDING THE JURISDICTION IN CASE OF JOINING THE CRIMINAL CASES**
Dan LUPAȘCU, Mihai MAREȘ ..... 106

**EUROPEAN PROTECTION ORDER IN CRIMINAL MATTERS: A NEW FORM OF COOPERATION IN EUROPEAN UNION**
Cătălin-Nicolae MAGDALENA* ..... 120

**CRIMINALISTICS TACTICS IN CASE OF CATASTROPHIC PLANE DISASTER**
Nicolae MĂRGĂRIT ..... 128

**REVIEW OF IRRECONCILABLE DECISIONS**
Bogdan MICU ..... 138

**CONSIDERATIONS ON RE-SOCIALISATION, SOCIAL REINSERTION AND RECOVERY THROUGH EDUCATION**
Constantin Marc NEAGU ..... 144

**THE CONCEPT OF SOCIAL REINTEGRATION IN ROMANIA AFTER 1989**
Constantin Marc NEAGU ..... 149

**CRIMINAL PROFILING IN CRIME INVESTIGATION**
Constantin NEDELCU ..... 156

**THE SIZE AND THE IMPORTANCE OF THE EVIDENCE GOVERNED DURING THE PROSECUTION IN REM**
Alin-Sorin NICOLESCU, Luminița CRIȘTIU-NINU ..... 163

**REPLACING THE JUDICIAL CONTROL WITH THE PREVENTIVE ARREST**
George Octavian NICOLAE ..... 168

**THE PERSONS DEPRIVED OF LIBERTY, AS PASSIVE SUBJECT OF THE CRIMINAL EXECUTION LEGAL RELATIONSHIPS**
Simona Cireșica OPRIȘAN ..... 172

**ASPECTS REGARDING THE APPLICATION OF THE PRINCIPLE OF CONTINUITY IN THE JUDGING STAGE IN THE LIGHT OF THE EUROPEAN CONVENTIONALITY BLOCK**
Rodica Aida POPA ..... 183

**EUROPEAN AND CANADIAN PROVISIONS ON KEEPING CONTACT BETWEEN THE PERSON DEPRIVED OF HIS LIBERTY AND HIS FAMILY, DIFFERENCES AND SIMILARITIES**
Iulia POPESCU ..... 190

**THE LEGAL CONSEQUENCES OF THE CONSTITUTIONAL COURT'S DECISIONS IN THE CONTEXT OF THE LEGALITY PRINCIPLE OF THE CRIMINAL PROCEDURE**
Liliana-Dorina RĂDUCU ..... 196

**ENFORCEMENT OF THE RIGHT OF DEFENSE IN THE CRIMINAL TRIAL**
Alina-Marilena ŢUCĂ ..... 209

**DEFICIENCIES IN ENACTING ARTICLE 44 OF ROMANIAN LAW NO.111/1996 REGARDING THE SAFE DEPLOYMENT, REGULATION, AUTHORIZATION AND CONTROL OF NUCLEAR ACTIVITIES**
Sorin-Alexandru VERNEA ..... 219

**PROTECTION OF THE WASTE REGIME BY CRIMINAL LAW. ACTUAL SITUATION IN ROMANIA**
Andreea Oana VERNEA ..... 225

**ON THE LIMITS AND CONSEQUENCES OF THE CASE SPLITTING IN THE ROMANIAN CRIMINAL PROCEDURE SYSTEM**
Andrei ZARAFIU, Radu SLĂVOIU ..... 230

**IMPLICATIONS OF CJEU JURISPRUDENCE ON THE DELIMITATION OF WORKING TIME BY REST TIME IN THE COLLABORATIVE ECONOMY**
Răzvan ANGHEL ..... 238

**LIABILITY OF THE TRANSPORTATOR IN THE CASE OF THE RAILWAY TRANSPORT CONTRACT**
Adriana Elena BELU ..... 250

**THE SHAREHOLDERS VOTING RIGHTS IN COMPARATIVE LAW**
Roxana-Mihaela CATEA ..... 256

**CONSIDERATIONS REGARDING THE CONDITION, AS A MODALITY OF THE LEGAL ACT**
Valentin COCEAN ..... 261

**UNPREDICTABILITY IN THE LOAN CONTRACT**
Georgiana COMAN ..... 265

**CONSUMER'S STATUS IN CROWD AND PEER TO PEER FINANCE**
Monica CALU ..... 270

**BLOCKCHAIN-BASED SOLUTIONS FOR FINANCIALLY DISTRESSED OR INSOLVENT COMPANIES**
Corina Georgiana COSTEA ..... 276

**ADMINISTRATIVE CONTRACTS IN THE CONTEXT OF THE NEW CIVIL CODE AND THE NEW CIVIL PROCEDURE CODE**
Crina Alina DE SMET ..... 281

**PARTICULARITIES ON THE REGULATION OF THE SUE PETITION, IN THE LIGHT OF PRACTICAL DIFFICULTIES AND LEGISLATIVE CHANGES**
Andrei-Radu DINCĂ ..... 287

**SIMULATED CONTRACTS BETWEEN THE OLD AND NEW CIVIL CODES OF ROMANIA**
Adrian-Gabriel DINESCU .....293

**SHORT ESSAY ON THE LEGAL EFFECTS OF SIMULATED CONTRACTS IN REGARD TO THIRD PARTIES**
Adrian-Gabriel DINESCU .....298

**EU FACILITATES NEW RULES FOR CROSS-BORDER MOBILITY OF COMPANIES**
Gabriela FIERBINȚEANU, Vasile NEMEȘ .....302

**THE LEGAL DIFFICULTIES GENERATED BY THE ALTERATION OF THE PROVISIONS REGARDING THE HEARING OF WITNESSES BY THE COURT WITHIN THE CIVIL PROCEDURAL CODE**
Bogdan Sebastian GAVRILĂ, Oana Luiza Petruța POSMAC .....308

**THE LEGAL DIFFICULTIES GENERATED BY THE ALTERATION OF ARTICLE NO. 200 OF THE OF THE CIVIL PROCEDURAL CODE**
Bogdan Sebastian GAVRILĂ, Oana Luiza Petruța POSMAC .....313

**INVESTMENT SERVICES AND ACTIVITIES AGREEMENT ON CAPITAL MARKET**
Cristian GHEORGHE .....321

**UNIVERSITY TEACHERS' ATTITUDES ABOUT UNETHICAL INFORMATION TECHNOLOGY USE: A REVIEW**
Roxana GHIAȚĂU, Liliana MÂȚĂ, Ioana BOGHIAN .....325

**IS THE ANNUAL LEAVE AN *AD INFINITUM* RIGHT?**
Bogdan IONIȚĂ* .....331

**THE OBLIGATION TO INFORM ONE ANOTHER OF THE INSURANCE CONTRACTIG PARTIES. LIMITS AND CONTENT OF THE OBLIGATION, FROM THE POINT OF VIEW OF EACH OF THE CONTRACTING PARTIES.**
Ștefan Matei DĂNILĂ .....335

**COMPARATIVE ANALYSIS OF THE REGULATION REGARDING THE SUBSTANTIVE CONDITIONS OF ADOPTION IN ROMANIA AND IN THE REPUBLIC OF MOLDOVA**
Cristian MAREȘ, Dan LUPAȘCU .....343

**THE JUDGMENT IN LIEU OF THE CONTRACT - INTERPRETATION AND APPLICATION OF ARTICLES 1279 AND 1669 OF THE CIVIL CODE RELATING TO THE PROMISE OF SALE**
Emilian-Constantin MEIU .....351

**CLUSTER OF COMMERCIAL SALE AGREEMENTS**
Vasile NEMEȘ, Gabriela FIERBINȚEANU, Anca Nicoleta GHEORGHE .....357

**PROTECTION OF A BUSINESS NAME IN CASE OF SIMILARITY OR IDENTITY OF BUSINESS NAMES AND/OR TRADEMARKS**
Anna NIKOLOVA .....362

**BRIEF PRESENTATION OF RESTITUTIO IN INTEGRUM ACCORDING TO THE ROMANIAN CIVIL CODE OF 2009**
Vlad-Victor OCHEA .....366

**THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD**
Ioana PĂDURARIU .....369

**PARTICULARITIES AND PRACTICAL ISSUES OF THE COMPULSORY INSURANCE CONTRACT FOR MOTOR THIRD PARTY LIABILITY**
Răducu Marian PETRESCU .....374

**CONTROVERSIES REGARDING THE ARBITRAL INSTITUTION DESIGNATED BY SUB-CLAUSE 20.6 OF FIDIC CONDITIONS OF CONTRACT TO ADMINISTER THE ARBITRAL CASES RESULTED FROM EXECUTION OF PUBLIC WORKS UNDER THE ROMANIAN LAW**
Cristian Răzvan RUGINĂ .....378

**HOW TO INCLUDE AND REWARD INVESTORS TO AN IDEA**
Dan-Alexandru SITARU .....386

**THE COURT OF JUSTICE OF THE EUROPEAN UNION'S INTERPRETATION OF REGULATION (EU) NO 650/2012.....**
Silviu-Dorin ȘCHIOPU .....391

**CHALLENGES OF MODERN MARRIAGES - NON-PATRIMONIAL RIGHTS AND OBLIGATIONS OF SPOUSES**
Nicoleta Roxana ŞERBĂNOIU .....397

**LEGAL ASPECTS REGARDING THE EXPRESSION OF BINDING CONSUMER CONSENT**
Gabriel VASII .....402

**THE PRINCIPLE OF "POLLUTER PAYS" IN INSOLVENCY PROCEEDINGS GOVERNED BY LAW 85/2014**
Candit Valentin VERNEA .....406

**OWNERSHIP TRANSFER AND SELLER'S OBLIGATIONS. LOOKING FOR UNITY IN SALE AGREEMENT REGULATION**
Dan VELICU .....413

**SUBSTITUTION OF PARENTAL CONSENT WHEN MINORS TRAVEL ABROAD: SANCTION OR REMEDY?**
Anca Magda VOICULESCU .....418

**THE RULE OF LAW-CONSTITUTIONAL AND CONTEMPORARY JURISPRUDENTIAL SIGNIFICANCE**
Marius ANDREESCU, Claudia ANDREESCU .....426

**CASE-LAW CONTRIBUTIONS TO CONSTITUTIONAL REVIEW'S DEVELOPMENT IN ROMANIA**
Marius ANDREESCU, Claudia ANDREESCU .....435

**CONSIDERATIONS RELATING TO THE ROLE OF THE COUNCIL IN THE INSTITUTIONAL UNION OF THE EUROPEAN UNION**
Dragoș Adrian BANTAȘ .....443

**THE ROLE OF THE PRESIDENCY IN THE FUNCTIONING OF THE EUROPEAN UNION ROMANIAN PRESIDENCY OF THE EU COUNCIL - CHALLENGES AND OPPORTUNITIES**
Dragoș – Adrian BANTAȘ .....453

**AN ATYPICAL FORM OF CIVIL LIABILITY – THE LIABILITY FOR THE ENVIRONMENTAL DAMAGE**
Florin Octavian BARBU .....460

**PERSONAL DATA PROTECTION ISSUE REFLECTED IN THE CASE-LAW OF THE CONSTITUTIONAL COURT OF ROMANIA**
Valentina BĂRBĂȚEANU .....465

**CONSIDERATIONS ON PROFESSIONAL DIGNITY**
Izabela BRATILOVEANU .....474

**AUTONOMOUS CONCEPTS OF THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN MATTERS OF DISCIPLINARY, ADMINISTRATIVE, FINANCIAL AND CRIMINAL LIABILITY**
Gheorghe BOCSAN .....482

**CONSIDERATIONS REGARDING THE LEGAL STATUS OF HERALDIC REPRESENTATIONS IN THE ROMANIAN SYSTEM OF LAW**
Claudiu Ramon D. BUTCULESCU .....498

**WORKS CONTRACT - ADMINISTRATIVE CONTRACT. THE IMPLICATIONS OF LEGISLATIVE CHANGES ON ONGOING WORKS CONTRACTS**
Doina CUCU .....503

**THE MODIFICATIONS BROUGHT TO THE LAW OF THE CONTENTIOUS ADMINISTRATIVE: CRITICAL PERSPECTIVE**
Marta-Claudia CLIZA .....507

**FAMILY - CONSTITUTIONAL, LEGAL, SOCIAL AND HUMAN PERSPECTIVE**
Marta-Claudia CLIZA, Laura-Cristiana SPĂTARU-NEGURĂ .....515

**THE E-BIKE PATH: LEGAL APPROACH IN EUROPEAN UNION LAW**
Alina Mihaela CONEA .....522

**THE JURISPRUDENCE - BASIC CONCEPTS OF BEING A FORMAL AND CONSTITUTIONAL SOURCE OF LAW (I)**
Emilian CIONGARU .....529

**RATING THE LEGAL SYSTEM: A STEP CLOSER TO THE FUTURE?**
Livia DIANU-BUJA, Cristian Paul LOSPA .....533

**THE ROLE OF THE HEAD OF STATE IN THE MODERN WORLD**
Adrian-Gabriel DINESCU .....538

**TRICK OR TREAT: LINKING EU FUNDS TO RULE OF LAW**
Oana DIMITRIU .....543

**ASPECTS OF THE EUROPEAN UNION'S SECONDARY LEGISLATION. CASE STUDY : FREE MOVEMENT OF SPOUSES THROUGH THE PROVISIONS OF THE DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**
Corina DABIJA (BARDĂ) .....551

**THE CONTRIBUTION OF THE ROMANIAN CONSTITUTIONAL COURT TO ESTABLISH THE RELATION BETWEEN THE RIGHT TO PROPERTY AND THE RIGHT TO A HEALTHY ENVIRONMENT**
Ramona DUMINICĂ, Adriana PÎRVU .....563

**THE TERM OF "RELEVANT MARKET", AS ELEMENT OF DOMINANT POSITION PROVIDED BY ART. 102 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION**
Cornelia Beatrice Gabriela ENE-DINU* .....569

**THE PROTECTION OF PERSONAL DATA - AN ESSENTIAL COMPONENT OF THE FUNDAMENTAL HUMAN RIGHTS**
Augustin FUEREA .....574

**CONSTITUTIONAL ANALYSIS ON AMENDMENTS TO LAW NO.317/2004**
Silviu Barbu GABRIEL, Gabriela-Nicoleta CHIHAIA, Lorena-Gabriela NIȚOIU .....580

**MANAGEMENT OF CLASSIFIED INFORMATION WITHIN THE ORGANISATION FOR INTERDICTION OF CHEMICAL WEAPONS**
Maria-Irina GRIGORE-RĂDULESCU,Corina Florenţa POPESCU** .....586

**THE MEANING OF NATIONAL COURT IN ARTICLE 267 TFEU AND THE IMPORTANCE OF THE COURT'S INDEPENDENCE**
Iuliana-Mădălina LARION .....590

**PRINCIPLES REGARDING STATE JURISDICTION IN INTERNATIONAL LAW**
Oana – Adriana IACOB .....598

**CONTROL ACTIVITY CARRIED OUT BY THE PREFECT. ROLE, MISSION, PERSPECTIVES**
Florina Ramona (MUREȘAN) PREDA .....605

**PATRIMONIAL LIABILITY OF FORESTRY PERSONNEL IN LIGHT OF EMERGENCY ORDINANCE NO. 59/2000 REGARDING THE STATUS OF THE FORESTRY PERSONNEL AND THE JUDICIAL PRACTICE IN THE MATTER**
Beatrice-Ștefania NICULAE .....620

**PUBLIC SERVICE – MEANS OF ACHIEVING THE PUBLIC ADMINISTRATION MISSION**
Vasilica NEGRUȚ .....625

**THE LEGITIMACY OF LAW IN DEMOCRATIC SOCIETIES**
Oana Andra NIȚĂ .....631

***VOX POPULI* - PARADIGM OF CONTEMPORARY LAW**
Oana Andra NIȚĂ .....637

**ANALYSIS OF ART. 396 PAR. (2) CIVIL PROCEDURE CODE, IN THE LIGHT OF THE ROMANIAN CONSTITUTIONAL COURT'S DECISION NO. 454/2018**
Beatrice NICULAE .....642

**THE LIMITS OF RECOURSE TO FORCE IN THE CONTEXT OF CONTEMPORARY GEOPOLITICS**
Sandra Sophie-Elise OLĂNESCU .....646

**THE CRIMINAL NORM IN DIFFERENT LEGAL SYSTEMS – COMPARATIVE PERSPECTIVE**
Alexandru Vladimir OLĂNESCU .....659

**CYBERTERRORISM: THE LATEST CRIME AGAINST INTERNATIONAL PUBLIC ORDER**
Sandra Sophie-Elise OLĂNESCU, Alexandru Vladimir OLĂNESCU .....672

**ANALYSIS OF THE INCREASING ROLE OF NGOS IN INTERNATIONAL PUBLIC LAW**
Patricia Casandra PAPUC .....678

**THE REALIZATION OF THE FUNDAMENTAL GUARANTEES RIGHTS, A CONSEQUENCE FOR ENSURING OF A GOOD ADMINISTRATION - SELECTIVE ASPECTS**
Cătălin-Radu PAVEL .....684

**SELECTIVE ASPECTS ON THE EVOLUTION OF THE REGULATIONS REGARDING THE JUDICIARY IN THE ROMANIAN CONSTITUTIONS AND IN THE ROMANIAN LAW 100 YEARS AFTER THE GREAT UNION**
Nicolae PAVEL .....696

**OPINION OF ADVOCATE GENERAL WATHELET AND JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN CASE C-673/16, CONCERNING THE CONCEPT OF "SPOUSE" IN EUROPEAN UNION LAW**
Roxana-Mariana POPESCU .....705

**INTERPRETATION AND ENFORCEMENT OF ARTICLE 148 OF THE CONSTITUTION OF ROMANIA REPUBLISHED, ACCORDING TO THE DECISIONS OF THE CONSTITUTIONAL COURT**
Roxana-Mariana POPESCU .....711

**INVOLVEMENT OF THE PEOPLE'S ADVOCATE IN THE CONSTITUTIONALITY REVIEW OF THE GOVERNMENT EMERGENCY ORDINANCES**
Simina Popescu-MARIN .....717

**LOCAL TAXES IN BULGARIA- A SOURCE OF REVENUES IN THE MUNICIPALITY BUDGETS**
Vanya PANTELEEVA .....725

**PARENTING AND LABOR ACTIVITY**
Maria RADEVA .....732

**PROPERTY RESTITUTION – A TYPE OF REPARATIONS MEASURE IN ROMANIA**
Bianca Elena RADU .....737

**EU TRADE POLICY AFTER BREXIT. PROVISION OF PROFESSIONAL SERVICES**
Oana-Mihaela SALOMIA.....752

**THE PRINCIPLE OF PROPORTIONALITY, THE IMPLEMENTATION OF EU LAW, THE PUBLIC ADMINISTRATION. GENERAL AND PRELIMINARY ASPECTS**
Oana ȘARAMET .....760

**COMPARISON BETWEEN THE LEGAL PARTICULARITIES OF ROMANIA'S AND THE UNITED KINGDOM'S MEMBERSHIP OF THE EUROPEAN UNION**
Maria-Cristina SOLACOLU.....768

**BREXIT AND THE ROMANIAN PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION – LEGAL ASPECTS AND POSSIBILITIES**
Maria-Cristina SOLACOLU.....775

**CONSCIENTIOUS OBJECTION TO VOLUNTARY ABORTION**
Mihail STĂNESCU-SAS.....782

**LEGAL STATUS OF ANTI-DRONE SYSTEMS UNDER INTERNATIONAL LAW**
Andrei-Alexandru STOICA .....794

**COOPERATION AND VERIFICATION MECHANISM(CVM) REPORT 2018 AND THE CHALLENGES OF THE JUDICIAL SYSTEM**
Florin STOICA .....803

**RECENT ADMINISTRATIVE CHANGES OF THE ADMINISTRATIVE LITIGATIONS LAW NO. 554/2004**
Elena Emilia ȘTEFAN.....810

**RECENT MODIFICATIONS OF THE CONTRAVENTION JUDICIAL REGIME**
Elena Emilia STEFAN.....815

**FREEDOM OF SPEECH. CONSIDERATIONS ON CONSTITUTIONAL COURT'S DECISION NO. 649/2018**
Cristina TITIRIȘCĂ.....820

**DEATH PENALTY IN INDONESIA: WHAT AND WHY? IS IT NOT AGAINST UNIVERSAL HUMAN RIGHT PRINCIPLE?**
Rima Yuwana YUSTIKANINGRUM .....825

**TRENDS IN INTERNATIONAL TAX PLANNING: NEW QUALIFICATIONS AND TAX JURISDICTION SHOPPING**
Vladimir TROITSKIY .....831

**INTERDISCIPLINARY JUDICIAL COOPERATION: MUTUAL RECOGNITION OF PROTECTION MEASURES IN EUROPEAN UNION**
Anca Magda VOICULESCU ..... 839

**ADMINISTRATIVE AND PATRIMONIAL LIABILITY OF MILITARY CIVIL SERVANTS**
Adelin-Mihai ZĂGĂRIN ..... 850

**THE ACTIVITY OF TRANSPOSING DIRECTIVE 2014/94/EU OF THE EUROPEAN PARLIAMENT AND COUNCIL OF 22 OCTOBER 2014 ON THE DEPLOYMENT OF ALTERNATIVE FUELS INFRASTRUCTURE. THE POST-TRANSPOSING ATTRIBUTIONS OF THE ROMANIAN ENERGY REGULATORY AUTHORITY**
Ionela-Alina ZORZOANĂ ..... 855

**PLAGIARISM AND SCHOOL WITH ITS "SINS"**
Ioana Victoria BĂLAN (MAFTEI) ..... 862

**DEONTOLOGY AND ETHICS –SOME DETAILS ON THE VIOLATIONS OF RULES IN SCIENTIFIC RESEARCH ACTIVITY AND THEIR SANCTIONING**
Corina DABIJA (BARDĂ) ..... 872

**AUTOPLAGIARISM AND SCIENTIFIC RESEARCH ACTIVITY**
Cristian Răzvan CERCEL ..... 881

**CHALLENGES OF INTERPRETING THE NOTION OF SOFTWARE COPYRIGHTS IN THE CURRENT ECONOMIC AND SOCIO-POLITICAL CONTEXT**
Ramona DUMITRAȘCU ..... 886

**NEW TYPES OF TRADEMARKS – PROTECTION OF MULTIMEDIA TRADEMARKS**
George-Mihai IRIMESCU ..... 892

**TEXT AND DATA MINING EXCEPTION - TECHNOLOGY INTO OUR LIVES**
Monica LUPAȘCU ..... 905

**THE PUBLIC LENDING RIGHT (PLR)**
Ana-Maria MARINESCU ..... 916

**PLAGIARISM IN THE CASE OF DOCTORAL THESIS AND THE SANCTIONING OF THIS TYPE OF PLAGIARISM**
Dantes MARCOVICI ..... 922

**THE PROTECTION OF OLFACTORY CREATIONS**
Viorel ROȘ, Andreea LIVĂDARIU ..... 930

**THE AUTHOR(S) OF THE PHD THESIS AND HIS/THEIR MORAL RIGHTS. JOINT LIABILITY OF THE PHD CANDIDATE AND OF THE PHD SUPERVISOR FOR THE OBSERVANCE OF THE ETHICS AND DEONTOLOGY RULES**
Ionela-Alina ZORZOANĂ ..... 952

**EVALUATION OF THE SERVICE QUALITY AND SATISFACTION IN THE TURKISH HIGHER EDUCATION IN TERMS OF INTERNATIONAL STUDENTS**
Nizamettin BAYYURT ..... 961

**DOMESTIC R&D INTENSITY, TECHNOLOGY TRANSFER AND GROWTH OF PRODUCTIVITY: AN EMPIRICAL INVESTIGATION OF TUNISIAN'S CASE**
Ahmed BELLAKHDHAR ..... 969

**CULTURAL TOURISM IN CENTRAL REGION OF ROMANIA**
Cristina BOBOC, Ana-Maria CIUHU, Valentina VASILE, Simona GHITA ..... 982

**CONTRIBUTION OF EVA LEVERAGE TO THE TOTAL LEVERAGE EFFECT ON THE COMPANY**
Kristina Jančovičová BOGNÁROVÁ ..... 989

**A MULTI-CRITERIA DECISION-MAKING SYSTEM BASED ON A BUILD-UP ALGORITHM**
Felicia Alina CHIVULESCU ..... 994

**DISTRIBUTED MULTI-AGENT SYSTEMS FOR SUPPORTING COLLABORATIVE NETWORKED ENVIRONMENT**
Adina-Georgeta CRETAN ..... 1000

**ASSET PRICING IN A CAPITAL MARKET**
Valentin Gabriel CRISTEA* ..... 1010

**APPLICATIONS OF FAIR VALUE PRICING**
Valentin Gabriel CRISTEA .....1017

**APPLYING THE QUALITY MANAGEMENT SYSTEM AND OPTIMIZING ITS COSTS**
Andrei DIAMANDESCU .....1022

**AN UNKNOWN TREASURE – HOW DO COMPANIES DETERMINE THE VALUE OF THEIR DATA?**
Barbara ENGELS.....1028

**THEORETICAL APPROACHES ON OPTIMAL CAPITAL STRUCTURE**
Maria Zenovia GRIGORE, Mariana GURĂU .....1035

**THE ACCOUNTANT'S AVERSION TO RISK WHEN CHOOSING ACCOUNTING POLICIES**
Mariana GURĂU, Mariana Zenovia GRIGORE .....1041

**THE INFLUENCE OF THE GDP CONVERSION RATE INTO GNI ON SOCIAL PROGRESS. COMPARATIVE ANALYSIS AT THE EU LEVEL**
Elena Mihaela ILIESCU[*] .....1046

**CONTROL AND AUDIT IN MARKETING**
Plamen ILIEV .....1053

**WOMEN AS CONSUMERS - EXPLORING WOMEN'S PURCHASING HABITS**
Darija IVANKOVIĆ, Sandra Mrvica MAĐARAC, Maja BEGIĆ[***] .....1057

**CHALLENGES FOR THE GLOBAL FINANCIAL SYSTEM**
Serghei MARGULESCU, Elena MARGULESCU.....1063

**EUROPEAN UNION ECONOMIC INTEGRATION AND DEVELOPMENT**
Mihaela MUSAT .....1072

**THEORETICAL ELEMENTS OF MOTIVATION IN ORGANIZATIONS**
Nicoleta Georgeta PANAIT, Costin Alexandru PANAIT .....1077

**EXPLORING THE INFLUENCE OF ONLINE CONSUMER BRAND BOYCOTTS ON BRAND EQUITY**
Otilia-Elena PLATON .....1084

**WAYS OF ENHANCING COMPETITIVENESS WITHIN A NATIONAL MEDICAL INSTITUTE**
Mădălina Antoaneta RĂDOI, Alexandru OLTEANU .....1089

**THE REFRACTION STATE OF THE PROFESSIONAL JUDGMENT AT A CONCEPTUAL LEVEL**
Viorica Mirela STEFAN-DUICU .....1096

**THE ROLE OF SOVEREIGN DEBTS IN THE DEVELOPMENT OF THE ACTUAL MACROECONOMIC ENVIROMMENT**
Emilia Cornelia STOICA, Nicoleta Georgeta PANAIT .....1102

**ECONOMIC POLICIES INSTRUMENTS USED BY DEVELOPED AND EMERGING STATES IN THE CONJUNCTURE OF OUR DAYS**
Emilia Cornelia STOICA, Mihaela SUDACEVSCHI .....1109

**ENTREPRENEURSHIP MODELS AND RURAL DEVELOPMENT IN ROMANIA BASED ON THE CULTURAL HERITAGE**
Mihaela Andreea STROE .....1119

**PRACTICAL METHODS OF SELECTION AND CALCULATION OF SAMPLE SIZE FOR AUDIT SAMPLING**
Sandra TEODORESCU, Andreea Paula DUMITRU .....1129

**BOUNDED RATIONALITY IN DECISION-MAKING**
José G. VARGAS-HERNÁNDEZ, Ricardo Pérez ORTEGA .....1134

**IMMIGRANTS' ECONOMIC AND SOCIAL INTEGRATION IN HOST COUNTRY- FROM PRECONCEIVED IDEAS TO REAL LIFE. CASE STUDY ON THE ROMANIANS'**
Valentina VASILE, Elena BUNDUCHI, Ana-Maria CIUHU .....1143

**THE RECYCLING BEHAVIOR OF ROMANIAN CONSUMERS**
Mirela-Cristina VOICU .....1151

**FOREIGN UNIVERSITIES IN QATAR: A CRITICAL REVIEW OF POLICY AND SUSTAINABILITY ISSUES**
Fethi B Jomaa AHMED .....1158

**EFFICIENCY, EFFECTIVENESS AND EQUITY IN PUBLIC ADMINISTRATION -THE ROLE OF THE PUBLIC ADMINISTRATOR**
Constantin BRAGARU ..... 1169

**SOCIAL INTEGRATION OF TURKISH IMMIGRANTS IN ROMANIA? SYNCOPES IN THE CONFIGURATION OF A DETERRITORIALIZED IDENTITY**
Abdullah DEMIR ..... 1175

**WOMEN LEADERSHIP: CHARACTERISTICS AND PERCEPTIONS**
Adina-Loredana DOGARU-TULICĂ ..... 1182

**ABOUT THE UNIONS OF THE STATE**
Milen IVANOV ..... 1190

**HEREDITARY AND SOCIAL FACTORS OF DRUG USE**
Bogdan MARINESCU ..... 1194

**THE FUTURE OF THE NATIONAL INTEGRITY AGENCY AFTER THE CVM REMOVAL. POSSIBLE SCENARIOS**
Daniela-Iuliana MĂNTĂRĂU-GHEORGHE ..... 1199

**ASPECTS OF ETHICAL MANAGEMENT IN TODAY'S EUROPEAN UNIVERSITIES**
Elena NEDELCU ..... 1213

**ISSUES ON POLITICAL TRANSITION IN ALBANIA**
Adelina NEXHIPI ..... 1220

**THE TRADITIONAL FAMILY, IN THE ROLE OF THE FUNDAMENTAL MATRIX OF THE FORMATION OF INDIVIDUAL CONSCIOUSNESS – A RADIOGRAPHY AT THE LEVEL OF THE ROMANIAN SOCIETY**
Mirela Cristiana NILĂ STRATONE, Bogdan MARINESCU ..... 1234

**THE URBANIZATION OF RURAL COMMUNITIES, BETWEEN THE SOCIAL NEED AND THE URBAN CULTURE INVASION**
Mirela Cristiana NILĂ STRATONE ..... 1241

**DEMOCRACY AND ELECTORAL OUTCOMES: COMPARATIVE ANALYSIS OF NIGERIA AND IVORY COAST ELECTIONS**
Harrison Oluwaseyi OGUNKALU, Anthony ENIAYEJUNI ..... 1247

**A FORM OF POST-WAR COOPERATION – SOVROM**
Florina POPA ..... 1255

**THE IMPACT OF PUBLIC PROCUREMENT LAW TO THE SYSTEM OF PUBLIC FINANCE**
Richard POSPISIL, Philipp KUNZ, Ondrej KROCIL ..... 1261

**EUROPEAN UNION REFORM AND THE NEED FOR THE REFORMS OF THE NATIONAL SOCIO-ECONOMIC SYSTEMS**
Carmen RADU, Liviu RADU ..... 1269

**ECONOMIC, SOCIAL AND POLITICAL REALITIES AND PERSPECTIVES IN THE UNSTABLE EUROPEAN CONTEXT**
Liviu RADU, Carmen RADU ..... 1281

**NATIONAL SECURITY AS A LEGAL CATEGORY**
Kremena RAYANOVA ..... 1291

**THE ECONOMIC COMPETITION BETWEEN UNITED STATES, EUROPEAN UNION AND CHINA**
Ștefan Cătălin TOPLICEANU ..... 1296

**GIVING REASONS FOR ADMINISTRATIVE ACTS – WARRANTY OF A GOOD ADMINISTRATION**
Ionela-Alina ZORZOANĂ ..... 1303

**TABLE OF CONTENTS ..... 1313**